Boatloads of incongruity: the evolution of Australia's offshore processing regime

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Almost six years on from the introduction of the Pacific Solution, the commitment of Australia's federal government to the regime of offshore processing of asylum seekers appears undiminished. The offshore processing regime has damaged Australia's international standing and has cost its taxpayers hundreds of millions of dollars. But its highest cost has been in human terms. This article examines the evolution of Australia's offshore processing regime with reference to its objectives, its consequences and its ramifications for Australia's performance of its human rights obligations under international law.

Introduction

Almost six years on from the introduction of the Pacific Solution, Australia's federal government has maintained its commitment to the offshore processing of asylum seekers. This commitment appears undiminished, despite a failed attempt in 2006 to extend offshore processing to all asylum seekers who arrive in Australia by boat. The processing centre on Nauru is currently accommodating seven Burmese and 83 Sri Lankan asylum seekers who arrived in Australian waters in August 2006 and February 2007, respectively. On 30 March 2007, the Minister for Immigration and Citizenship, Kevin Andrews, announced plans to extend the Pacific Solution to Indonesia, which would entail the processing of asylum seekers interdicted on the high seas around Australia (Hart 2007). Australia's commitment to offshore processing was further confirmed with the news on 18 April 2007 that Australia would be swapping some refugees processed in Nauru under the Pacific Solution with refugees processed by the United States at its navel base in Guantánamo Bay, Cuba. This article will examine the phenomenon of offshore processing with reference to its objectives, its consequences and its ramifications for Australia's performance of its human rights obligations under international law.

In the arena of refugee processing, nomenclature has assumed particular importance. Debates about border protection and the need for a tough stance on asylum seekers

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saw individuals possessed of a legal right to seek asylum described in terms including 'illegals', 'illegal immigrants' and 'queue-jumpers'. The response to the arrival of these people by boat was the introduction of the Pacific Solution, a term which assumed that spontaneous boat arrivals represented a problem which required resolution. This inference is not unprecedented.

Since 1981, the US has maintained a policy of interdicting asylum seekers on the high seas (Legomsky 2006; Dastyari 2007). The policy was introduced in response to an influx of asylum seekers arriving in the US by boat from countries including Haiti and Cuba. Kneebone, McDowell and Morell note that both the US policy and the Pacific Solution have been rationalised on the basis of safety, security and cost and the objective of deterring boat arrivals (Kneebone, McDowell and Morrell 2006). The approach taken by both nations has incorporated disincentives to refugees who do not in fact have many options available to them. The US policy has involved the offshore 'processing' of asylum seekers at Guantánamo Bay and the screening of asylum seekers on Coast Guard vessels. In April 2007, the Australian Government announced a scheme whereby asylum seekers interdicted by the US and processed in Guantánamo Bay would be brought to Australia. In exchange, up to 200 refugees processed in Nauru would be taken to the US for settlement. The scheme demonstrates the federal government's continuing commitment to offshore processing and highlights the parallels between US and Australian refugee policies. The degraded procedures employed by the US and Australia have reduced the likelihood of successful applications for refugee status, thus minimising the number of individuals granted refugee protection. Offshore processing has the effect of removing asylum seekers from the protections offered by Australia's legal system and has proved to be costly in human and economic terms while calling into question Australia's compliance with its international treaty obligations.

The evolution of offshore processing in Australia

Australia has a long history of using regional agreements to stop the flow of asylum seekers to its shores. But offshore processing represents a radical departure from Australia's traditional approach to the processing of refugees. In the late 1980s, Australia negotiated inter-country agreements, most notably with China, to stem the flow of asylum seekers at its source. These agreements were successful at curbing new arrivals until the late 1990s, when a new group of people seeking protection began arriving in Australia (Crock, Saul and Dastyari 2006, 112). These asylum seekers were predominantly from Central Asia and the Middle East, and used Indonesia as a transit point.

Australia and Indonesia developed a Regional Cooperation Arrangement in 2000 as a response to asylum seekers transiting through Indonesia. Under the agreement,

Indonesia is paid to intercept asylum seekers before they can travel to Australia. Indonesia also allows Australia to intercept boats and force them to return to Indonesia. This agreement was able to stop 3930 people from reaching Australia from its inception to May 2004.[1]

Individuals returned to Indonesia are kept in the custody of the International Organisation for Migration (IOM). IOM is not and has never been part of the United Nations (UN) system and it does not have a protection or humanitarian mandate. IOM's role is dictated by its 120 member governments which include Australia in their number. An additional 19 states have observer status within IOM (IOM Constitution). Only the member states and with it the sponsors control the work of IOM. The organisation has received funding from Australia for the purpose of assisting returned asylum seekers to Indonesia. People who have a refugee claim are referred by IOM to the United Nations High Commissioner for Refugees (UNHCR).

The agreement with Indonesia did not stop all boats form arriving in Australian territorial waters. In late August 2001, the Norwegian registered container ship *MV Tampa* rescued 433 asylum seekers on the verge of sinking in ocean 75 nautical miles north of Christmas Island. The federal government undertook vigorous efforts to prevent the *Tampa* from entering Australian territorial waters. These included arrangements for the ship to be boarded by 45 SAS troops and the signing of hasty agreements with Australia's Pacific neighbours. The governments of Nauru and New Zealand agreed to host the *Tampa* asylum seekers.

