

2016/18 :Should asylum seekers who attempt to come to Australia by boat be permanently denied any type of access to Australia?

What they said...

'It is a critically important, strong message to send to the people smugglers. They must know that the door to Australia is closed to those who seek to come here by boat with a people smuggler'

Malcolm Turnbull, Prime Minister of Australia

'Australian law would ensure that families remain broken up, and that parents are separated from children. The bill's ban would not apply to children - but would exile their parents'

Experts in international law, Ben Saul and Jane McAdam

The issue at a glance

On October 30, 2016, the Prime Minister, Malcolm Turnbull, and the Minister for Immigration and Border Protection, Peter Dutton, conducted a joint press conference to announce a proposed amendment to the 1958 Migration Act.

The Bill was introduced in the House of Representatives on November 8, 2016.

The amendment prevents any asylum seeker who had sought to come to Australia by boat since July 19, 2013, from ever being allowed to visit Australia in any capacity.

The ban will apply to any adult who has been sent to detention centres on Nauru or Manus Island since the date specified. It will not apply to children.

Adults who tried to enter Australia by boat since that date, but who subsequently chose to return home, will never be allowed to get a visa to Australia - even as a tourist or a spouse.

The amendment has been condemned by the Greens, welcomed by One Nation and will not be supported by the Labor Opposition.

Its supporters claim it is no more than a logical extension of the current policy. Its opponents see it as playing populist politics with the electorate and seeking to put the Labor Opposition at a disadvantage.

Background

(The information provided below has been primarily taken from two sources. One is 'Australia's Humanitarian Programme 2016-17: Discussion paper' issued by the Department of Immigration and Border Protection.

The full text of this program can be accessed at <https://www.border.gov.au/ReportsandPublications/Documents/discussion-papers/discussion-paper-humanitarian-programme-2016-17.pdf>

The other is a BBC background report titled 'Australia asylum: Why is it controversial?' which was published on August 3, 2016.

The full text of this report can be accessed at <http://www.bbc.com/news/world-asia-28189608>)

Australia's humanitarian intake of refugees

Australia's humanitarian intake of refugees has remained relatively steady over the last 20 years, with around 12,000 to 13,000 people typically accepted every year.

In 2015-16, Australia accepted 13,750 people through its humanitarian program and has committed to accepting an additional 12,000 refugees fleeing Syria and Iraq. Its humanitarian intake comes from two sources - offshore and onshore.

The offshore resettlement component offers resettlement in Australia for people overseas who are in the greatest need of resettlement and comprises those granted visas under the Refugee category and the Special Humanitarian Program (SHP) category.

The onshore protection component offers protection for people who are considered to have arrived lawfully in Australia (that is, who have usually come by plane, with a visa) and who are found to be refugees under the Migration Act 1958, or otherwise engage Australia's

protection obligations under certain international treaties.

Asylum seekers who arrive by boat

Asylum seekers have attempted to reach Australia on boats from Indonesia, often paying large sums of money to people smugglers. Hundreds have died making the dangerous journey.

Australia designates these people 'illegal maritime arrivals'. The legality of their actions is disputed. They have committed no crime under international law. In fact Australia is a signatory to the United Nations 1951 Refugee Convention which binds us to offer asylum to refugees (those fleeing persecution in their own country) no matter what their mode of arrival. Australia, however, terms their arrival 'unauthorised' and considers it illegal.

The Humanitarian Program does not include places for people who are deemed to have travelled to Australia illegally, including illegal maritime arrivals (IMA), unauthorised air arrivals and people transferred to regional processing centres. Temporary protection visas granted to people who arrive illegally in Australia are not included within the Humanitarian Program.

At its peak, 18,000 people arrived in Australia illegally by sea. However the numbers plummeted after the government introduced tough new policies to 'stop the boats'. The cause and effect relationship between the harsh policies and reduced numbers of unauthorised arrivals has been disputed.

Operation Sovereign Borders

Australia's two leading political parties, the ruling Liberal-National coalition and the Labor opposition, both support tough

asylum policies.

They say the journey the asylum seekers make is dangerous and controlled by criminal gangs, and they have a duty to stop it. The coalition government made Australia's asylum policy even tougher when it took power in 2013, introducing Operation Sovereign Borders, which put the military in control of asylum operations.

Under this policy, military vessels patrol Australian waters and intercept migrant boats, towing them back to Indonesia or sending asylum seekers back in inflatable dinghies or lifeboats.

The government says its policies have restored the integrity of its borders, and helped prevent deaths at sea. However, critics say opposition to asylum is often racially motivated and is damaging Australia's reputation.

Offshore processing

When asylum seekers reach Australia by boat, they are not held in Australia while their claims are processed. Instead, they are sent to an offshore processing centre. Currently Australia has one such centre on the Pacific island nation of Nauru and another on Manus Island in Papua New Guinea.

Even if these asylum seekers are found to be refugees, they are not allowed to be settled in Australia. They may be settled in Nauru or Papua New Guinea, and four were settled in Cambodia at a reported cost of A\$55m.

Rights group say conditions in the PNG and Nauru camps are totally inadequate, citing poor hygiene, cramped conditions, unrelenting heat and a lack of facilities.

The closure of Manus Island

Papua New Guinea's Supreme Court ruled in April that restricting the movement of asylum seekers who have committed no crime was unconstitutional. The country's prime minister has since demanded that Australia shut down the centre.

