

Expert Panel on Asylum Seekers

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BY EMAIL

Dear Expert Panel,

We are pleased to make a brief submission to your Panel which is examining ‘the best way forward for Australia to prevent asylum seekers risking their lives on dangerous boat journeys to Australia’.

As these issues have been widely discussed and debated for more than a decade, and the facts and legal issues are well known we will limit our submission to some propositions which are supported by our own publications or previous submission.

We submit that the issue of Australia’s response to asylum seeker ‘boat arrivals’ needs to be seen in the context of:

- Australia’s overall refugee intake under the Refugee and Humanitarian Program; and
- The dimension of the refugee ‘problem’ which is faced by other countries in the region; and
- The political and practical realities within the regional context.

We conclude that the Australian government:

- Should increase the size of its Refugee and Humanitarian Program; and
- Process all ‘offshore’ asylum seekers in all regions in the same way under the Refugee component of the Program; and
- Engage directly with transit countries in the region to resettle refugees in Australia.

We elaborate briefly upon these points.

The Refugee and Humanitarian Program

The starting point for understanding Australian migration law is that in order to enter Australia 'lawfully', a person must enter on a valid visa (Migration Act 1958 (Cth), s4). The 'protection' visa which is available for refugees or asylum seekers who are processed by Australia is only available *after* entry to Australia. Notably the persons who seek to come to Australia as 'boat people' are from countries or categories which cannot access the visa regime. They are thus discriminated against by the visa regime (see comment below re 'on shore' asylum seekers and Chinese students).

There are three cohorts of refugees or asylum seekers who come within the above Program. These are refugees who are resettled from third countries, 'on shore' asylum seekers (typically and mostly overseas students on lawful visas from China) and 'boat people' or 'off-shore entry persons' (OEP).¹ In most years the number of 'on shore' asylum seekers has exceeded the number of 'off-shore entry persons'. Yet disproportionate attention is focussed by politicians on the latter category who have been consistently discriminated against under the mandatory detention policy and other deterrent policies referred to in our publications, including off-shore and extraterritorial processing.² Moreover, the visas granted to OEPs are linked to the visas granted under the resettlement and humanitarian sectors of the Refugee and Humanitarian Program.³ This fact is used as basis for 'demonising' OEPs in public debate, as 'queue' jumpers.

Between 1996-2003 the number of available places under the Refugee and Humanitarian Program was capped at 12,000 with 10,000 notionally allocated for offshore resettlement and 2,000 for onshore asylum seekers.⁴ In recent years the allocation for 'onshore asylum

¹ Migration Act 1958 (Cth), s5(1).

² S Kneebone, Chapter 4 'The Australian Story: Asylum Seekers Outside the Law' in *Refugees, Asylum Seekers and the Rule of Law* (Cambridge University Press, 2009) (attached), S Kneebone, 'The Pacific Plan: the Provision of "Effective Protection"?' (2006) 18 *International Journal of Refugee Law* (Nos 3 and 4) 696 (attached); S Kneebone, 'Migration Control at Sea – the Australian case' in B Ryan and V Mitsilegas eds, *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) pp356-366 (attached).

³ It is difficult to obtain separate statistics as the visas granted to off-shore OEP asylum seekers are counted under the 'humanitarian' rather than 'refugee' component of Australia's Refugee and Humanitarian Program (see Kneebone, *Rule of Law*, supra, pp176-178 and the next footnote) and are combined with onshore protection visas. See Department Of Immigration and Citizenship, Fact Sheet 60 <http://www.immi.gov.au/media/fact-sheets/60refugee.htm>, accessed 23 March 2012, which states that there were 4828 visas granted 'onshore' but this figure includes the OEP asylum seekers. However the statistics for the RRT show that in the 2010-2011 period close to 3,000 decisions re onshore protection visas were lodged \ handed down. See <http://www.mrt-rrt.gov.au/Conduct-of-reviews/Conduct-of-reviews/default.aspx#stats>, accessed 23 March 2012. Note this figure of 3,000 represents those who did not succeed at first instance (departmental level) and thus the actual number of onshore applicants will be higher.

⁴ The offshore program is directed at two categories of persons:

seekers' or OEPs has disappeared and the size of the Program has been increased to a mere 13,750 places (see <http://www.immi.gov.au/media/fact-sheets/60refugee.htm>) whilst the Migration Stream has been increased substantially from 93,914 in 2002-03.