The *Tampa* affair led to radical and unprecedented measures to stop the flow of boats to Australia and marked the beginning of the Pacific Solution.[2] The aim of the Pacific Solution is to ensure that certain asylum seekers are not processed in Australia and do not have the same rights as those who are processed in Australia. To meet this aim, the Pacific Solution is based on four strategies. First, a minister can now declare that certain Australian territory is no longer part of the migration zone or is an 'excised offshore place' (*Migration Act 1958* (Cth), s 5(1)). Second, a new category of 'offshore entry person' was created to catch all asylum seekers who land without a valid visa or other authority on an excised territory (*Migration Act*, s 5(1)). Third, 'offshore entry persons' can be taken to a 'declared country' (*Migration Act*, s 198A). Finally, asylum seekers who do not land in 'excised territory' may still be processed

1. A reference to the agreement can be found in Millar 2004. However, the agreement itself does not appear to be available to the public.
2. There is extensive literature on the *Tampa* and the genesis of the Pacific Solution. See, for example, Taylor 2005; Magner 2004; Crock 2003; Flynn and Laforgia 2002; and Della Torre 2002.

outside Australia. Australia launched a naval interdiction program called Operation Relex on 3 September 2001. Operation Relex I was superseded by Operation Relex II on 14 March 2002 (Department of Defence 2002–03). At the time of writing, Operation Relex II remains in force.

The Pacific Solution allows for the deflection of asylum seekers before they reach Australian soil. It also allows Australia to expel asylum seekers even when they have reached Australian territory and would ordinarily be subject to Australian law. The initial reluctance of Pacific states to participate in the Pacific Solution has been eased by financial incentives.

Nauru acceded to Australia's request for the establishment of a processing centre in exchange for a pledge of $30 million in desperately needed aid. According to the Australian Democrats, Nauru was also granted aid packages of $41.5 million for 2001–03 and $22.5 million for 2003–05 (Australian Democrats 2004). Nauru had been scheduled to receive a mere $3.4 million in aid from Australia in 2001–02 (Oxfam Community Aid Abroad 2002a). In fact, the pledge of $30 million exceeded the total AusAID funding provided to Nauru between 1993 and 2001, and represents 18 per cent of the total AusAID budget to the Pacific Islands in 2001–02 ($164.6 million).

On 12 October 2001, Australia and Papua New Guinea signed a Memorandum of Understanding (MOU) allowing for the provision of a detention centre on PNG shores in exchange for $1 million. The initial agreement guaranteed that all persons brought to PNG for processing would leave after six months of entering, or in as short a time as was reasonably necessary. An agreement was also signed with IOM to provide security, water, sanitation, power generation, health and medical services for the duration of the stay of the asylum seekers at offshore facilities and to coordinate the return of asylum seekers to their home countries.[3]

The Pacific Solution has led to difficulties for the countries involved. A Senate Committee found in 2002 that the Pacific Solution 'accentuates the perception that Australia tends to take advantage of Pacific island countries' (Senate Foreign Affairs, Defence and Trade Committee 2003). In 2002, the then Nauruan President, Rene Harris, called the Pacific Solution a 'Pacific nightmare' (Dodson and Douez 2002). It has also been argued that the Pacific Solution has adversely impacted upon Australia's image and reputation within the region by fuelling the perception that Australia's domestic political considerations are accorded greater priority than

3. The agreement with IOM is not available to the public. Reference to the agreement can be found at IOM 2001.

broader regional issues (Oxfam Community Aid Abroad 2002b). In March 2002, the Secretary-General of the Pacific Islands Forum Secretariat, speaking at the Commonwealth Heads of Government Meeting, made the following remarks concerning the political tension caused by Australia's policy of offshore processing:

> The political fabric of many of our countries is pretty fragile. If you allow these people to stay longer, under the Convention … the state is obligated to give them services and the services would not be in proportion to what they give to its own people. And then you are likely to create a situation where the people become restless and complain that as taxpayers, they're not being looked after by their governments. [ABC Radio Australia News 2002.]

The federal government has not recognised offshore processing as a source of diplomatic tension. Rather, it has sought to extend the regime to all asylum seekers who arrive in Australia by boat without valid authority in an attempt to resolve political tensions. In March 2006, a decision was made by the Department of Immigration and Multicultural Affairs (DIMA) to grant temporary protection visas to 42 of 43 West Papuan asylum seekers who arrived in Australia by boat in January 2006. The diplomatic tensions which followed between Australia and Indonesia saw the recall of Indonesia's ambassador to Australia and the introduction into Parliament of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 on 11 May 2006.

Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

The Bill intended to give legal effect to the policy of extending offshore processing to all asylum seekers who arrive in Australia by boat without valid authority. In his Second Reading speech concerning the Bill, the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs, Andrew Robb, made the following statement:

> It seems incongruous that an unauthorised boat arrival at an excised offshore place is subject to offshore processing arrangements, while an unauthorised boat arrival travelling, in some cases, only a few kilometres further to the Australian mainland is able to access the onshore protection arrangements, with the consequential opportunities for protracted merits review and litigation processes. The landing on mainland Australia of a group of unauthorised boat arrivals from Indonesia in January 2006 highlighted this incongruous outcome.
>
> The essence of this bill therefore is to broaden the group of people to whom offshore processing arrangements will apply. This expanded group, referred to as 'designated unauthorised arrivals', will include the existing group of people who arrive unauthorised by boat on the Australian mainland. [Robb 2006.]

The Bill was the subject of an enquiry by the Senate Legal and Constitutional Legislation Committee (the Senate Committee), which received 136 submissions. With the exception of the submission by DIMA, all submissions opposed the Bill. On 13 June 2006, the bipartisan Senate Committee released its report, which described the Bill as representing flawed domestic policy; deficient foreign policy in terms of a perceived attempt to appease Indonesia over the situation in West Papua; and a breach of Australia's obligations under international law. The Committee's key recommendation was that the Bill should not proceed (Senate Legal and Constitutional Legislation Committee 2006a). In separate reports within the Senate Committee report, Democrats Senator Andrew Bartlett and Greens Senator Kerry Nettle took a broader view. They recommended the outright reversal of the Bill and also the abandonment of the offshore processing system which the Bill sought to extend (Senate Legal and Constitutional Legislation Committee 2006a).