However, Australia is not prepared to accept the 850 men held in the centre and it is not clear where they will be taken

The likely closure of Manus Island means that these asylum seekers could be relocated to Nauru, which says it has additional room. Otherwise, they could be taken to the Australian territory of Christmas Island, where there is an existing detention centre.

Neither of these solutions is seen as desirable and the Australian government is attempting to negotiate with other countries that are signatories to the UN Refugee Convention to take these people.

Internet information

On November 14, 2016, The Conversation published a comment by Michelle Foster, Professor, Melbourne Law School, University of Melbourne titled 'Turnbull's asylum seeker ban violates Australia's human rights obligations'

Professor Foster explains why Australia is in contravention of the United Nations Refugee Convention 1951 and a number of other international obligations.

The full text of this comment can be accessed at <https://theconversation.com/turnbulls-asylum-seeker-ban-violates-australias-human-rights-obligations-68475>

On November 11, 2016, Australian barrister, human rights and refugee advocate, Julian Burnside, made a submission to the Senate enquiry on the Migration Legislation Amendment (Regional processing cohort) Bill 2016. Burnside makes a series of detailed criticisms of the probable operation of and the assumptions upon which the amendment is based.

The full text of the submission can be accessed at <http://www.julianburnside.com.au/category/asylum-seekers/>

On November 9, 2016, The Sydney Morning Herald published a comment by specialists in international law, Ben Saul and Jane McAdam, titled 'Malcolm Turnbull is breaking international law with cruel lifetime refugee ban'

The opinion piece attempts to demonstrate why the proposed amendment to the Migration Act is in violation of international law.

The full text can be accessed at <http://www.smh.com.au/comment/malcolm-turnbull-is-breaking-international-law-with-cruel-lifetime-refugee-ban-20161108-gskstx.html>

On November 8, 2016, SBS ran a news report titled 'Government to introduce law banning 'irregular maritime arrivals' from Australia'

The report covers the Government's introduction into the parliament of its proposed amendment to the Migration Act and gives a range of views on the legality and fairness of this amendment.

The full text of the report can be accessed at <http://www.sbs.com.au/news/article/2016/10/30/government-introduce-law-banning-irregular-maritime-arrivals-australia>

On October 30, 2016, the Prime Minister, Malcolm Turnbull, and the Minister for Immigration and Border Protection, Peter Dutton, conducted a joint press conference to announce a proposed amendment to the 1958 Migration Act which would permanently prohibit asylum seekers who had attempted to arrive in Australia by boat ever subsequently coming here.

The full text of the press conference can be accessed at <https://www.pm.gov.au/media/2016-10-30/joint-press-conference-minister-immigration-and-border-protection>

On October 31, 2016, News.com.au released a report titled 'Turnbull to propose law that bans boat asylum seekers from Australia permanently'.

The report outlines the Prime Minister's proposed alteration to the law and responses to it.

The full text of this report can be accessed at <http://www.news.com.au/national/turnbull-to-propose-law-that-bans-boat-asylum-seekers-from-australia-permanently/news-story/793919195011e35c15471918b007c8a1>

On October 31, 2016, ABC News ran a report titled 'Refugee, asylum seeker ban won't break international obligations, Peter Dutton says'

The report gives Peter Dutton's view as to why the government's proposed amendment to the Migration Act is not in violation of international law.

The full text of this article can be accessed at <http://www.abc.net.au/news/2016-10-31/dutton-says-refugee-ban-won't-break-international-obligations/7979242>

On October 31, 2016, The Guardian published a news report titled 'New asylum laws pave the way for third-country resettlement, Peter Dutton says'

The report presents the Minister for Migration and Border Protection's analysis of the connection between resettling refugees on Manus Island and Nauru and the proposed amendment to the Migration Act.

The full text can be accessed at <https://www.theguardian.com/australia-news/2016/oct/31/new-asylum-laws-third-country-resettlement-peter-dutton>

On October 31, 2016, The Illawarra Mercury published a report titled 'Bill Shorten and Malcolm Turnbull clash over refugee ban' which detailed the different attitudes of the prime Minister and the leader of the Opposition to the proposed amendment to the Migration Act.

The full text of the report can be accessed at <http://www.illawarramercury.com.au/story/4261939/bill-shorten-and-malcolm-turnbull-clash-over-refugee-ban/?cs=8>

On October 30, 2016, the ABC posted a background piece by Shalailah Medhora titled 'Asylum seekers who arrive by boat banned from setting foot in Australia'

The full text of the article can be accessed at <http://www.abc.net.au/triplej/programs/hack/boat-asylum-seekers-banned-from-australia/7978370>

On February 11, 2016, the ABC's current affairs segment, the Drum, published a comment by Michael Bradley, the managing partner of Sydney law firm Marque Lawyers. The opinion piece is titled 'Asylum policies and the problem of a "higher purpose".'

Bradley attempts to explain the manner in which supporters of policies adverse to asylum seekers arriving by boat justify their position.

The full text of this comment can be accessed at <http://www.abc.net.au/news/2016-02-11/bradley-asylum-policies-and-the-problem-of-a-higher-purpose/7158430>

In April, 2015, the Victorian Foundation for Survivors of Torture published a background discussion paper by Harriet McHugh-Dillon titled 'If they are genuine refugees, why?' Public attitudes to unauthorised arrivals in Australia.

The paper explores the range of fears and preconceptions which appear to shape popular attitudes to asylum seekers in Australia.

