

Australia's Closed Borders -Refugee Protection or Neglect?

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My first experience of Saint Vincent de Paul was working in a place for homeless alcoholic men. I was introduced to the manager and ex shearer who looked me up and down with pure disdain. I felt the quintessential "wet behind the ears" university student. He then proceeded to instruct me how the mash potato had to be the consistency of good mortar. The fact that we became good friends and he an excellent mentor testifies to the strength of the movement of Saint Vincent de Paul and its ability to attract difference in serving a larger aim, that of relieving the suffering of others.

"We should strive to keep our hearts open to the sufferings and wretchedness of other people, and pray continually that God may grant us that spirit of compassion which is truly the spirit of God." -*Saint Vincent de Paul*

Let me tell you another personal story. Sometime in November 2004 when I had just moved to Saint Canice and taken up the role of Director of Jesuit Refugee Service in Australia, our household was visited one night by a rather grim looking group of men who were looking for an asylum seeker whom we knew. The person who answered the door answered truthfully that he did not live with us -though this was where his mail went- but that they might be able to find him in a house owned by the parish around the corner. The asylum seeker in question unbeknown to us had overstayed his visa and was now "illegal". These men were mostly Federal Police who had come to take "Jay" into detention. They didn't find him: Jay had already gone and was to spend the next year or so staying presumably with

friends and contacts. I remember thinking that he should stop living off the kindness of others and take whatever he had coming to him, as surely this would be better than the life he was living then.

Two months ago I received a phone call from this same person who told me he was now "legal" and living in another city. He told me he was issued with a temporary visa during a lengthy admission to hospital. He is now living in the community, with access neither to Medicare, nor benefits of any kind except that provided by the people with whom he is living. He is not permitted to work or to study though I doubt if he could do wither at present. He has appealed his case to the Minister, who is under no obligation to look at the case and, if he does, whose determination cannot subsequently be challenged. Jay did not sound well. He currently awaits the outcome of his appeal and tries to get his health back together. In this and a couple of other conversations Jay told some of his history, both before coming to Australia and also more recently. It is his version of events admittedly but as I grew to know this person better I became ashamed of my own thoughts of two years ago concerning him.

I will return to Jay a little later, but firstly I would like to paint the political and cultural context within which people like Jay are forced to place their lives with all their vulnerabilities in our society.

On the 17th April this year the Immigration Minister Senator Kevin Andrews announced that an agreement had been reached whereby people assessed as being refugees detained on Nauru would be resettled in the US in return for Australia

accepting American refugees held at Guantanamo Bay.¹ Both countries have a policy of interdiction and offshore processing. The United States historically encouraged Cubans fleeing Castro's regime as a way of weakening the regime and also scoring some ideological points. By the 1970s however the regime of Castro looked less and less vulnerable and there was little chance of Castro's forced removal. The United States then gradually closed the door to Cubans attempting to travel there by bringing their refugee policy, like Australia's, under more direct political control.

The Australian Prime Minister, John Howard, characterised the refugee "swap" as "part of our policy to reinforce the message to those who would engage in people smuggling that this country has a very tough border protection policy."² In other words it is part of a deterrent mechanism to prevent Australia from becoming a country of first asylum.

Both Australia and the US find it difficult to get other countries to take their unwanted refugees. Previously, Australia had only found five countries willing to take people from Nauru. Of those refugees resettled in this manner, 94% have ended up in Australia or New Zealand.³ From all sides, this refugee "swap" looked a desperate measure of a government fresh out of policy options.

It is, however, clever politics. It provided a political wedge for the refugee lobby in an election year. The Refugee Council of Australia summarised this ambivalence when forced to state that it: "accepts that re-settlement of Sri Lankan and Burmese

¹ Cath Hart "Refugee Swap to bring Cubans to Australia", *The Australian*, 18th April 2007 <http://www.theaustralian.news.com.au/story/0,20867,21576776-601.00.html>

² AAP, "Australia serious on border security: PM" *The Sydney Morning Herald* 18th April 2007 <http://www.smh.com.au/news/NATIONAL/Australia-serious-on-border-security-PM/2007/04/18/1176696867928.html>

³ Mary Crock, Ben Saul & Azadeh Dastyari, *Future Seekers 2: Refugees and Irregular Migration in Australia*, Leichhardt: Federation Press, 2006. 124.

asylum seekers in the US affords a protection solution to their plight, which is far preferable to the course of returning the former group to Indonesia, which was the government's first choice....However the Council believes this is a drastic departure from established international norms. "⁴

How did we get to this place? If one looks at the development of refugee policy in this country that began under the Hawke Labour government and continued under both Keating and Howard governments, it forms, I suggest, a logical extension of established policy directions. It is therefore instructive to look briefly at the development of Australia's post war refugee policy and particularly as it developed in the 1970s and 1980s.