The Bill passed the House of Representatives on 10 August 2006 with 78 votes in support and 62 votes against its introduction. Liberal members Petro Georgiou, Russell Broadbent and Judi Moylan sided with the Labor opposition in voting against the Bill. Liberal member Bruce Baird was joined by Nationals MP John Forrest in abstaining from the vote. Forrest also resigned from his position as the National Party's chief whip, owing to a belief that an abstention would be incompatible with his position as whip.

The government's position within the Senate was more precarious. With a majority of only one senator, the passing of the Bill would require the support of all key coalition senators (including Judith Troeth and Barnaby Joyce). If coalition members voted against or abstained from supporting the Bill, the support of Family First Senator Steven Fielding would also be required. Senators Troeth and Fielding declared their intention to vote against the Bill prior to its scheduled debate on 14 August 2006. Nationals Senator Barnaby Joyce proposed an amendment to the Bill which would have afforded the Senate the opportunity to disallow a decision made by the Immigration Minister when exercising the power of ministerial discretion. In the face of imminent defeat in the Senate, the Prime Minister withdrew the Bill.

The failure of the Bill to pass had the effect of frustrating the government's policy of deflecting all asylum seekers who arrive in Australia by boat for processing offshore. Nevertheless, the policy of offshore processing continues with respect to asylum seekers who land in areas designated by the *Migration Act* as 'excised offshore territory', such as Christmas Island and Ashmore Reef (*Migration Amendment (Excision from Migration Zone) Act 2001* (Cth)). Asylum seekers who land in these excised places fall outside Australia's refugee protection regime and are taken to Nauru or PNG for processing. The federal government's negotiations towards

extending the Pacific Solution to Indonesia; its decision to transfer the most recently arrived Sri Lankan asylum seekers from Christmas Island to Nauru; and its recent exchange agreement with the US clearly demonstrate that despite the appointment of a new minister and the introduction of a re-packaged Department of Immigration and Citizenship, offshore processing remains a key policy.

Onshore and offshore processing compared

The gulf between the treatment of asylum seekers processed onshore and that of those processed offshore has widened since 2005 on account of significant advances made in addressing the needs of asylum seekers processed in Australia.

The changes made to onshore processing followed intense lobbying and media interest in immigration detention. After the High Court decided that s 196 of the *Migration Act* authorises indefinite detention of an unlawful non-citizen (*Al Kateb v Godwin,* 2004), even if the detention continues for life, the *Migration Regulations 1994* (Cth) were amended in May 2005 to create the Removal Pending Bridging Visa (Subclasses 070 (Bridging (Removal Pending)), *Migration Regulations,* Sch 1, Pt 3, 130(3)). The visa applies where the Immigration Minister believes that removal is not reasonably practicable and the detainee agrees in writing to cooperate fully with arrangements for their eventual removal from Australia.

The *Migration Amendment (Detention Arrangements) Act 2005* (Cth) was passed on 19 June 2005. The Commonwealth Ombudsman was empowered to review the circumstances of detainees who have remained in detention for two years or more, with review to continue every six months thereafter. The minister was given a discretion to allow families with children to live in a 'specified place' in the community while their entitlement to protection is being determined and the principle affirmed in s 4AA(1) that 'a minor shall only be detained as a measure of last resort'. On 29 July 2005, all children and their families were released from onshore detention centres. Since then, with the exception of 'illegal foreign fishers' held at the Northern Immigration Detention Facility in Darwin (HREOC 2007), child asylum seekers and their family members have been accommodated in the community. Other individuals awaiting status determination have been granted bridging visas, which entitle them to reside in the community subject to a variety of conditions.

Recommendations made by the Palmer Inquiry (Palmer 2005) concerning the detention of Cornelia Rau and the Comrie Inquiry (Comrie 2005) concerning Vivian Alvarez resulted in a number of policy initiatives by the Department of Immigration and Citizenship. These include the conduct of an independent review into the system

for identifying and managing detainees who are at risk of suicide or self-harm and the active case management of all persons held in detention for more than 14 days or those deemed vulnerable on account of age or health status.

The advances made in the processing of asylum seekers in mainland Australia have not been extended to the processing of asylum seekers in offshore facilities. Offshore detention is not subject to scrutiny by the Ombudsman. Adults and children are detained in confined areas and subject to curfews and to regular and intrusive security checks. Bridging visas do not operate offshore and there is no access to migration advice and lawyers. There is no entitlement to merits review, no scope for the exercise of ministerial discretion to substitute a more favourable decision under s 417 of the *Migration Act*, and no right to judicial review. People processed offshore fall outside the protection of Australian law.

Offshore processing and Australia's human rights obligations

Offshore processing not only compromises Australia's relationship with its Pacific neighbours, but also erodes Australia's commitment to human rights. It undermines the universal operation of human rights standards by setting a concerning precedent for other states which might be contemplating similar policies. It is contrary to the constructive role played by Australia in the formulation and ratification of UN human rights instruments. Our executive has, on Australia's behalf, ratified the UN Convention Relating to the Status of Refugees 1951 (the Refugee Convention), making Australia the Convention's sixth ratifying nation. In 1973, Australia acceded to the Protocol Relating to the Status of Refugees 1967 (the Refugee Protocol), which removed the Refugee Convention's geographic and temporal limitations. The Refugee Convention characterises refugee protection as achievable only by international burden sharing.

Additional international instruments ratified by Australia include the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and the Convention on the Rights of the Child (CROC). Central to all of the above treaties is an understanding that all individuals are entitled, without discrimination, to a common core of human dignity. These instruments seek to provide guarantees to all individuals within the state party's territory and subject to its jurisdiction (see, for example, Art 2(1) of CROC and Art 2(1) of the ICCPR). A state party may not divest itself of obligations under these instruments by forcibly removing individuals from its jurisdiction. The Vienna Convention on the Law of

Treaties seeks to codify customary international law pertaining to the performance of states' treaty obligations. Underpinning the Convention is Art 26 and the principle of *pacta sunt servanda,* or good faith performance of states' treaty obligations. States are furthermore prohibited by Art 27 from invoking domestic law to justify a failure to perform treaty obligations. Some of the key rights enshrined in international human rights treaties which Australia has ratified are examined below with reference to the offshore processing of asylum seekers.