The full text can be accessed at <http://www.foundationhouse.org.au/wp-content/uploads/2015/07/Public-attitudes-to-unauthorised-arrivals-in-Australia-Foundation-House-review-2015.pdf>

On March 2, 2015, a Parliamentary paper titled 'Asylum seekers and refugees: what are the facts?' was published. It was written by Janet Phillips of the Social Policy Section.

The paper is an attempt to give a clear overview of the facts surrounding and the operation of Australia's policies regarding asylum seekers and refugees.

The full text of the paper can be accessed at

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/AsylumFacts

The Refugee Advice & Casework Service (RACS) produces 'An overview of the current legal situation for asylum seekers' in Australia.

The full details of this situation as it currently applies can be accessed <http://www.racs.org.au/wp-content/uploads/2016/10/RACS-FACT-SHEET-An-overview-of-the-current-situation-for-asylum-seekers-4.10.2016.pdf>

On July 14, 2014, The Australian Independent Media Network posted an extensive explanation and criticism of Australia's policies regarding asylum seekers by Glenn Murray.

The treatment is titled 'The facts about "boat people" - The government & media are lying'

The full text can be accessed at <http://theaimn.com/facts-boat-people-government-media-lying/>

On January 8, 2014, The Sydney Morning Herald published a report titled 'Australians want boat arrivals treated more harshly: poll'

The report detailed the results of a nationwide opinion poll by UMR Research which showed that 59 per cent of people surveyed thought most boat arrivals were not genuine refugees.

The full text can be accessed at <http://www.smh.com.au/federal-politics/political-news/australians-want-boat-arrivals-treated-more-harshly-poll-20140107-30g97.html>

On March 16, 2012, ABC News ran a report titled 'Plane arrivals in widespread roting of asylum system'

The analysis sought to demonstrate the asylum seekers arriving by plane were less likely to be genuine refugees than those arriving by boat.

The full text of this article can be accessed at <http://www.abc.net.au/news/2012-03-15/chinese-fly-into-australia-to-make-27dodgy27-asylum-claims/3892416>

Arguments against permanently denying access to Australia to asylum seekers who attempt to arrive by boat

1. Asylum seekers attempting to come to Australia by boat are not breaking international laws and should not be considered to be breaking Australian law

Opponents of Australia's current refugee policies argue that those who seek to come to Australia by boat are only exercising their rights under international law.

The conflict between international law and Australia's internal laws is explained in a Parliamentary paper titled 'Asylum seekers and refugees: what are the facts?' and published on March 2, 2015.

The paper, written by Janet Phillips, Social Policy Section, states, 'Although those who come to Australia by boat seeking Australia's protection are classified by Australian law to be "unlawful non-citizens", they have a right to seek asylum under international law and not be penalised for their mode of entry.'

Phillips further explains, 'Generally speaking "illegal immigrants" are people who enter a country without meeting the legal requirements for entry (without a valid visa, for example). However, under Article 14 of the 1948 Universal Declaration of Human Rights, everyone has the right to seek asylum and the 1951 Refugee Convention prohibits states from imposing penalties on those entering "illegally" who come directly from a territory where their life or freedom is threatened.'

Phillips explains why the designation 'illegal immigrant' should not be applied. She writes, 'The UNHCR emphasises that a person who has a well-founded fear of persecution should be viewed as a refugee and not be labelled an "illegal immigrant" as the very nature of persecution means that their only means of escape may be via illegal entry and/or the use of false documentation.'

The Refugee Council of Australia (RCOA) similarly notes the practical difficulties encountered by asylum seekers in obtaining the requisite documentation prior to departure and argues that they should not be penalised as 'illegal entries' as a result of these difficulties.

The RCOA states, 'It is not a crime to enter Australia without authorisation for the purpose of seeking asylum. Asylum seekers do not break any Australian laws simply by arriving on boats or without authorisation. Article 31 of the Refugee Convention clearly states that refugees should not be penalised for arriving without valid travel documents. What may be considered an illegal action under normal circumstances (e.g. entering a country without a visa) should not, according to the Convention, be considered illegal if a person is seeking asylum.

...[I]nternational law make[s] these allowances because it is not always safe or even possible for asylum seekers to obtain travel documents or travel through authorised channels. Refugees are, by definition, people fleeing persecution and in most cases are being persecuted by their own governments. It is often too dangerous for refugees to apply for a passport or exit visa or approach an Australian Embassy for a visa, as this could put their lives, and the lives of their families, at risk. Refugees may also be forced to flee with little notice due to rapidly deteriorating situations and do not have time to apply for travel documents or arrange travel through authorised channels. In other cases, refugees may be unable to obtain travel documents because they do not have identity documentation or because they cannot meet the necessary visa requirements.

Australia has very restrictive policies which work to prevent citizens of countries where persecution is widespread from getting access to temporary visas of any kind. These policies leave many people seeking to flee to Australia with no way of entering in an authorised manner. Permitting asylum seekers to enter a country without travel documents is similar to allowing ambulance drivers to exceed the speed limit in an emergency - the action may ordinarily be illegal but, in order to protect lives at risk, an exception is made.'

2. Australia has a legal obligation to accept asylum seekers, irrespective of how they arrive

Critics of the proposed amendment to the Migration Act 1958 claim it contravenes Australia's obligations under international law. Australia is a signatory to both the United Nations Universal Declaration of Human Rights and the United Nations Refugee Convention, each of which give asylum seekers rights which Australia is currently denying.