We submit that:

- There is scope for enlarging the size of the Refugee and Humanitarian Program proportionate to the increase in the Migration Stream.
- There is a need for provision of more resettlement places for asylum seekers in transit in the region.
- Moreover, the granting of visa categories which are intended to deter movement of asylum seekers should be discontinued.⁵ In particular, asylum seekers should be granted visas under the Refugee category of the Refugee and Humanitarian Program rather than under the Humanitarian category.

The Regional Refugee Situation

It has been estimated that the Asia-Pacific region hosts 30% of the global refugee problem. As the UNHCR points out, these refugee situations in the region are both large-scale and protracted. Within the region there is a refugee 'problem' which far exceeds the scale of refugee applicants that Australia receives. Details about the origins and nationalities of these groups can be obtained from the UNHCR website – see <http://www.unhcr.org/pages/4a02d8ec6.html>.

Three countries within our immediate region of Southeast Asia host large numbers of refugees; Thailand, Malaysia and Indonesia. Malaysia and Indonesia are the two main transit countries for those travelling from (mainly) the Middle East to Australia. Others travel directly by boat from countries such as Sri Lanka, (and to a lesser extent Vietnam and China).

These issues are described and analysed in:

Susan Kneebone, 'The Pacific Plan: the Provision of "Effective Protection"?' published in a Special volume of the *International Journal of Refugee Law* (December 2006, Volume 18, numbers 3 and 4) pp 696-721 (attached).

Susan Kneebone and Sharon Pickering, 'Australia and the Pacific Region', in S Kneebone and F Rawlings-Sanaei eds, *New Regionalism and Asylum Seekers: Challenges Ahead* (Berghahn Books, 2007) pp167-187.

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- The **Refugee** component for those who meet the Refugee Convention definition of a 'refugee' and;
 - The **Special Humanitarian** (SHP) component for persons subject to 'substantial discrimination' or human rights abuse.

⁵ Kneebone, 'Migration Control at Sea – the Australian case' in Ryan and Mitsilegas eds, above.

Susan Kneebone, 'Migration Control at Sea – the Australian case' in Bernard Ryan. and Valsamis Mitsilegas eds., *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) pp.347-374 (attached).

In recent years Australia has chosen to adopt a policing model of response to the irregular movement of asylum seekers within the region en route to Australia (see Kneebone 'Migration Control at Sea' above). This response has grown out of a decade of Australia's deterrent policies which have failed to resolve 'the problem' (see Kneebone, 'The Australian Story' attached). Under this response Australia conflates issues of smuggling and human trafficking, and denies the rights of asylum seekers (see Kneebone, 'Migration Control at Sea' above).

The issue of the deaths of asylum seekers at sea is the result of Australian policies, arising from its failure to deal with the problem of refugees in transit countries in the region.

One way of breaking this impasse is for Australia to be directly involved in selecting refugees for resettlement in Australia from within the region, under cooperative arrangements with the transit countries and agencies in those countries (IOM and UNHCR). This would be consistent with the operation of the Refugee and Humanitarian Program in other regions such as Africa.

However Australia cannot 'contract out' its obligations to other agencies (IOM and UNHCR) under an off-shore processing regime. See:

Susan Kneebone, 'Outing Off-shore Processing: the High Court of Australia Redefines Regional Cooperation and the role of the Refugee Convention' in (2012) 26 (No 2) *Journal of Immigration, Asylum and Nationality Law* 156-174 (attached).

(Castan Centre) *Submission to Inquiry into the agreement between Australia and Malaysia on the transfer of asylum seekers to Malaysia*, Prepared by Professor Susan Kneebone, Maria O'Sullivan and Tania Penovic, September 2011 (attached).

Conclusion

In conclusion we submit that in order to prevent 'asylum seekers risking their lives on dangerous boat journeys to Australia', the Australian government:

- Should increase the size of its Refugee and Humanitarian Program; and
- Process all 'offshore' asylum seekers in all regions in the same way under the Refugee component of the Program; and
- Engage directly with transit countries in the region to resettle more refugees in Australia.

That is, a new approach to these issues needs to be adopted, which includes de-linking them from the concept of 'border control'.

We thank you for considering our Submission and would be happy to elaborate on any point raised in it.

Yours sincerely,

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