The right to personal liberty

Personal liberty has been described as the most elementary and important of common law rights (*Re Patterson; Ex parte Taylor,* 2001, per McHugh J at [12]; *Al Kateb v Godwin,* 2004, per Gleeson CJ at [19]). It is also one of the most fundamental human rights under international law. Arbitrary detention is prohibited by the ICCPR and CROC. Article 9(1) of the ICCPR states: 'Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention.' Article 37(b) of CROC prohibits the unlawful or arbitrary deprivation of liberty of children and stipulates that arrest, detention or imprisonment of a child must be 'a measure of last resort and for the shortest appropriate period of time'. Subsection 4AA(1) of the *Migration Act* has to some extent applied the protections of Art 37(b) to children processed in Australia but does not extend to those processed offshore. Offshore processing *requires* children and adults to be detained until their status is determined and arrangements are made for their settlement or removal.

Australia's onshore detention regime was introduced in 1992 and has been the subject of considerable international scrutiny. The UN Human Rights Committee has scrutinised the regime in its consideration of Australia's periodic reporting concerning its implementation of the ICCPR and under its First Optional Protocol. Australia ratified the Protocol on 13 August 1980, thereby recognising the Committee's competence to consider written communications brought by alleged victims of ICCPR violations and to determine whether such violations have occurred. In its first finding with respect to Australia's immigration detention policy (*A v Australia,* 1993), the Committee found that the detention of a Cambodian asylum seeker who had arrived in Australia by boat was arbitrary on the basis that it was not necessary in the circumstances and was disproportionate to the aims of the policy, which might include prevention of flight or interference with evidence. The Committee further found that every decision to detain must be open to periodic review in accordance with Art 9(4) of the ICCPR and that no review of the detention arrangements under consideration was available. The Committee has made consistent findings concerning immigration detention on five further occasions (*Mr C v Australia*, 1999; *Baban v Australia*, 2001; *Bakhtiyari v Australia*, 2002; *D and E v Australia*, 2002; and *Danyal Shafiq v Australia*, 2004).

Persons processed offshore are apprehended and transferred by force to offshore processing centres (*Migration Act*, s 198A). Asylum seekers held in Nauru have been accommodated in a confined area in which they can move during the day. They are subject to regular scrutiny by security guards and a strict 7 pm curfew. The ocean surrounding the island continent of Nauru eliminates any opportunity to leave. In *Ruhani v Director of Police* (*No 2*), an asylum seeker held on Nauru was refused habeas corpus by the High Court on account of lawful justification, but the court nevertheless considered that the applicant was deprived of liberty while held in Nauru. Refugees detained on Manus Island in PNG have been subject to similar restrictions. Yet DIMA maintained that offshore processing does not amount to detention. In his appearance before the Senate Committee in relation to the Bill, DIMA's Deputy Secretary, Bob Correll, stated that '[o]ffshore processing centres are not detention centres, and conditions of movement are determined by the respective governments of Nauru and PNG' (Senate Legal and Constitutional Legislation Committee 2006b).

Mr Correll's assertion is itself incongruous. Although detention of asylum seekers is not defined by the ICCPR or CROC, it has been defined by UNHCR. It is described as confinement within a narrowly bounded or restricted location — including prisons, closed camps, detention facilities or airport transit zones — where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory (UNHCR 1999; see also *Ammur v France*, 1996). A similar definition is employed by Goodwin-Gill, characterising detention as confinement in prison, closed camp or other restricted area such as a 'reception' or 'holding area' (Goodwin-Gill 2003). In determining whether an asylum seeker is being detained, the UNHCR guidelines indicate that the cumulative impact of the degree and intensity of restrictions should be considered and that asylum seekers should not be detained.

The right to health

Article 12 of the ICESCR and Art 24 of CROC enshrine the right to enjoy the highest attainable standard of physical and mental health. The detention environment has emerged as a vehicle for preventable mental illness in individuals who have experienced trauma in their countries of origin, and consequently submitted themselves to the perils of travelling by boat to Australia. Immigration detention has been associated with high rates of anxiety, depression, self-harm, suicidal ideation and post-traumatic stress disorder.

The human impact of immigration detention has been scrutinised by medical professionals and a preponderance of clinical evidence has revealed a link between

immigration detention and serious mental illness. On Australia's mainland, the adverse impact of immigration detention on mental health has been exacerbated by the geographic remoteness of centres such as the facility located at Baxter, South Australia. Isolation from the Australian community impedes the provision of timely and appropriate services (Palmer 2005) and reinforces detainees' sense of isolation and abandonment, with limited opportunities for access by community visitors, lawyers or members of the media. The hopelessness and isolation felt by mainland detainees in remote centres is magnified in the context of offshore processing. The despair experienced by detainees on Nauru has led to frequent hunger strikes and acts of self-harm (Crock, Saul and Dastyari 2006).

In his appearance before the Senate Committee Inquiry, Mr Correll conceded that the detainee population of Nauru suffered high rates of mental illness. Reference was made to numerous acts of self-harm, suicide attempts, moderate and severe depression, acute stress reaction, adjustment disorder and anxiety disorder in children (Senate Legal and Constitutional Legislation Committee 2006b). The mental health problems associated with offshore processing are not unique to Nauru. DIMA also reported incidents of self-harm, threats of suicide and three attempted suicides in PNG among the detainee population between October 2001 and December 2002 (Senate Legal and Constitutional Legislation Committee 2006b). While maintaining that persons processed offshore who suffered from a mental illness have often experienced 'highly traumatised previous life circumstances and there are many factors contributing to their mental health condition', Mr Correll conceded that 'individual circumstances that may relate to a person's presence in Nauru may contribute in one case to an assessment of mental health considerations' (Senate Legal and Constitutional Legislation Committee 2006b, 58). Indeed, experiences of prior trauma would appear to be exacerbated by the experience of offshore detention, thus occasioning preventable psychiatric illness.