On November 14, 2016, The Conversation published a comment by Michelle Foster, Professor, Melbourne Law School, University of Melbourne titled 'Turnbull's asylum seeker ban violates Australia's human rights obligations'

Professor Foster argues, 'If passed, this bill will be in direct contravention of the Refugee Convention and Australia's other international obligations.'

Professor Foster explains the contravention as follows. 'The people who will be affected by this law are predominantly asylum seekers who came to Australia by boat and have been assessed as refugees in an offshore detention centre.

There's no dispute that these people are genuinely in need of international protection.

There is no visa available for people travelling to Australia to seek asylum. Nor is there an orderly international queue for recognised refugees. For most refugees, the chances of being resettled are extremely low. This makes their travel to Australia in search of protection without a visa understandable.'

The United Nations Refugee Convention allows for these circumstances. Professor Foster states, 'The drafters of the Refugee Convention foresaw this dilemma. This is why Article 31 exists. Article 31 prohibits states from imposing penalties on refugees who illegally enter or stay in a country if they come directly from a place where their life or freedom was threatened.

Even if a refugee travels through or spends time in a transit country, they're considered as having "come directly" so long as they were not granted protection in that intermediate country. This is the case for most asylum seekers who come to Australia by boat.'

Professor Foster further notes, 'It's worth reflecting on the fact that some of the refugees who will be affected by this bill were taken by Australia, against their will, to countries in which at least some have suffered serious human rights violations.

International law prohibits countries from returning asylum seekers to persecution. A country must also not transfer, deport or send an asylum seeker to a place where she or he will face torture or inhumane or degrading treatment.

Australia is arguably in violation of this obligation, having exposed at least some asylum seekers to precisely such treatment. The UN Special Rapporteur on Torture made this assessment in relation to Australia's offshore detention centre on Manus Island. The allegations of physical and sexual assaults on Nauru suggest that some refugees may have suffered inhuman and degrading treatment there, too.'

3. Asylum seekers arriving by plane are not subject to such penalties

There are three main ways a person may attempt to come to Australia as a refugee:

- i. arrive on short-term visas (e.g. tourist, student or business visa) by plane and then seek protection;
- ii. arrive by boat without any visa for Australia (this method will immediately have the applicant lodged in offshore detention on either Nauru or Manus Island);
- iii. be assessed as a refugee while residing in another country and come through Australia's offshore humanitarian resettlement program.

Until 2012, the majority of asylum seekers applying for protection in Australia arrived originally by air with a valid short-term visa and then applied for asylum at a later date while living in the community. Historically, boat arrivals only made up a small proportion of asylum applicants—estimates vary, but it is likely that between 96 and 99 per cent of asylum applicants arrived by air.

In 2012 the proportions of irregular maritime arrival (IMA) and non-IMA (that is air arrival) asylum seekers shifted due to a significant increase in boat arrivals. However, applications from boat arrivals still only accounted for about half of Australia's onshore asylum claims until 2012-13 when the figure reached 68.4 per cent.

However, in 2013-14 the proportions shifted back and the majority of applications (51.5 per cent) were again lodged by air arrivals.

Although the proportion of asylum seekers arriving by boat has increased significantly in the last few years, and boat arrivals continue to be the focus of much public and political attention, they are in fact more likely to be recognised as refugees than those who have arrived by air.

For example, the final protection visa grant rate for asylum seekers from the top country of citizenship for boat arrivals (Afghanistan) has varied between about 96 and 100 per cent since 2009; while the final protection visa grant rate for those applying for asylum from one of the top country of citizenship for air arrivals (China) is usually only around 20 to 30 per cent.

On March 16, 2012, the ABC ran a report titled 'Plane arrivals in widespread rorting of asylum system'.

The report stated, in 2011 'more than 6,000 asylum seekers arrived by air. The largest group by far came from China, with much smaller numbers flying in from India and other south east Asian countries.

While some might be legitimate, many are not and they are being supported by a network of corrupt officials from China to migration agents in Australia.'

Adrienne Millbank from Monash University has claimed that the system is open to manipulation.

Millbank stated, 'Once in the country, it is much easier for people to apply for asylum or a protection visa because Australia is bound by the refugee convention.

The hypocrisy of parliamentarians is where they're spending so much money keeping people out, extending their borders and controls out onto other countries, but then when people actually get in, they're very welcoming and it must be like winning the lottery.' Critics have noted that there is a particular injustice in the way the system is applied to asylum seekers who arrive by boat. They are dramatically disadvantaged relative to those who are not, while statistically the likelihood of their being refugees is far greater. This latest permanent prohibition on entry to Australia only confirms their relative disadvantage.

4. Placing a life-long ban on asylum seekers arriving by boat is cruel or an over-reaction

It has been claimed that placing a life-long ban on an asylum seeker who had attempted to come to Australia by boat is either cruel or an exaggerated reaction, depending on the circumstances.

Australian barrister, human rights and refugee advocate, Julian Burnside, has stated, 'In the short term, it will operate to prevent people who are currently in a Regional Processing Centre, and who have been assessed as refugees, from being reunited with members of their immediate family who are presently living in the Australian community. That is a result which most Australians would regard as needlessly harsh.'

The cruelty and illegality of the proposed amendment has been stressed in a comment by Ben Saul and Jane McAdam published in The Sydney Morning Herald on November 9, 2016. The authors claim, 'Where refugees already have close family members in Australia, a permanent ban on other family members from coming to live with them would flagrantly violate international law. Australian law would ensure that families remain broken up, and that parents are separated from children. The bill's ban would not apply to children - but would exile their parents.'