The Beginnings of Australian Refugee Policy 1945-1976

Refugee policy, as it developed in Australia during the post war period, was seen as part of wider immigration policy. As Matthew Gibney puts it, refugees were "the fortunate beneficiaries of a general program of immigration that was motivated by the security and economic needs of the state."⁵ The motto, "populate or perish" encapsulated this need for a population large enough to ensure the nation's military security and economic development. The anxiety generated by the movement of the Japanese south during the war highlighted a more vicarious reality in Australia's psyche, security anxiety due to the presence of large populations immediately to our north. This was compounded by the realisation that Australia's economy was vulnerable to fluctuations in international commodity prices. The country's natural geographic isolation and remoteness to European

⁴ Refugee Council of Australia Media Release: Asylum Swap with US denies Australia's regional obligations Refugee Council of Australia April 18, 2007.
<http://www.refugeecouncil.org.au>

⁵ Matthew Gibney, *The ethics and politics of asylum: Liberal Democracy and the response to Refugees* Cambridge: Cambridge University Press: 2004, 168.

centres of population, natural advantages to prevent spontaneous population movements, became less significant in the face of these factors. As a result of the post war immigration, Australia's population doubled in the space of thirty years while its manufacturing base widened significantly to take advantage of the directed labour schemes for new migrants which saw bonded labour work for two years at the government's discretion.

The acceptance of this mass migration rested upon a strict control of the kind of people who came, specifically young and European, and upon ongoing campaigns to integrate the new settlers into a mainstream, essentially British, society.⁶ Both factors are highly significant in the ongoing developments of refugee policy.

During this time around 350,000 refugees entered Australia though these figures must be seen in the context of pre-screening of refugee applicants that occurred and their entry as part of wider resettlement schemes which the government operated under its own discretion.⁷ Particularly the old and infirm as well as non Europeans were screened out as officials were careful to keep the components which made such a scheme overall acceptable to the population at large.

Changes 1976-1990s

This scenario began to change in 1976 with the arrival of the first boatload of Vietnamese refugees fleeing the country in the aftermath of the Indo Chinese war. The Fraser government, in the face renewed anxiety, took a pro active stance and initiated discussions with East Asian governments to create an orderly departure program which saw the movement of about a million people from Vietnam, of which Australia took around 130,000:

⁶ Gibney, *Politics of Asylum*, 171-174.

⁷ Gibney, *Politics of asylum*, 177.

When faced with the unplanned arrival of Indo-Chinese boat people, from 1976, the Fraser Liberal and later the Hawke Labor governments anxious to placate public concerns sought a compromise. In agreements that called upon Thailand and Malaysia not to deflect boat people to Australia (the Orderly Departures Program of 1979) and for Vietnam to crack down on illegal departures (the Comprehensive Plan of Action of 1987), these governments pledged to resettle Indo-Chinese refugees. Recognising the value of the appearance of order, government officials accepted large numbers of quota refugees in return for actions that would prevent unplanned boat arrivals.

The trade off appeared to work Throughout most of the 1980s boat arrivals at Australia's northern shores were few and refugees from Indo-China benefited from being able to claim refuge in a Western country without travelling enormous distances by boat." ⁸

The Vietnamese intake occurred at a time when the rationale for post war immigration was beginning to unravel. Improvements in military technology and increase in Australia's population negated the security arguments. Economically Australia was experiencing a down turn even as immigration levels remained high during the 1980s.

There were, however, a new set of reasons that compelled Australia to take such big numbers of refugees: The rise of East Asia as an economic and political force coincided with weakened influence of the United States in the region and the entry of the United Kingdom into the European Common Market. This meant that Australia's strategic interests relied upon a greater interaction with its near neighbours.