The experience of Dutch psychiatrist Dr Maarten Dormaar serves to illuminate the impact of offshore detention on mental health. Dr Dormaar was employed by IOM to work in Nauru in mid 2002 (Harding-Pink 2004, 398–400) after practising medicine since the late 1960s and psychiatry since 1975 (Colvin and Fowler 2003). In a report to Nauru camp managers in October 2002, he reported that:

> I seldom or never encounter an asylum seeker who still sleeps soundly and is able to enjoy life. Mental health, or psychiatry for that matter, is basically not equipped to improve their situation in any essential respect. [Colvin and Fowler 2003.]

Dr Dormaar has claimed that he provided many reports on the severity of mental illness of detainees on Nauru, and that IOM officials 'received it but they didn't react

to it, they didn't react to all my extensive reports' (Colvin and Fowler 2003). DIMA has denied that Dr Dormaar's concerns had been ignored, and asserted that Nauru had 'comprehensive mental health services in the centres to improve the residents' psychological wellbeing' (Colvin and Fowler 2003). In November 2002, Dr Dormaar resigned in protest over the conditions in the camp and consistent disregard for his professional clinical opinion (Colvin and Fowler 2003).

Children's rights

Children seeking asylum have suffered trauma prior to their arrival in Australia (Crock 2006, 128). When subjected to the uncertainty and anxiety of the detention environment, these children have been exposed to acts of self-harm and suicide by adult detainees. Due to children's developmental needs and heightened vulnerabilities, the impact of detention on the human rights of children has been of particular concern.

The damaging impact of detention on child asylum seekers is heightened by the use of remote detention facilities under the Pacific Solution. A study of unaccompanied child asylum seekers has found the physical, financial and emotional impact of offshore processing to be 'disastrous' for unaccompanied children seeking protection from Australia (Crock 2006, 128).

The inconsistency of the detention environment with a range of CROC's provisions may be seen to amount to a repudiation of Australia's obligations under the Convention. In light of the prior trauma suffered by children seeking refugee protection, their accommodation in the detention environment fails to take appropriate measures to promote physical and psychological recovery of those who have suffered neglect, abuse, exploitation or torture as required by Art 39. Children have been detained alongside adults in offshore centres. Article 37(c) of CROC requires children and adults to be separated unless it is considered in the child's best interests not to do so, and calls on states to facilitate contact between detained children and their families. Australia's ratification of CROC was subject to a reservation to Art 37(c).[4] The reservation has been maintained on the basis that detention of children together with adults 'remains necessary because of the demographics, geographic size and isolation of some remote and rural areas of Australia' (*Australia's Combined Second and Third Reports under the Convention on the Rights of the Child* 2003). Although Australia is not bound by Art 37(c), the detention of children together with adults raises concerns in relation to other articles in CROC.

4. See, for example, Silove and Steel 2006; Silove and Steel 1998; Steel et al 2004; Steel et al 2006.

Children's exposure to acts of suicide and self-harm by adult detainees compromises their right to be protected from physical and mental violence in Art 19(1).

The detention of children, including unaccompanied children, in offshore facilities fails to facilitate an evaluation of individual circumstances, such as children's vulnerabilities and developmental needs (Crock 2006). Such arrangements fly in the face of Art 3(1) of CROC, which enshrines the best interests of the child as primary consideration in all actions concerning children, and Art 3(2), which provides that parties shall adopt appropriate legislative and administrative measures to ensure that children are accorded protection necessary for their well-being, taking into account the rights and duties of parents and legal guardians. In allowing the Minister for Immigration and Citizenship to permit families with children to live in the community while they await refugee status determination, the *Migration Amendment (Detention Arrangements) Act* has moved towards an acceptance of Art 3 with respect to child asylum seekers in Australia but not to children processed offshore.

The conditions of detention call into question Australia's compliance with a range of economic and social rights enshrined in CROC, in addition to the right to the highest attainable standard of health. Children detained in offshore processing centres are unlikely to fully enjoy the right to education in Art 28. The Seeking Asylum Alone project has found that although children have had access to education on Nauru, the schooling provided was inadequate and the teachers were rarely paid (Crock 2006, 190).

Child asylum seekers processed offshore are also unlikely to enjoy a standard of living adequate for their physical, mental, spiritual, moral and social development in accordance with Art 27. Jeremy McBride has argued that deprivations of such rights may amount to torture in circumstances where treatment is, 'at the very minimum, a gross form of humiliation, rising to the deliberate infliction of severe mental or physical suffering' (McBride 1998, 109). In light of children's needs and vulnerabilities, their arbitrary detention arguably may amount to torture or to cruel, inhuman or degrading treatment in violation of Art 37(a) of CROC, Art 7 of the ICCPR and Art 1 or 16 of CAT.

Non-refoulement

Article 33 underpins the Refugee Convention. It prohibits the expulsion or return (refoulement) of a refugee to the frontiers of a place where their life or freedom may be threatened on grounds of race, religion, nationality, membership of a social group or political opinion. Under Art 32, expulsion is only authorised in exceptional circumstances where national security or public order is at risk. The Convention's

prohibition on expulsion or refoulement is not confined to the return to a refugee's country of origin, but extends to any state where they may be subjected to persecution (UNESCO 2006).

Asylum seekers have been processed offshore in PNG and Nauru. PNG is a party to the Refugee Convention, subject to seven reservations (Arts 17(1), 21, 22(1), 26, 31, 32 and 34). Nauru is not a party to the Convention. Nauru is consequently not obliged to refrain from refoulement, with the possible result that refugees may be returned to a place of persecution.

