



National Program on Refugees and Displaced People

REFUGEE SUNDAY EDUCATION

25th August

August 25, 2002 is the eve of the anniversary of the M.V. Tampa rescuing 433 asylum seekers at sea on August 26, 2001.

The Pacific Solution

The Solution at a Glance

As at 30 January 2002, there were over 1,564 people being held in detention centres in the Pacific: 1,118 on Nauru and a further 446 on Manus Island in Papua New Guinea.

A further 132 mostly women, children and families, were taken to New Zealand for refugee status processing. Of these, 131 were found to be genuine refugees and given permanent residence in New Zealand.

Australia meets the costs of establishing and maintaining camps in Nauru and Papua New Guinea, and processing applications for refugee status. Application processing is conducted by Australian officials in Papua New Guinea and by Australian officials and the United Nations High Commissioner for Refugees (UNHCR) in Nauru.

A Memorandum of Understanding (MOU) was concluded between Australia, Papua New Guinea and Nauru. The MOU states that all asylum seekers will have left after six months "or as short a time as is necessary". Australia later had it extended to 12 months and may yet ask for further time.

The Pacific Solution comes at a heavy price. First, it penalises victims rather than people smugglers. Second, it has cost over \$500 million already.

Spending on 'border protection' over the next four years is forecast in this year's federal budget to cost \$2.8 billion. All for around 4,000 people seeking refugee onshore without a visa each year.

BACKGROUND

On 26 of August 2001, a Norwegian container ship called the M.V. Tampa rescued 433 asylum seekers at sea, who had been en route to Australia. It was a humanitarian gesture that would later win the Captain a human rights medal, but in Australia it created political turmoil. First, the Australian Government refused permission for the Tampa to land on Christmas Island off Australia's Northwest coast. When that failed to deter the Captain from entering Australian waters, the Australian Government threatened to have him arrested under the Migration Act. Finally, it ordered the SAS forces to board and seize the Tampa in an attempt to get the vessel to turn back into international waters. Relations with Norway, one of the largest maritime countries in the world, quickly soured. As the world looked on in disbelief, the Federal Government then tried to rush through retrospective legislation to legalise its actions, but it failed to gain support in rushed session of Parliament. Desperate to live up to his promise that no one on board the Tampa would set foot in Australia, Prime Minister John Howard approached Indonesia to take the asylum seekers, but was refused. In an equally desperate move, Foreign Minister Alexander Downer then approached new UN administrator of East Timor, Sergio Vieira de Mello, but was again refused both by Vieira de Mello and by UN Secretary General Kofi Annan, who John Howard had approached separately. As the stand-off continued, New Zealand, in a compassionate gesture, offered to take 132 of the asylum seekers, mostly families, women and children.

Finally, the Federal Government approached two countries it knew it could rely on; its former colony Papua New Guinea, which was still heavily dependent on Australian aid, and the tiny Pacific atoll, Nauru, which was also heavily dependent on aid and had been trying to obtain further aid from Canberra. It also approached Fiji, offering to lift the sanctions it had imposed after Fiji's coup. At first, it appeared that Fiji would agree, and Australia lifted the sanctions, but then Fiji's Great Council of Chiefs rejected the idea. Other Pacific Island nations were approached, but by this stage the asylum seekers were already being forcibly removed and taken to PNG and Nauru, where the Australia Government was busy overseeing the construction of the new offshore detention centres.

Back in Australia, a court case was mounted in an attempt to allow the asylum seekers to exercise their human right to seek protection in Australia. The case was lodged against the Commonwealth Government for illegally detaining the asylum seekers on the deck of the Tampa. Justice North ruled that the government had acted illegally and ordered that the 433 asylum seekers be released and permitted to enter Australia and claim asylum in Australia. The Australian government launched an appeal against the ruling and argued that as the refugees never stepped onto Australian soil, they had not triggered asylum rights under Australian law. The full bench of the Federal Court decided two-to-one in favor of the government, and the asylum seekers were taken to New Zealand (women children and families) or to the Pacific Island of Nauru.

In September 2001, the Government reintroduced legislation into the Parliament to retrospectively legalise the Government's actions and ensure that no Australian official would be charged for their role in the event. This was followed by a raft of other laws described on the next pages and in the Refugee Sunday education sheet.