Especially significant was the need to be seen by Asia and others that Australia was not racist:

The need to overcome long established mutual suspicions and cultural differences made it crucial that Australia show that it had left behind the racism that had tarred its immigration policies historically and that it was willing to share some of the region's burdens as well as its benefits. Here the resettlement of Vietnamese refugees took on great significance. For Australia's inclusive response had the advantage of challenging the

⁸ Gibney, *Politics of Asylum*, 184.

country's image as racist while simultaneously illustrating to powerful Association of South East Asian Nations (ASEAN) members (like Thailand Malaysia and Indonesia) that the country was willing to cooperate to resolve the region's problems. " ⁹

The fact that these objectives were achieved with the seeming support of the Australian populace is testament to the political skills of the governments involved. More importantly still it demonstrated that humanitarian objectives can be combined with and perhaps even separated from national interest criteria when it comes to refugees. Australian governments:

had in little more than a decade, managed to disentangle refugee policy from its traditional security, economic and demographic justifications and provided it with a humanitarian rationale, albeit one that was supported by a range of new regional interests. The influential Fitzgerald report of 1988 gave its imprimatur to this transformation. It found no significant opposition to refugee resettlement in its wide ranging submissions and consultations (CAAIP 1988: 69) The foundation for the country's responses to refugees was, the report found that 'helping refugees is part of the Australians' view of themselves' (CAAIP 1988: 69).¹⁰

All of this seems to suggest quite a happy story. So where did we go wrong? In the space of 12 years this "remarkable feat" had been replaced by the symbolic and terribly damaging Tampa incident, followed later by the Children Overboard affair. With Pauline Hansen added to the mix Australia was once again being seen in the region as unreliable, racist and unwilling to share in regional burdens and problems.

It is a mistake to associate this policy slide with the Howard government alone. Indeed the origins of the shift can be traced to two acts that occurred in the Hawke government years, one an act of benevolence and the other, one of cowardice.

⁹ Gibney, *Politics of Asylum*, 183. See also Nancy Viviani, *The Indo-Chinese in Australia 1975-1995: From burnt boats to barbeques*, Melbourne: Oxford University Press, 1996. 11-14.

¹⁰ Gibney, *Politics of Asylum*, 183-184.

The late eighties saw a sharp increase in claimants seeking Australia's protection as a result principally of the one off offer to consider for refugee status Chinese students living in Australia in the aftermath of the massacre at Tiananmen Square in 1989.¹¹ This coincided with the arrival of the Cambodian boat people arrival in 1989 and the rise in asylum seekers from Afghanistan, Somalia, Ethiopia and Iran.

In the same year the Hawke Government cut back on refugee resettlement entries for the first time in ten years. In 1992 it created a new detention facility at Port Headland in Western Australia and passed the 1992 Migration Amendment Act requiring that 'any person who arrived by boat in Australia after Nov 19 1989 be kept in custody until he or she left Australia or was given an entry permit.'¹²

Resettlement continued but increasingly served as an excuse to criticise asylum seekers as 'queue jumpers' pushing their way past others refugees waiting to enter Australia legitimately. Lastly the right of courts to release detainees was forbidden at the same time as rights of appeal were considerably limited.¹³

The Howard Government when it came to power in 1996, continued this policy trajectory, however the deterrent measures of the Hawke-Keating years, namely mandatory detention and limited rights of appeal, were proving inadequate in the days of "jet age" asylum seekers. In a succession of legislation, the emphasis moved to direct prevention of arrivals through measures such as naval interdiction, the deployment of Overseas Compliance Officers and Airline Liaison Officers, the excision of island territories from the migration zone and finally offshore processing on Manus Island and Nauru.

¹¹ Viviani, *Indo-Chinese in Australia*, 21

¹² Gibney, *Politics of Asylum*, 185.

¹³ Viviani, *Indo-Chinese in Australia*, 22-23.

These moves went further than any previous government, both in terms of their emphasis and the manner in which they were used to gain the Government electoral advantage. The demonisation of the asylum seeker, combined with vague notions that asylum seekers constituted a serious threat to the security of the Australian nation, enabled the government to pick up -and retain- the One Nation vote amongst others: it had clear resonance in the electorate.