Concerns about such indirect or 'chain' refoulement, namely indirect return to a country of origin, would appear to be addressed in an MOU between the governments of Australia and Nauru. The document provides that any asylum seekers awaiting determination of their status will not be returned by Nauru to a country in which they fear persecution, nor before a place of settlement is identified (the MOU is cited in *Ruhani v Director of Police (No 2)*, 2005). However, the document is of uncertain legal effect and does not adequately address concerns about Australia's ability to monitor and regulate offshore facilities in other nations. It also fails to impose any obligations upon Nauru to comply with international law.

Senator Vanstone made the following comments in May 2006: 'We can't make rules in relation to facilities in other countries. We can influence them but we can't make rules … I am saying that in Australian territory the arrangements we made last year apply … but Nauru is another country' (SBS Australia 2006). The former minister's comments concerning Australia's limited ability to monitor offshore facilities in the sovereign state of Nauru would suggest that offshore processing is not regarded by her as extraterritorial processing. It is instead the deflection of those who seek Australia's protection to a state which does not owe protection obligations under the Refugee Convention, thus heightening the risk of chain refoulement. The likelihood must therefore be confronted that some of the 420 unsuccessful asylum seekers removed by Nauru (Kneebone 2006) were refugees who may have been returned to situations of danger.

The continuation of Operation Relex II brings with it the danger of direct refoulement by Australia. Like its predecessor, Operation Relex II aims to deter and deny the access of asylum seekers to Australia. Some methods adopted under Operation Relex I include surveillance and response operations in order to deter unauthorised boat arrivals, including the return of asylum seekers to Indonesia (see Marr and Wilkinson 2003). It is feared that this may constitute refoulement, particularly if Operation Relex II sees asylum seekers who have fled Indonesia being returned to Indonesia without proper assessment of their refugee status.

Non-refoulement obligations may also be breached if a nation has inadequate refugee assessment procedures that result in the return of genuine refugees to countries where they have a well-founded fear of persecution. There is evidence of systematic problems in Australia's processing of asylum seekers detained in Nauru. Migration Agent Marion Le, who was the agent/advocate for all detainees on Nauru as at December 2003, has identified several issues of concern in the processing of asylum claims on Nauru. These include:

- the merging of more than one applicant in certain written decisions, which featured the names of different applicants in different parts of the decisions;
- the confusion of applicants' identities based on similarities of name — for example, a decision in one applicant's case was issued to a different applicant with a similar name;
- written decisions were expressed in almost identical words to other decisions which rested on different facts;
- decisions based on a wrong finding of nationality were later amended without any reassessment in light of the new accurate information;
- a lack of understanding and knowledge about Afghan political groups — for example, the existence of a political party was denied even though it could be verified by an internet check or a DIMA database search;
- decisions which ignored documentation held by the applicants which gave rise to serious concerns for their safety in the event of their return; and
- failure to add relevant information provided by advocates to files (Le 2006).

Le also found serious inequities and discrepancies between the decisions being handed down for asylum seekers processed onshore and those processed offshore (Le 2006). The above evidence suggests that asylum seekers in offshore facilities may suffer a wrong status determination decision because of flawed practices in offshore facilities, a danger characterised by Kneebone as 'constructive refoulement through processing errors' (Kneebone 2006). The risk of refoulement in offshore facilities is further increased by the lack of legal assistance and review of primary decision making. Offshore processing severely limits Australia's ability to abide by its obligation under the Refugee Convention and places asylum seekers at risk of return to situations of danger, in breach of its non-refoulement obligations.

Access to legal assistance

Offshore processing has the result that asylum seekers' claims are processed without the benefit of migration advice. Once admitted into the onshore processing regime in mainland Australia, most asylum seekers in detention (as well as some applying from within the community) are given access to government-funded assistance if

they sign a form requesting such help. The Immigration Advice and Application Assistance Scheme (IAAAS) allocates funded migration agents (some of whom are lawyers) to onshore asylum seekers.

In 2003–04 the IAAAS program assisted 288 protection-visa applicants in immigration detention and 456 disadvantaged-visa applicants in the community (Department of Immigration and Citizenship 2007). The IAAAS program does not extend to judicial review for asylum seekers onshore. However, in practice, government-funded legal assistance may be provided for court actions, either directly from Legal Aid offices or from lawyers funded by Legal Aid in circumstances where the law is unsettled or where the proceedings challenge the lawfulness of detention. Furthermore, many law societies and courts have set up pro-bono legal schemes for asylum seekers wishing to challenge visa refusals in the courts.

Offshore asylum seekers have no access to government-funded immigration or legal advice. The Department of Immigration and Citizenship has noted that it has no objection to lawyers advising clients in offshore facilities (Senate Legal and Constitutional Legislation Committee 2006c). Nevertheless, the experience of offshore processing has been that no asylum seeker received legal assistance until 2003. It is difficult if not impossible for pro-bono lawyers to access clients in Nauru in order to receive instructions. Putting to one side the financial burden on pro-bono lawyers travelling to Nauru, lawyers have been refused visas and have been barred from accessing offshore facilities in the past. According to the submission to the Senate Committee by Australian Lawyers for Human Rights, between August 2001 and March 2003 a number of lawyers volunteered to travel to Nauru to provide legal assistance to asylum seekers detained there. Their visa applications were refused by Nauru twice, notwithstanding support from UNHCR. No reasons were offered for the refusals (Australian Lawyers for Human Rights 2006).

The lack of funding and the difficulty of accessing clients in offshore facilities deprive many, if not all, asylum seekers in offshore facilities of legal assistance or migration advice. This is extremely concerning in light of the complex nature of asylum law and the danger of refoulement. Lack of access to legal assistance for offshore asylum seekers is a stark incongruity in Australia's processing of all asylum seekers seeking its protection.