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What's Wrong With The Pacific Solution?

The Pacific Solution: No Solution at All

Recently, Immigration Minister Philip Ruddock claimed that the Pacific solution – using the navy to intercept asylum seekers en route to Australia and then forcibly sending them to the Pacific to be detained until given a visa or deported – had successfully stopped people smuggling because those with aspirations of getting to Australia had not had those aspirations realised. The comment raised the whole issue of whether a country is justified in deterring and or punishing those seeking refuge in the name of putting people smugglers out of business.

While the Pacific Solution enables Prime Minister Howard to live up to his 2001 electoral promise that no asylum seeker on board the M.V. Tampa – then off Christmas Island – would set foot in Australia, it is certainly not the international solution that the 134 signatories States to the 1951 Refugee Convention have sought to achieve.

In fact, it directly undermines the ability of these countries to achieve an international solution based on sharing the world's burden rather than each state shirking their responsibility (Australia has signed the Convention and its primary responsibility under the Convention is towards refugees arriving onshore). First, in deterring refugees, it simply pushes them on to other countries, or worse still, in their increasing desperation, into ever more risky voyages. Through further restricting official channels for asylum seekers, it will create even greater pressure to circumvent official channels, for example, by obtaining false documents to enter Australia by air. Second, it provides a poor international precedent. What if other countries were to start paying-off other countries to take their refugees?

The Pacific Solution also comes at a heavy price. Not only does it penalise the victims rather than the people smugglers, but also it has already cost over \$500 million, with spending on 'border protection' over the next four years forecast to cost \$2.8 billion. All this for around 4,000 arrivals per year.

Then there is the cost to our international reputation. Far from creating the impression that Australia is trying, in a cooperative manner, to find an international solution to alleviate the factors that drive people to flight, the Pacific solution creates the impression that we are seeking to dump our 'problems' on small less-developed and aid-dependent nations, like Nauru.

In signaling a further withdrawal from the Refugee Convention, it may also encourage other developed and less developed nations - such as Iran and Pakistan, which have born the brunt of millions of Afghan refugees coming across the border - to abrogate their responsibilities. Indeed, Pakistan even cited Australia's increasingly strict policies as one reason for shutting its border to Afghan refugees in 2001.

While the 'Pacific solution' appears to be the answer to the problem of onshore arrivals, the **National Council of Churches in Australia (NCCA)** believes it is **undesirable and unsustainable**.

The NCCA has stated a number of concerns:

Goes Against the Spirit of the 1951 Refugee Convention

While the NCCA recognises the generosity of successive Australian Governments in maintaining an offshore program, it reminds the Government that its primary responsibility under the 1951 Refugee Convention is towards refugees arriving onshore. In the NCCA's view, turning back asylum seekers at the border is contrary to the spirit of the 1951 Refugee Convention.

Our church partners in the Pacific feel that deploying the Royal Australian Navy to intercept boat people and forcibly transfer them to detention centres in the Pacific for the duration of the refugee status determination process lacks proportion, both as a response to a comparatively minor influx of asylum seekers, and as a measure to combat people smuggling and secondary movement.

Under international law, it is clear that any domestic law redefining migration zones cannot override the obligations Australia has entered into under the 1951 Refugee Convention. Article 27 of the Vienna Convention on the Law of Treaties plainly states that "*a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty*". In excising sovereign Australian territory, the Commonwealth Government also appears to have failed to properly consider the undertaking it made when signing the International Covenant on Civil and Political Rights "*to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant.*" (Article 2).

Sets a Poor Precedent for Other Countries

The NCCA believes the September 2001 legislation signals a further withdrawal from the Refugee Convention and sets a negative precedent that could encourage other developed countries to abrogate their responsibilities. It also sets a poor precedent for less developed countries such as Iran and Pakistan, which together had over 4 million refugees at the end of 2001, mostly from Iraq and Afghanistan.

The use aid as a lever to extract concessions from smaller aid dependent countries also leaves a lot to be desired, particularly when it involves forcibly relocating asylum seekers. What if other countries were to follow Australia's lead in making aid conditional upon taking asylum seekers turned away from their borders?

