

The Expert Panel

On 13 August 2012, the Federal government-appointed, three-member Expert Panel on Asylum Seekers issued a Report setting out a policy agenda for Australia's response to the public policy problem of unauthorised boat arrivals.¹ The Report was couched in the language of hard compromise, and presented to the Australian public as a thoughtful and pragmatic way out of the policy stalemate generated by Parliament. This characterisation of the Report is best expressed by one of its authors, Paris Aristotle AM, during a recent speech at the Castan Centre:

"We were struck with a very difficult ethical issue, and we weren't able to fall short on that ethical conundrum, and it goes like this; should a country like Australia put in place measures to discourage people from risking their lives and dying at sea, or should we allow people to make independent decisions to take those risks regardless of the consequences because we shouldn't intervene in the process? We wrestled with that, and I think it's a legitimate ethical question either side and there are compelling arguments either side. When we wrestled with it, we came down on the side that it was unacceptable with the rate of deaths that were occurring, and knowing that more were going to occur, we fell down on the ethical side of saying

¹ Expert Panel on Asylum Seekers, 'Report of the Expert Panel on Asylum Seekers,' 13 August 2012 available <http://expertpanelonasylumseekers.dpmc.gov.au/report> accessed 1 October 2012 (hereafter 'Report of the Expert Panel').

we had to do something, whatever we could, to prevent that."²

What follows upon this ethical imperative described by Aristotle is a suite of border protection mechanisms, having as their key principles the concept of 'regional cooperation' to stem the flow of people's movement towards Australia and the tenet that 'no advantage' is to be accorded to such people in any form of visa or resettlement outcome to enable them to live in Australia. Below is our response - as one part of the Melbourne Anti-Deportation Campaign - to the recommendations of the Expert Panel Report.

The Boats

The Report takes as its primary term of reference the imperative of seeking 'how best to prevent asylum seekers risking their lives by travelling to Australia by boat.'³ The moral prerogative of preventing deaths at sea gives license to the Report of the Expert Panel and is also its founding myth. In purporting to 'prevent' the loss of life at sea, the Report presents these tragedies as given—as natural disasters, the confluence of hapless asylum seekers meeting with unscrupulous people smugglers offshore. This assumption is best expressed in the Foreword to the Report where the authors state:

'We believe that the current impasse on Australian policy making in relation to asylum

² YouTube, 'Castan Events: Paris Aristotle AM' available at <http://www.youtube.com/watch?v=L-x1taCDhyk> accessed 1 October 2012.

³ Report of the Expert Panel, 'Terms of Reference,' p 7.

*issues is not a viable option for the future. The prospect of further losses of life at sea is one that demands urgent and decisive action on the part of the Australian Parliament.*⁴

The sinking boat therefore creates an imperative to act; it also creates an imperative for us to accept the proposals of the Expert Panel for action. Put simply, we are either for the Expert Panel's recommendations, or we are for continuing loss of life at sea.

Given all that we are being asked to accept in the name of preventing deaths at sea, it is necessary for us to accurately examine the cause and scale of these deaths. The assumption that asylum seeker deaths at sea happen through Australian apathy, rather than the active operational design of Australia's border protection policies, is the foundational myth of the Expert Panel Report which it is our obligation to question.

Former Australian Ambassador and figurehead of the Senate inquiry into the sinking of 'SIEV X' in 2001, Tony Kevin, released a detailed examination of Australia's border patrol and smuggling disruption operations in June 2012 entitled *Reluctant Rescuers*.⁵ This examination recognises that the Australian public have been encouraged to think of smugglers as the cause of boat tragedies, and to see the numbers of such incidents as increasing exponentially. Combining statistics of the Australian Parliamentary Library, Kevin reminds us that that given some 24,184

persons have arrived on boats since 1998, the death toll of people who have travelled by boat is around 2.7 percent if not below.⁶ Put another way, 97.3 percent of persons who embarked from Indonesia for Australia by boat since 1998 managed to arrive here safely.⁷ The point in citing these numbers is not to calculate away the tragedy of deaths at sea, but rather to ask; *what happens in those 2.7 percent of cases, when 97.3 percent of passengers arrive safely?*

The unwavering contention throughout Kevin's book is simple; Australia's border protection policies beginning in 1998 and continuing to date, including sophisticated disruption operations in Indonesia, have led directly to boat journeys toward Australia becoming more dangerous and deadly. The Australian government's diplomatic pressure and crackdown on Indonesia's official facilitating of the movement of people has led in turn to smugglers paying higher tariffs to ensure passage out of the country—this higher cost was in turn paid for by overloading boats to unseaworthy levels and otherwise economising on safety. The domestic Australian policies of destroying and impounding unauthorised boats and mandatorily imprisoning their crew gave smugglers impetus to only run vessels they could afford to lose and likewise to engage less skilled and therefore less valuable crew members. In these ways, Kevin states, Australia's own border policies are at the heart of asylum seeker journeys between Australia and Indonesia becoming more precarious and untenable-

⁴ Report of the Expert Panel, p 7.

⁵ Tony Kevin, *Reluctant Rescuers* (Union Offset, Canberra, 2012) (hereafter 'Tony Kevin').

⁶ Tony Kevin, p 9.

⁷ Tony Kevin, p 9.