Discrimination

The differential treatment of asylum seekers processed offshore has been contingent upon the happenstance of the geographic location of their arrival. These individuals have simply not managed to reach Australia's mainland. In his Second Reading

speech concerning the Migration Amendment (Designated Unauthorised Arrivals) Bill, Mr Robb acknowledged the 'incongruity' of this differential treatment. The unsuccessful Bill was proposed as the solution to this incongruous situation. Yet the Bill would have operated with the result that all asylum seekers who arrived in Australia by boat would be denied a range of rights concomitant with onshore refugee processing. Under the withdrawn Bill, these rights would still have been accessed by asylum seekers who arrived in Australia by plane, a group which is statistically less likely to constitute refugees. In the six-year period between July 1999 and June 2005, DIMA approved, at the first instance, a mere 2 per cent of initial visa applications lodged by unauthorised air arrivals as compared with some 79 per cent of applications lodged by unauthorised boat arrivals (Senate Legal and Constitutional Legislation Committee 2006b).

The distinction drawn between asylum seekers who arrive on Australia's mainland and those who do not calls into question Australia's performance of its non-discrimination obligations under a range of international instruments, including the ICCPR (Art 2(1)) and CROC (Art 2(1)). Article 2 of the ICCPR calls on state parties to apply the rights enshrined in the Covenant 'without distinction of any kind' to 'all individuals in its territory and subject to its jurisdiction'. Article 26 states that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law' and prohibits discrimination on grounds including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. CROC's Art 2(1) calls upon state parties to respect and ensure its rights to every child within their jurisdiction without discrimination of any kind, irrespective of the legal status of the child or of the child's parent or legal guardian. Appropriate measures are required by Art 2(2) to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status of the child's parents, legal guardians or family members. Children seeking asylum and children determined to be refugees are entitled, under Art 22, to appropriate protection and humanitarian assistance in the enjoyment of CROC rights and rights in other treaties ratified by a state party.

Article 3 of the Refugee Convention calls upon state parties to apply the Convention without discrimination as to race, religion or country of origin. Forcible deportation and detention of boat arrivals may also constitute a penalty in contravention of Art 31(1), which states that:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization.

The conditions in which asylum seekers are held in offshore centres, combined with the denial of the rights outlined above, contrast markedly with the entitlements of persons processed in Australia and may be seen to amount to a penalty within the meaning of Art 31.

Merits review

An important right enjoyed by asylum seekers processed in Australia is the right to merits and judicial review of their asylum decision. There is no right to merits review at the Refugee Review Tribunal (RRT) for applicants who are processed outside Australia (*Migration Act 1958*, s 411(2)(a)). Applicants processed offshore do have a right to have Department of Immigration and Citizenship decisions reviewed by the department. There is, however, no provision for independent review of departmental decisions. The independence of the RRT is an important safeguard against the influence of political constraints that may affect a government department. The removal of an independent reviewer may give rise to allegations of political intervention in refugee decision making and create a risk of refoulement of genuine refugees.

The RRT has played a significant role in ensuring procedural fairness for asylum seekers. Between 1 July 1993 and 28 February 2006, the RRT overturned 7885 cases decided by DIMA (as it then was). The department has erred most extensively in its decisions involving Iraqi and Afghan asylum seekers. Between 1 July 2005 and 28 February 2006, the RRT set aside 144, or 95 per cent, of all decisions on Afghan asylum seekers and 373, or 97 per cent, of all departmental decisions involving Iraqi asylum seekers.

Merits review allows a re-assessment of the facts by an independent tribunal. In light of the concerns about offshore processing identified by Marion Le and other submissions to the Senate inquiry,[5] it is clear that denial of the rights to merits review exposes asylum seekers processed offshore to a high danger of refoulement. In denying the protections of the Australian legal system, Australia's offshore processing regime is inconsistent with the prohibition on discrimination considered above and denies equal protection of the law to persons processed offshore.

5. Although the supervisory UN Committee on the Rights of the Child has indicated that this reservation may impede Australia's full implementation of the instrument: Concluding Observations of the Committee on the Rights of the Child 1997, Pt C, para 8.

Judicial review

In theory, the right to judicial review of decisions by Commonwealth officers is protected under s 75(v) of the Australian Constitution. This right ensures that Commonwealth officers are prevented from exceeding their power, and encourages adherence to the rule of law (per Brennan J in *Church of Scientology v Woodward*, 1982, at 70).

In practice, however, lack of access to legal advice and assistance frustrates the fulfilment of this right. Few cases brought on behalf of applicants held on Nauru have been judicially determined (See *Ruhani v Director of Police*, 2005 and *Ruhani v Director of Police (No 2)*, 2005). Decisions which are not made by Commonwealth officers will not be subject to judicial review under s 75(v) of the Constitution. This may include decisions made by UNHCR officials or IOM.

Furthermore, judicial review for asylum seekers processed offshore may be futile because it would not guarantee a re-hearing of their claims by a decision maker. In making refugee status determinations, a Commonwealth officer processing claims outside Australia would be applying the Refugee Convention, rather than any specific section in the *Migration Act* (Horan 2003, 551–72). There is no legislative regime that compels the hearing of an asylum claim by a Commonwealth officer in offshore facilities. According to Chris Horan, the absence of an enforceable duty to hear an asylum claim by a Commonwealth officer is fatal to the application for a rehearing. In the event of a successful judicial review decision, Horan believes the High Court would be unlikely to make an order compelling the Commonwealth to make a fresh determination in relation to a particular asylum seeker (Horan 2003, 551–72).