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Harms Australia's International Reputation

Far from creating the impression that Australia is trying, in a cooperative manner, to find solutions to alleviate the factors that drive people to flight, the Pacific solution creates the impression that we are seeking to dump our 'problems' on small less-developed and aid-dependent nations. This makes Australia look like an unwelcoming country instead of a tolerant, compassionate, multicultural society.

Since the Tampa standoff, the impression expressed by our church partners in the Pacific and internationally is one of Australia lacking compassion and violating international law. Such a perception could undermine Australia's efforts to promote human rights, good governance and the rule of law abroad.

Distorts Australia's Pacific Development Priorities

As an ecumenical Christian organisation working in partnership with National Councils of Churches in the Pacific through the Pacific Conference of Churches, the NCCA is deeply concerned about the use of aid as a lever to extract concessions from smaller aid-dependent countries, and that the inducements offered to Pacific countries will distort Australia's Pacific development assistance priorities in the Pacific. Nauru, for instance, has been promised \$30 million in aid (on top of \$72 million for detention centres) for 2001-02, but the Government has only budgeted for \$20 million, leading to fears that the other \$10 million will be cut from bilateral or regional programs. Given the outlay is more than Nauru received from 1993 to 2001 and takes up 18% of AusAID's entire budget for the Pacific, there is legitimate concern that AusAID's priorities may now shift away from poverty alleviation and good governance.

Distorts Pacific Politics

The NCCA is also concerned over the impact that large offers of conditional development aid have on the domestic politics of PNG and Nauru, particularly on the freedom of the media in these countries. According to the Age, the Governments of PNG and Nauru have been quick to stifle debate over the deal. In Nauru, Dr. Kieran Keke, one of two doctors at Nauru's main hospital, and David Adeang, Presidential Counsel, were suspended without pay on orders of President Rene Harris after they took a stand on the asylum seeker deal. In PNG, Prime Minister Mekera Morauta sacked Foreign Minister John Pundari for his opposition to Australia's plans. It also appears that the Government's decision to lift sanctions against Fiji just 5 hours before Australia's Federal Election was announced on 5 October 2001,

was premature, and clearly designed to facilitate negotiations for Fiji to become another Pacific camp for Afghan and Iraqi asylum seekers.

Since the asylum seekers have arrived, both journalists and lawyers intending to represent the asylum seekers have been routinely denied visas to visit Nauru.

Despite the fact that Australia has long encouraged Pacific Island nations to assume financial responsibility, the deal also offers a way for the Government of Nauru to avoid balancing its books.

Encourages Arbitrary Detention

The most worrying factor is that, in its haste to secure a deal with these nations, Australia has more or less imposed its own model of arbitrary or unjustified detention on Nauru and PNG.

Australia's detention system is arbitrary for three main reasons. First, it is **mandatory**. Every man, woman and child without a visa is automatically detained on arrival. Second, it is for an **indefinite** period because they are held until they are either given a visa or deported. Third, because it is **non-reviewable**. A detainee cannot challenge the lawfulness of their detention in a court of law and the courts cannot order a detainee's release.

Left to their own devices, PNG and Nauru may have chosen a detention system more in keeping with their own constitutions, which both prohibit arbitrary detention, and international law, which Australia's model of arbitrary detention is accused of breaching. Indeed, given there is little danger of asylum seekers absconding - particularly from Nauru, which is one of the smallest and most remote atolls in world - they may not have chosen to detain the asylum seekers at all.

Creates Serious Problems for Refugees

Perhaps the most serious concern is that the legislation fails to articulate adequate guarantees of safety in defining what constitutes a 'safe country'. This is particularly worrying given that Australia is sending asylum seekers to Nauru, which is not a signatory to the 1951 Refugee Convention and is therefore under no legal obligation not to return or expel refugees aside from customary law. PNG has signed the Refugee Convention, but it has done so with significant reservations, such as: article 17 (wage earning employment), article 21 (housing), article 22 (public education), article 26 (freedom of movement), article 31 (refugees unlawfully in the country of refuge), article 32 (expulsion) and article 34 (naturalisation).

There are a number of other drawbacks as well. First, asylum claims are being processed by Australian immigration officials, but not under Australian law, creating concerns over claimants right to judicial appeal. Access to legal advice is also of concern, as neither PNG nor Nauru has the capacity to offer adequate legal assistance and foreign lawyers have been

denied visas. In Australia, asylum-seekers are assisted by registered migration agents in understanding screening and resettlement procedures. They also have help from both pro-bono lawyers and translators in preparing their applications. Without these, asylum-seekers in the Pacific are severely disadvantaged in the determination process.