The appeal of the anti asylum seeker stance can be seen as part of an overall fear in Western countries in the face of huge increase in people movements in the nineties and reflects similar developments in other western countries such as Germany, the United States and United Kingdom. Each of the common arguments put by government to exclude asylum seekers is readily refuted. How could there be queue jumpers when there was no queue to jump? The existence of people smugglers and traffickers is real, however the argument promoting interdiction is weakened when it is realised that countries like Indonesia and Malaysia are not party to the 1951 Refugee Convention. Even the security argument at its most basic, that asylum seekers pose a security risk, pales in the face of the policy of mandatory detention that gives ample opportunity for entrants to be screened.¹⁴

The small numbers of asylum seekers reaching the Australia, even at the height of the recent crisis in 2001 - 3, belies the argument that our country is being inundated, rather recalling wartime anxiety surrounding security.

The last common argument moved by government is that Australia has a generous off shore humanitarian program that brings in about 13,000 people a year. Such bare statistics hide some important facts about the program, however. The first is

¹⁴ Gibney, *Politics of Asylum*, 191.

that only about half the number are refugees, the remaining people comprising other humanitarian categories.¹⁵ More disturbing though is the nature and conduct of the program itself: "officials use characteristics in addition to need to choose entrants (preference goes to 'the educated rather than the skilled, the healthy rather than the disabled, the quiescent rather than the troublesome....'"¹⁶ The resettlement system operated by Australia recalls the spectre of state control and as a result one cannot be call it a proper substitute for claiming asylum in-country.¹⁷

Post Pacific Solution

My hope is that I have demonstrated that Australia's recent history in refugee protection, our response to international people movements, lies deeply rooted in our own peculiar geo-politics and history. It must be said that there is no doubt concerning the human cost of some of these latter day policies and our population's overall tolerance of this cost. Refugees, through no fault of their own, have met a complex of political and other factors at the very time their vulnerability begs for compassion in response. Are there positives that we can take from this policy consistency and use them to create a more equitable, humane system? I will focus upon answering this question in the last part of this paper.

Firstly it is important to establish an ethical framework out of which to work.¹⁸ My position around refugee policy is this: Howard's strong assertion of Australia's sovereignty relies upon the theoretical basis that cultural integrity and territorial security roughly coincide in the nation state and generate a set of rights that normally outweigh those of any individual or group of people making claims on the

¹⁵ Crock *et al.*, *Future Seekers*, 17.

¹⁶ Malley, quoted in Gibney *Politics of asylum*, 191.

¹⁷ Gibney *Politics of asylum*, 191.

¹⁸ See Gibney, *Politics of Asylum*, 27ff

state from within or outside its borders. This nation state, in order to preserve and enhance the cultural and economic development of its people, their identity and basic rights, possesses a right to control who goes across its borders.

However certain circumstances exist where humanitarian imperatives outweigh these rights. Much like the case of an ambulance or emergency vehicle breaking the speed limit in order to attend a situation where a life is threatened, so too the needs of a refugee in fleeing a country, broadly speaking, comprise such a circumstance. This in turn is not an unlimited right however: there are limits to any country's ability to absorb refugees usually when the cultural and social stability of the country is threatened.

There is another argument that also strengthens the humanitarian case on behalf of the refugee. This argument refutes the assumption that what we do as a country has no discernable effect on people or countries elsewhere. It develops in two ways. Firstly any decision for or against a refugee claim will have immediate effects upon those claimants themselves. This is self-evident. But in turning around people with genuine claims, assuming that this is what Australia is doing from time to time, means that we are implicitly asking someone else to look after them henceforward.¹⁹ This burden shifting is addressed by arguments in international law that assert that there may be, in some cases, residual responsibility for such actions lying with the country who is initiating the action. This has been argued with regard to Australia's initiation of various measures to prevent arrival of asylum seekers offshore.²⁰ Some argue that we do more than our fair share in

¹⁹ I argue this on the basis of the same people claiming refugee status successfully in other countries subsequent to an Australian negative assessment.

²⁰ See for example Savitri Taylor, "Effective Protection under Australia's Regional Cooperation arrangements with Indonesia and PNG: Whose responsibility?" Unpublished Paper given at *Protection Elsewhere International Law and offshore processing and protection of Refugees* Workshop at Melbourne Law School 23rd Feb 2007.

relation to other countries in our region. This assertion can be countered when one looks at the disparity between the first and developing world in regard to its care of refugees in pure number terms. In our region too, comparisons with countries such as Malaysia and Thailand, which host in pure number terms many times the Australian caseload, albeit without some of the protection mechanisms that Australia has in place, puts our contribution in perspective.

In short I hold that there are a number of humanitarian arguments that make a moral if not legal case for accepting refugees *and* asylum seekers in a quick, judicious and timely manner according to the capacity of a country to absorb new entrants.