Where the nature of the ban is less serious, critics see it as an unnecessary over-reaction. Julian Burnside has noted, 'It would mean that people presently in a Regional Processing Centre and who are assessed as refugees and who settle in (say) Canada or Sweden and rebuild their lives there will never be able to visit Australia for tourism, or business, or any other legitimate reason. This has absurd and pointless possibilities.'

The same point has been made by leader of the Opposition, Bill Shorten. Mr Shorten has stated, 'It seems ridiculous to me that a genuine refugee who settles in the US or Canada and becomes a US or Canadian citizen is banned from visiting Australia as a tourist, businessman or businesswoman 40 years down the track.'

5. Opponents of the amendment have accused the Coalition of political opportunism

If, as the government is claiming, its current deterrent strategies are discouraging asylum seekers attempting to reach Australia by boat, why is it necessary to impose another deterrent.

Some critics have suggested that this harsh and dubiously required amendment is an attempt to hold onto the votes of political conservatives within the electorate who might otherwise stray toward One Nation.

Labor leader Bill Shorten described Turnbull's new policy initiative as both currying favour with One Nation and an attempt to hold off the opposition of conservatives within his own party.

Mr Shorten stated, 'Two weeks ago, Mr Turnbull was happy to trade a vote in the Senate for weaker gun laws, last week his government lied about dodgy data to smear single mums, and now he's shown he's happy to suck up to chase the votes of

One Nation senators to fight off Tony Abbott and keep his job.

He's earning the praise of Pauline Hanson - I hope he's proud of that.

The old Malcolm Turnbull would never have proposed this to keep the extremists in his party happy.'

Other critics have suggested that it is a ploy to create division with the Labor opposition, placing Mr Shorten in a position where he would either alienate the radicals within his party if he supported the amendment or appear weak on border control to much of the electorate if he failed to support it.

Some of the comments made by Mr Turnbull and Mr Dutton when announcing the amendment at a joint press conference appear intended to wrong foot Mr Shorten.

Mr Turnbull said, 'Now, the minister and I are asking the Labor Party and its leader Mr Shorten, to support this legislation. It is entirely consistent with his Party's stated public position - we were disappointed to see what appeared to be some equivocation from his Shadow Minister this morning. Mr Shorten has the opportunity now to express clear unequivocal support for this very strong statement of long-standing, Coalition and so far as we understand, Opposition policy.'

Arguments for permanently denying access to Australia to asylum seekers who attempt to arrive by boat

1. Harsh deterrents directed at asylum seekers arriving by boat prevent people drowning

Some of those who defend a life-long prohibition disallowing asylum seekers who attempt to come to Australia by boat ever being able to reside here believe this would act as a means of saving lives. They argue that if asylum seekers can be prevented from making unauthorised boat journeys to Australia then many drownings will be prevented.

This point was made by Foreign Affairs Minister Julie Bishop who argued, 'I will never forget 1200 people that we know of drowned at sea coming to Australia under these people smuggling networks. We cannot have situations where people are drowning at sea...'

When outlining the new prohibition to be included in an amendment to the 1958 Migration Act, Mr Turnbull stressed the extent to which the Coalition's 'tough' border protection policy was about reducing drowning. He stated, 'Since 2013 the Coalition has been diligently working through the mess we were left by Labor. The mess - the failure that Kevin Rudd acknowledged. First, we acted to stop the boats and stop the deaths at sea - and I'm proud that under the Coalition, there has not been a successful boat arrival in over 800 days, and there have been no deaths at sea...

We accept thousands of refugees, and we do so willingly, but we will not tolerate any repeat of the people smuggling ventures which resulted in over 1200 deaths at sea under the Labor Party and 50,000 unauthorised arrivals.'

The Prime Minister, Malcolm Turnbull, has made this point before. When challenged in October 2015 about the number of children of asylum seekers still in detention, Mr Turnbull responded that while the government recognised its border protection policy of turning back boats and offshore processing was 'tough' and 'many would see it as harsh' he insisted that it was the only 'proven' way to stop deaths at sea.

This same argument for harsh deterrents against those attempting to reach Australia by boat as an asylum seeker were expressed by Michael Pezzullo, secretary of the Department of Immigration and Border Protection, before the Senate Legal and Constitutional Affairs Legislation Committee in February 2016.

Mr Pezzullo stated, 'If you have...a policy that is tough - and indeed, to paraphrase [the Prime Minister] further, one that cannot really be described, in parts, other than as harsh - it has to be applied universally.

The moment you have a chink of light, the moment you give someone a clue as to how to game the system, you will put people's lives in danger.'

This appears to be part of the rationale behind the Government's proposed amendment to the Migration Act. Denying asylum seekers who have attempted to arrive in Australia by boat the prospect of ever coming to this country would act as an absolute disincentive to their taking such a voyage. This disincentive would then prevent them risking their lives at sea.

2. Harsh deterrents directed at asylum seekers arriving by boat undermine people smugglers

Prime Minister Malcolm Turnbull stressed the need to discourage people smuggling when he announced the new policy at a joint press conference. Mr Turnbull stressed the need for 'a united and concerted answer to the people smugglers that if they seek to bring people to Australia, those passengers will never settle in this country. That absolutely, unflinching, unequivocal message has to be loud and clear.'