Denis Nihill, the IOM Chief of Mission in Australia for the International Organisation for Migration - responsible for managing the detention centres - told *Human Rights Features* that asylum-seekers "can have access to lawyers" but that the management does not provide unsolicited legal assistance for them. Whether asylum-seekers have been advised of this right is unclear. What is clear is that the domestic legislation of both Nauru and PNG require people in detention to be able to seek and receive legal assistance.

Second, security and other contracts have been given to private corporations, creating concerns over transparency and accountability, particularly given the remote location of the detention centers. This will make it difficult for NGOs and Churches to monitor detention conditions and processing standards even if greater access to the centres is granted. This is also true of detention centres at Woomera, Port Hedland and Curtin. Third, there is genuine concern that if resettlement places cannot be found or unsuccessful applicants cannot be returned home, and then they may face indefinite detention.

So far, only one country has offered resettlement places – Ireland, and it has only offered 50 places when there are 1,564 asylum seekers in the Pacific. While some of the Afghans may eventually be able to return home, when it is safe for them to do so (UNHCR has advised Australia not to do so until the situation in Afghanistan settles), the majority of Iraqis and others found to be refugees would require far more places. UNHCR has stated that it is Australia's responsibility to resettle these refugees. Its responsibility is for the refugees in Indonesia and other regions, who were assessed as refugees first.

In practice, the policy is unlikely to stop desperate people from seeking to reach Australia. In fact, it may induce some boats to head for the mainland, increasing the risk for passengers. One thing is certain. Through further restricting official channels for asylum seekers, it will create greater pressure to circumvent recognised channels. For example, by obtaining false documents to enter Australia by air (particularly for those denied reunion with family members in Australia).

Creates Strong Pacific Opposition

Outside government circles in the Pacific, Australia's plans are clearly unpopular, with vocal opposition from our main partners, the Pacific Conference of Churches and the Pacific Desk of the World Council of Churches, along with Fiji's NGO Coalition on Human Rights, Nauru's main opposition party and others. The comment of Hilda Lini, Director of the Pacific Concerns Resource Centre, sums up this feeling: "*The Pacific has always been a dumping ground for everything industrialised countries reject, whether its weapons, whether its military bases, (nuclear) testing, or in this case dumping of human beings from other regions*". In sum, it is clear that these financial inducements have heightened feelings of neo-colonialism and the sense that Australia has impinged on the sovereignty of Pacific Island nations.

Financially Unsustainable and Disproportionate

Official Government figures estimate the cost of setting up and running the detention centres in the Pacific at \$96 million in 2001-02. Recent reports, however, state that the Cabinet has been told it will cost up to \$500 million. In this year's budget, 'border protection' is forecast to cost 2.8 billion dollars over the next four years.

The sheer cost of the Pacific solution is thus unsustainable, particularly when we consider this amount is being deployed for the sake of 1,550 people seeking refugee in Australia. It is also totally lacks proportion in comparison to the resources the Australian Government has allocated to supporting countries of first asylum. Last year, for example, Australia's total allocation to the countries surrounding Afghanistan, Australia's largest source country for asylum seekers, was just \$21.3 million.

In a recent report on Iran, the Refugee Council of Australia (RCOA) also compared expenditure on the Pacific solution to Iran, which received less than \$60 million per year from UN agencies, NGOs and other governments combined to provide for over 2½ million refugees.

Clearly demonstrating this complete lack of financial sustainability, the RCOA has determined that the decision to process asylum seekers "offshore" will result in each application costing in the order of \$250,000 to process compared to \$50,000 if the claim was assessed in Australia.

Lacks Transparency

Another major concern has been the Government's secrecy over the cost of the policy and lack of detailed information communicated regarding decisions being taken and the implementation of the policy.

The National Program on Refugees and Displaced People operates under the Christian World Service Commission of the National Council of Churches in Australia. For information on the Program or Refugee Sunday, or to subscribe to the Program's Newsletter or Briefings, please contact James Thomson on (02) 9299 2215 or email: jthomson@ncca.org.au