Should a judicial review application from an asylum seeker processed offshore be successful and a re-hearing granted by the High Court, the asylum seeker may nevertheless be refused an Australian visa. A successful refugee application in an offshore facility does not guarantee the right of resettlement in Australia. An applicant who is successful in his or her refugee application must await resettlement in a third country. The right to apply for an Australian visa is a non-delegable and non-compellable discretionary power that cannot be subject to judicial review (*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants*, 2003, at 12 per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

Lack of legal assistance or migration advice, difficulties in processing claims offshore and the removal of independent review create an environment in which refugees may be vulnerable to political decision making and human error.

Financial cost of offshore processing

Offshore processing is costly in terms of its psychological impact on asylum seekers and Australia's ability to adhere to its international obligations and consequent international standing. It also represents a high cost for the Australian taxpayer. The running of offshore processing centres alone by IOM cost the Australian Government $119,463,592.51 between 2002 and 2005 (Senate Supplementary Budget Estimates Hearing 2005). This does not include associated costs, such as the transport of asylum seekers to offshore processing centres. In 2002–03, $90 million was spent on offshore asylum seeker management. In comparison, only $5 million was spent on administering the entry of 4000 refugees under the offshore humanitarian program (assisted passage and medical clearance costs) in that year (Crock, Saul and Dastyari 2003, 73). In August 2006, despite the availability of processing facilities on Christmas Island, eight Burmese asylum seekers were transferred to Nauru at a cost of $225,000 (Crock, Saul and Dastyari 2003). The annual cost of maintaining detention facilities at Nauru and Manus Island is around $24 million and $3 million respectively.

The costs of running detention centres on remote Australian Islands such as Christmas and Cocos Islands are also high. Megan Saunders of *The Australian* reports that, according to the government's own figures, the cost of detaining boat people on temporary facilities at Christmas and Cocos Islands is between $200 and $300 per day. This is more than double the expense of keeping them on the mainland (Saunders 2002). The construction of a new detention facility on Christmas Island is nearing completion. The centre will have the capacity to accommodate 800 people. It is expected to commence operation in mid 2007 and its construction costs are approaching $400 million (ABC *Lateline* 2007; Snowdon 2006).

The high cost of detention outside Australia, even when the number of detainees is low, was clearly demonstrated by the case of Aladdin Maysara Salem Sisalem. Mr Sisalem spent more than 18 months in detention on Manus Island, PNG, and was the sole detainee on the island for 10 months. His solitary detention cost the Australian taxpayer more than $216,666 dollars per month. An estimated total of $1.3 million was spent accommodating, feeding and caring for Mr Sisalem. Overall costs — including power, water and maintenance projects which benefited the local community, along with some back pay — add up to more than $4 million (Jackson 2004). Detention of Mr Sisalem in Australia would have saved the Australian taxpayer an average of $211,866 per month, with detention in the Australian mainland costing approximately $4800 per person per month (Jackson 2004).

An elephant in the room?

Given the enormous cost and dubious gains of offshore processing, one may be forgiven for questioning the motives underpinning the maintenance of the system. In the hearing of the Senate Committee on 26 May 2006, Senator Brett Mason made the following comments in his questioning of Brian Walters SC, President of Liberty Victoria:

> As a politician, one of the big issues for us in not only domestic political concerns but also broader foreign policy interests. I suspect that there is the elephant in the room that we have not discussed and perhaps it is not an issue that is easy for discussion.

Mr Walters's prescient response was that the offshore arrangements are Australia's responsibility. He then commented as follows:

> The fact is that in our region we should be upholding the rule of law. If ever there was a region where we ought to be doing that, it is here. It is in the Pacific. It is Australia's responsibility as a powerful country, and a country which has these people seeking asylum on its shores and within its jurisdiction, to act in accordance with its legal, democratic and convention obligations. [Senate Legal and Constitutional Legislation Committee 2006c.]

Senator Mason has suggested that the elephant in the room is Australia's broader foreign policy interests. The Refugee Convention calls on state parties to recognise the social and humanitarian nature of the problem of refugee flows and to do everything within their power to prevent this problem from becoming a source of tension between states (Preamble to the Refugee Convention). Within the realm of realpolitik, such tensions may nevertheless on occasion arise. But reactive laws which subordinate humanitarian concerns in order to ease political tensions will not generate respect for Australia's sovereignty or foster enduring mutual respect between nations.

In acceding to the UN's constitutional document, the UN Charter, Australia recognised the link between the conditions of stability and well-being which are necessary for peaceful and friendly relations among nations and respect for human rights (see, for example, Arts 1(2) and 55). The link between human rights, peace and stability within the Asia–Pacific region has been recognised in the emergence of the state of East Timor and with respect to its current security and humanitarian situation. As a leader in our region, it is incumbent upon Australia to set a positive example by performing its proper role as a fair-minded and principled power within its region, committed to upholding fundamental human rights and maintaining international peace and security. Australia's flawed and costly offshore processing regime is antithetical to this proper role.

Conclusion

The Immigration Minister's parliamentary secretary identified an incongruity inherent in the differential treatment of asylum seekers processed offshore when compared to those processed in Australia. But the federal government has chosen to overlook the flaws inherent in the offshore processing regime which has spawned the situation of incongruity — flaws which were highlighted in 135 submissions to the Senate Committee in the context of its enquiry into the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006. The government's commitment to offshore processing is itself incongruous and highly costly in a nation which has voluntarily signed up to human rights obligations under international law and maintained that these obligations are valued and upheld.

The high cost of offshore processing includes the inevitable doubt cast over the sincerity of Australia's commitment to human rights and concomitant damage to our international standing. Australia's stance undermines the universal application of human rights by setting a disturbing precedent for burden sharing in the Asia–Pacific region and beyond. The offshore system has cost Australian taxpayers hundreds of millions of dollars in circumstances where operational mainland facilities have been readily available at a significantly lower cost. But the regime's highest costs have been in human terms, including its deleterious effect on mental health and its denial of the fundamental rights required to secure human dignity. Offshore processing has exacted an unacceptably high cost and should be abandoned.

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