Looking to the future therefore, is the refugee swap with the United States the last word in asylum and refugee policy? In this year's budget and in a number of related developments in recent months we have entered the next stage of refugee policy, the "Post Pacific Solution" era. This is characterised by new and strengthened bilateral arrangements between Australia and Malaysia, and Australia and Indonesia in order to strengthen border control and the treatment of irregular or illegal migration. There is new funding for the operation of Airline Liaison Officers and more funding for the International Organisation for Migration's operations in Indonesia particularly, presumably to look after people who have tried to reach Australia and been turned around. There is also new funding to UNHCR to help Indonesia develop a better Refugee Status Determination process. The detention centre on Nauru is being reserved as the default option but the emphasis is upon developing the capacities of other countries to deal with people movements long before they reach Australia's shores.

There is no doubt that political imperatives are driving at least part of this –the Pacific Solution is now a liability for the government. But the government still wants to be seen to be in control of Australia’s borders and migration program.

Politics aside, what are we to make of these developments? There are potentially some positives here: at best it can be seen to be building on the policy legacy of the 1980s in that it aims to prevent people from making the hazardous journey from overseas, by cooperation with the countries of the region. But while the harsh regime of excision and offshore processing remains in place it is hard to see this as a truly humanitarian policy stance. The question might therefore be asked: What are the ethical criteria needed for this policy to be acceptable on humanitarian terms?

Firstly the policy relies upon the assertion that the countries to our north with whom we are dealing provide effective protection to refugees. The UNHCR question this in the case of both Malaysia and Indonesia. Clearly Australia’s efforts to build capacity in these countries are laudable but these efforts cannot form the basis for a policy of returning refugees to these countries or preventing them from accessing Australia for purposes of claiming asylum, even when Australia foots the bill. The issue is how far Australia’s obligations stretch and whether we are deemed to be still responsible when “farming out” our responsibilities for refugee processing. One can ask a related question: Is our aid to these countries being used merely to further Australia’s strategic advantage? The danger is that we create economic and social pressures for these countries, that may lead to eventual repression of refugees and non admittance of asylum seekers.

In these contexts the policies of associated with what is called a “layered border management system” also come into question. The use of interdiction on the seas and the maintenance and strengthening of the regime of Airline Liaison Officers at overseas airports pose several ethical difficulties, the major one of which is the question of whether they are preventing some people from exercising their right to claim asylum in Australia.²¹ The risk is two fold: in turning people around who may have genuine claims we may be *refouling* them, sending them back to the situation of danger from which they originally fled or, alternatively, be placing responsibility for their care upon a third country which may be less capable or willing to take up that responsibility.

Further, the system, as it is developing, fails to address the scenario of mass influx, which in turn generates demand for the people smuggling the government so badly wants to eradicate. A better way to address this problem is to stem the demand for such services by pro actively instituting resettlement, in cooperation with other governments, from those countries generating mass cross border movements. Thus refugees from Iraq at present in Syria or Jordan, some two million in number, and those from the civil war in Sri Lanka which number potentially some 120,000, should be considered as constituting extraordinary cases with appropriate measures taken for their protection. The situation in Thailand, which is hosting nearly 2 million Burmese, many of whom are refugees, and Somalia may also need to be considered in this context.

This brings me to the last major point. The present intake of 7,000 refugees a year, whilst generous in the governments eyes, pales when taken in the light of selection

²¹ David Corlett *Returning Failed Asylum Seekers from Australia*, Discussion Paper, January 2007. 16-17.

tendencies to weed out the infirm and old, and the harsh regime for asylum seekers who do make the trip here. The overall migrant intake of approximately 140,000 leads one to think that Australia could be far more generous than we are at present in accepting humanitarian claimants in overall number terms. We have both our own historical precedent, our ability as a country to absorb and integrate large numbers of people, and our overall healthy but still commodity based economy, which continues to hide structural weakness, as political positives that add to this essentially humanitarian argument.

My learning and softening toward "Jay" when I learnt of his story has been my own journey of healing. The balance of border protection and security versus hospitality and refugee rights and protection has been drawn too much in the direction of the former in this country in recent times. In cooperation with the countries of the region we need better to respect the legal and moral right for people to claim asylum and combine this with a truly generous off shore resettlement regime. It can only make us a stronger people.

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