Mr Turnbull continued, 'It is a critically important, strong message, to send to the people smugglers. They must know that the door to Australia is closed to those who seek to come here by boat with a people smuggler. It is closed. We accept thousands of refugees, and we do so willingly, but we will not tolerate any repeat of the people smuggling ventures which resulted in over 1200 deaths at sea under the Labor Party and 50,000 unauthorised arrivals.'

At the same press conference, Mr Peter Dutton, the Minister for Immigration and Border Protection, stated, 'The announcement that we make today is one of the strongest announcements yet by this Government in relation to border protection policy. It builds on the success and the strong position that we have achieved over the course of the last couple of years. And it has to be a very clear message to people smugglers...

We have been very clear and we demonstrate that consistency of purpose again today, and we will not ever give up our border controls to the people smugglers again. We're cleaning up this mess. There's still a way to go but the government is maintaining the security of our borders and that is what the Australian public expect.'

When questioned by a journalist at the press conference about the fairness of the proposed change in the law, Mr Turnbull again stressed the importance of the need to discourage people smuggling. Mr Turnbull stated, 'This is a battle of will between the Australian people, represented by its government and these criminal gangs of people smugglers. You should not underestimate the scale of the threat. These people smugglers are the worst criminals imaginable. They have a multibillion-dollar business. It is a battle of will. We have to be very determined to say no to their criminal plans...

We have to send a very clear message to the people smugglers. This is not a theoretical debating issue. We know exactly what happens when you unpick the Coalition's strong policy. We know. It's not a matter of theory or speculation. Kevin Rudd did it, and we know what happened. We will not let that happen again.'

The same point was made by Foreign Minister, Julie Bishop, who stated, 'We must never allow the criminal people-smuggling syndicates to get back into business, that's what the legislation is aimed to prevent,'

3. Asylum seekers attempting to arrive by boat must not be offered false hope

It has been suggested that this amendment is necessary to avoid giving detention seekers who come to Australia by boat a false impression of their situation. The Coalition's aim is to demonstrate to asylum seekers the futility of attempting to arrive in Australia by boat as those who do so will never be accepted on Australian soil. This is one of the key purposes of the offshore processing regime, under which, even if an individual is judged to be a refugee, he or she remains resident on either Nauru or Manus Island.

The Coalition has argued that if the prospect of ever being able to settle in Australia is offered to asylum seekers who arrive by boat, this would act as encouragement to other asylum seekers to risk the same voyage.

Peter Dutton, the Minister for Immigration and Border Protection, has stated, 'It has to be a very clear message to people smugglers and to people who are on Nauru and Manus at the moment, that Australia is not an option for you.'

There are still people, advocates in Australia and elsewhere, who are messaging to people on Nauru and Manus, that at some stage you will come to Australia. And those people are living in false hope and it cannot continue.'

The Coalition has called on the Opposition to support this amendment in the name of sending a clear, consistent message to potential asylum seekers either on Manus Island or Nauru or planning to attempt to come to Australia by boat.

Mr Dutton explained that there were a range of expedients that asylum seekers might use to arrive in Australia after having originally attempted to do so by boat. Mr Dutton stated, 'There is intelligence that I have seen about people wanting to travel to Manus Island to marry people from the regional processing centre to try and create a process where they might come here on a spouse visa, that is not acceptable. We are not going to allow arrangements that would subvert the program and the success that we've had within this process.'

Mr Dutton further explained that in a context where Australia is actively working to have refugees on Nauru and Manus Island resettled to a third country it was important not to offer the prospect that they would be able to move from that third country to Australia.

Mr Dutton stated, 'What we don't want is if somebody is to go to a third country that they apply for a tourist visa or some other way to circumvent what the government's policy is by coming back to Australia from that third country.'

The Coalition claims the amendment is merely a logical extension of the repair policy introduced by the Rudd government when it established offshore processing on Manus Island and declared that those processed there would never live in Australia.

Malcolm Turnbull has stated, 'Mr Rudd himself recognised finally that he failed and that is why we have set the date from which this legislation applies, to the date when he made that statement, a statement - an admission of failure on his part when he said, "As of today, asylum seekers who come here by boat without a visa will never be settled in Australia".'

4. Australia is not contravening its international obligations

The Australian government claims that it is not contravening its international legal obligations by offshore processing, holding asylum seekers in detention centres or by permanently denying those who attempt to arrive by boat access to Australia.

At the joint press conference at which the Prime Minister and the Minister for Migration and Border Protection announced the proposed amendment, the Prime Minister was asked, 'Was the Solicitor-General consulted about these changes, and also have you sought and received any advice on whether this is consistent with international law and Australia's international obligations?'

The Prime Minister replied, 'The Solicitor-General was not asked about this, but we have had extensive advice from the Australian Government solicitor in the usual way. The Solicitor-General is generally asked to advise on matters of constitutional contention if you like. And this Bill is absolutely clearly within power. So the constitutional issues are not an issue here.'

When asked again if the government were satisfied that this amendment was in accord with international law, the Prime Minister replied, 'We absolutely do, yes we are satisfied.'

The Minister for Migration and Border Protection, Mr Peter Dutton later explained the bases on which the Government believes the amendment is not in contravention of international law or Australia's international obligations.

Mr Dutton stated, 'The new law would cover those who tried to reach Australia by boat from mid-July 2013, and would block them from obtaining any visa, including tourist and business visas.'

Article 31 of the United Nations' 1951 Convention relating to the Status of Refugees states that signatories "shall not impose penalties, on account of their illegal entry or presence, on refugees".'

Mr Dutton did not explain this justification further; however, it would appear that the government considers its latest penalty appropriate because it imposed on people have not yet entered or are present within Australia.

Mr Dutton went on to explain that the Convention 'further states that the advice should apply to refugees who come directly from a life-threatening region.' The defence here appears to be that those on Manus Island or Nauru or who have resettled to a third country after having been detained on Manus or Nauru are not in a 'life-threatening' situation.'

Mr Dutton concluded the legislation met the obligations currently in place and the legal advice which had been given to the Government was clear.

5. Australia accepts asylum seekers who come to this country by other means

The Coalition government defends itself against accusations that it is not meeting its obligations under international law to supply asylum to refugees by highlighting the number of refugees Australia accepts who do not come here by boat.

In the joint press conference at which the Prime Minister announced the proposed amendment to the Migration Act, Mr Turnbull stated, 'We are able to increase our humanitarian intake from 13,750, to 18,750 over the next several years and we have committed - and are in process of accepting an additional 12,000 refugees from the Syrian and Iraq conflicts. We have also been able to announce an additional \$220 million commitment to address the humanitarian needs in Syria and the neighbouring countries where so many of its population have fled.'

At the same press conference, the Minister for Migration and Border Protection also stressed the generous manner in

which Australia offers places to those in offshore refugee camps.

Mr Dutton stated, 'We deal with people humanely, we provide a record number of refugee places each year, which puts us on a per capita basis and in real terms in the top three countries in the world on a yearly basis, of that we should be very proud.'

Mr Turnbull further implied that there was a direct connection between Australia's refusal to accept asylum seekers who arrive by boat and Australia's capacity to accept large numbers of offshore refugees.

Mr Turnbull explained, 'We have restored security at the border, we have restored confidence in our immigration system... that confidence in our immigration system, in our border protection system, is absolutely fundamental to the harmony of our multicultural society and our ability to generously accept humanitarian refugees from around the world.'

Mr Turnbull's implication appears to be that accepting uninvited refugees who arrive by boat would create disharmony and disrupt our successfully multicultural disharmony, presumably making it difficult to accept significant numbers of offshore refugees as part of our humanitarian program.

Mr Turnbull also seems to be implying that if Australia were to accept refugees who arrived by boat, this would be at the expense of the offshore refugees who we currently invite here. The suggestion appears to be that there is ultimately a limit to the number of people to whom residence can be offered and that if Australia allowed boat arrivals sanctuary then there would be less opportunity to assist those in refugee camps under the offshore resettlement program.

Mr Turnbull summarised the situation, 'A generous humanitarian program, a harmonious multicultural society, depends on the Australian Government being in control of its borders.'

Further implications

Negative attitudes are aroused within many Australians at the prospect of asylum seekers arriving in Australia by boat.

These attitudes were given powerful expression by then Prime Minister John Howard as part of the 2001 election campaign.

Mr Howard stated, 'We will decide who comes to this country and the circumstances in which they come.'

That single sentence encapsulates fears about undefended borders; suspect foreigners and having our natural resources plundered and our national identity undermined. It is a sentence that argues for territorial control and suggests what will be lost without it. However, it seems an exaggerated response to the 'threat' posed by asylum seekers arriving in Australia by boat.

The growing number of refugees worldwide appears to have created the impression within this country that Australia is at immediate risk of inundation by poorly identified and potentially dangerous alien masses. The reality does not support this fear. The number of people arriving unauthorised by boat in Australia is small in comparison to the numbers arriving in other parts of the world such as Europe. Similarly, the number of asylum claims lodged in Australia is small in comparison to the United States and Europe.

In 2012, Australia ranked 20th overall for number of refugees received, 29th per capita and 52nd relative to GDP. It also needs to be remembered that of that figure more than half these refugees were invited into the country by way of our humanitarian resettlement program or arrived in Australia by plane. In 2012-13 refugees who arrived by boat made up just 2.5% of all immigration. Further all unauthorised boat arrivals in Australia are subject to the same assessment criteria as other asylum applicants and are also subject to comprehensive security and health checks.

Former Secretary-General of the United Nations, Ban Ki-moon, has stated, 'Poor countries host vastly more displaced people than wealthier ones. While anti-refugee sentiment is heard loudest in industrialised countries, developing nations host 80 per cent of the world's refugees.'

It would appear that popular concern in Australia regarding refugees is misplaced. That, however, begs the question of why there is such a widespread fear and why it has gained such powerful political expression.

A nationwide opinion poll conducted in 2014 showed that most Australians believe that asylum seekers who arrive in Australia by boat are not genuine refugees and that a majority population supported harsh government policies to deter their arrival. A strong majority of Australians, 60 per cent, wanted the government to 'increase the severity of the treatment of asylum seekers.'

Groups most strongly favouring harsher policies were older Australians (aged over 70 years - 68 per cent), and self-employed people (71 per cent). People in Queensland and Western Australia were slightly more supportive of a more severe approach (65 per cent and 64 per cent respectively) than in Victoria and NSW (both 62 per cent). Only 30 per cent of Australians thought asylum seekers should not be treated more severely, while 9 per cent were unsure.

A majority of Australians - 59 per cent - opposed refugees receiving government welfare assistance. Only 27 per cent believed that refugees should receive government support.

These figures clarify the nature of popular attitudes; however, they do not explain them. It is possible that at least some of this fear and hostility derives from living in a post-September 11 era where anxiety about terrorist incursions has grown dramatically.

An ANU poll conducted in July, 2016, indicated that more than half of the country's adults are concerned Australia will be a target for terrorism at home and strongly believe the government needs to introduce greater preventive measures to combat it. Fear of uninvited asylum seekers may well be fed by such apprehensions.

A data survey and qualitative interviews conducted by Harriet McHugh-Dillon in 2015 revealed that fears about national security were a key factor in hostility to 'boat people'. Also significant were 'Negative attitudes...most commonly expressed in terms of indignation at perceived violations of fairness and justice by unauthorised arrivals. Concerns about asylum seekers' perceived 'illegality' - related to fairness and views of asylum seekers' character - also consistently ranked highly.' The nexus here seems to centre around the perception that these people have come without authorisation, they are therefore suspect, pose a risk to the country and are undeserving of support.

McHugh-Dillon further noted, 'Studies also identified fears that asylum seekers pose a threat to jobs and resources as well as an existential threat to Australian values, customs and national identity.' This last cluster of concerns centres on the xenophobia which has been a persistent feature of Australia's history, despite the relative success of our multicultural story.

Perhaps the most regrettable aspect of this situation is that a group of people is being rejected for reasons that do not

withstand rational analysis. The core concern around illegality is entirely a matter of designation. If successive Australian governments had not made it illegal to arrive in Australia as an asylum seeker by boat, then it is interesting to speculate whether popular attitudes would be so hostile.

Newspaper items used in the compilation of this issue outline

AGE, October 23, 2016, page 24, comment by Julia Baird, 'Human rights and compassion are not dirty words'. [↗](#)

AGE, November 5, 2016, page 28, comment by Michael Gordon, 'A policy full of holes'. [↗](#)

AGE, November 5, 2016, page 5, news item by Gordon and Hunter, 'Lifetime ban for refugees arriving by boat "likely to breach UN convention"'. [↗](#)

AUST, November 4, 2016, page 14, comment by Graham Richardson, 'Refugee ban a political ploy'. [↗](#)

AGE, November 4, 2016, page 16, editorial, 'Refugee ban proposal cruel and misguided'. [↗](#)

AGE, November 1, 2016, page 14, letters incl, 'Where is the decency and compassion? / Why I'm no longer proud to be an Australian'. [↗](#)

AUST, October 31, 2016, page 12, comment by Jennifer Oriel, 'Open borders inevitably stoke xenophobia'. [↗](#)

The Age, November 6, 2016, comment by Elizabeth Farrelly, *Australia's fall from Lucky Country to Cruel Country* [↗](#)

The Age, November 7, 2016, comment by Jessica Irvine, *There's nothing to fear in a big Australia: it's the right thing to do* [↗](#)

The Age, November 7, 2016, comment by Amanda Vanstone, *It's not racist to speak out about migration* [↗](#)

The Herald-Sun, November 8, 2016, news item by S Benson, *Asylum seekers marry Manus Island workers for visas* [↗](#)

The Age, November 8, 2016, background (ref to ABC Q&A program) by Georgina Mitchell, *Q&A: Naomi Klein says*

Australia no better than 'insane and racist' Donald Trump [↗](#)

The Conversation, November 7, 2016, comment by Andrew Jakubowicz, *European leaders taking cues from Australia on asylum seeker policies* [↗](#)

Eureka Street, November 2, comment by Kerry Murphy, *Turnbull's boat ban is crazy and cruel* [↗](#)

Eureka Street, November 2, comment by Gillian Bouras, *Mooted boat ban ignores history and humanity* [↗](#)

Australian immigration laws, detention centres, incl refugees / asylum seekers, incl "boat people", "people smuggling", Border Force:

The Monthly, November 7, 2016, comment by Robert Manne, *It's time: The government's new legislation is an opportunity for Labor to end 15 years of bipartisan cruelty to asylum seekers* [↗](#)

Eureka Street, November 10, 2016, comment by Kerry Murphy, *Punitive truth behind Dutton's 'sham marriage' furphy* [↗](#)

The Age, November 12, 2016, news item by Adam Gartrell, *Turnbull to renew focus on Operation Sovereign Borders to combat people smugglers* [↗](#)

The Age, November 13, 2016, comment by Michael Gordon, *Finally, Turnbull shows he is not just Abbott in a nicer suit* [↗](#)

The Conversation, November 14, 2016, comment by Michelle Foster, *Turnbull's asylum seeker ban violates Australia's human rights obligations* [↗](#)

Eureka Street, November 13, 2016, comment by Frank Brennan, *Five reasons to welcome US Manus deal* [↗](#)

The SMH, November 14, 2016, news item by Mark Kenny et al, *Lifetime visa ban for refugees in doubt as crossbenchers balk* [↗](#)

The Age, November 18, 2016, news item by A Remeikis, *'Punitive' Australia responsible for damage to offshore detainees, says United Nations report* [↗](#)

The Conversation, November 21, 2016, comment by Amy Maguire, Amy Elton, *Dutton's demonisation of refugees is the latest play in a zero-sum game* [↗](#)

The Conversation, November 21, 2016, informative by Gleeson and O'Sullivan, *FactCheck Q&A: how much was spent on the Cambodia refugee deal and how many were settled?* [↗](#)