*'In such ways, even if Australian authorities were not covertly disrupting voyages by planting disruption agents in the people-smuggling industry or by illegal pre-departure acts of sabotage—and they always claimed that they did not and would not knowingly do this—Australia's lawful deterrence and disruption policies and practices inevitably made SIEV voyages less safe in the years after 1998. **The Australian propaganda warnings of grave dangers to people who embarked on people-smuggling voyages were essentially being validated by Australia's own increasingly effective program to deter and disrupt those voyages.**'⁸*
(emphasis added)

It is Kevin's contention, that given the reach of Australia's border policies and their role in shaping asylum seeker voyages, it should be the basic responsibility of Australia's Border Protection Command ("BPC") to ensure the safety of each vessel that departs Indonesia for Australia. The fact that BPC and the intelligence-based agencies that inform its activities, expressly *do not* see their role in these terms, has directly contributed to the boat tragedies that were examined. Quite contrary to the inertia and inaction claimed by the Report to be the cause of deaths at sea, Kevin explains that it is the very operation of Australia's border patrol and protection policies that have led to the small minority of boat tragedies in the years since 1998.

These observations are critical to our response to the Report of the Expert Panel on a number of fronts. Firstly, it should be clear that it is moral

⁸ Tony Kevin, p 13.

hypocrisy in the extreme to utilise deaths at sea, themselves a bi-product of our border patrol policies, as a means of designing yet more impenetrable and hostile border arrangements. Secondly, the Expert Panel's endorsement of increased interception and disruption activities across the broader South East Asia region is specifically at odds with its avowed dedication to preventing deaths at sea. **As described, it has been the function of Australia's border policies and practice since 1998 to create the very conditions that they purport to prevent. It is this *fait accompli* which we must question and disrupt, in the name of preventing deaths occurring on account of *our* border protection mechanisms.**

'No Advantage'

(Recommendations 1; 7; 8; 9 and 10)

It is uncontroversial that the numbers of people claiming refugee status are increasing exponentially as the conflict zones in Afghanistan, Pakistan, Iraq, Iran and Sri Lanka continue to proliferate.⁹ The Expert Panel attempts to counter the magnitude of these factors with its disincentive recommendations. A range of disincentive measures for people arriving in Australia by boat are detailed in the Expert Panel's Report—including removing the ability of such persons to sponsor their families for travel to Australia, and importantly the protection assessment and processing of such persons in

⁹ UNHCR, 'A Year of Crises-- Global Trends 2011' available at www.unhcr.org/4fd6f87f9.html accessed 25 October 2012.

Nauru (and eventually, Papua New Guinea). The 'offshore processing' component of the Expert Panel's report is expressed in terms of the principle that people arriving in Australia through irregular maritime voyages should be afforded 'no advantage' over humanitarian entrants elsewhere in the world attempting to travel to Australia. The Panel expresses this principle for the offshore processing regime in the following terms:

"The purpose of these disincentives, which are consistent with Australia's international obligations, is not to 'punish' those in search of such protection or asylum. It is to ensure that IMAs to Australia do not gain advantage over others who also claim protection and seek asylum but who do so through enhanced regional and international arrangements and through regular Australian migration pathways."¹⁰

The re-opening of offshore processing facilities at Nauru is presented in the Report as one of a range of 'regional cooperation' and 'capacity-building' measures designed to stem the flow of unauthorised entry to Australia. Processing on Nauru is presented as a short-term stop-gap whilst these other measures are put into effect.¹¹

In the interim, whilst these longer-term regional measures take effect, the Expert Panel recommends the more immediate deterrent value of processing the asylum claims of those who arrive by boat on the remote island state of Nauru. In an attempt to distance the present proposal from the previous manifestation of offshore

processing under the Howard government, the Panel cites the following differences from previous policy regarding offshore processing at the Nauru facility;

- *treatment consistent with human rights standards (including no arbitrary detention);*
- *appropriate accommodation;*
- *appropriate physical and mental health services;*
- *access to educational and vocational training programs;*
- *application assistance during the preparation of asylum claims;*
- *an appeal mechanism against negative decisions on asylum applications that would enable merits review by more senior officials and NGO representatives with specific expertise;*
- *monitoring of care and protection arrangements by a representative group drawn from government and civil society in Australia and Nauru; and*
- *providing case management assistance to individual applicants being processed in Nauru.¹²*

There is no attempt in the Report to reconcile the assertions of 'improved conditions' for processing in Nauru, with the primary principle for such processing contained in the 'no advantage' principle. Assuming that the 'no advantage' principle entails that boat arrivals should in no way receive priority compared to humanitarian entrants elsewhere in the world, then by the Panel's own estimates applicants at Nauru may be detained for several years on end.¹³ Perhaps

¹⁰ Report of the Expert Panel, p 47.

¹¹ Report of the Expert Panel, p 43.

¹² Report of the Expert Panel, p 48.

¹³ Accepting the Panel's statistic, borrowed from the UNHCR, that annually only one in ten humanitarian entrants in need of resettlement receive that outcome; see Report of the Expert Panel, p 38.

the most candid articulation of the 'no advantage' calculation in relation to detention at Nauru came across during Immigration Minister Chris Bowen's interview with *ABC News 24*:

Curtis: *You are, though, back now to offshore processing on Nauru and Manus Island, what John Howard did. One thing that is different is potentially those people who go to those places for offshore processing will spend longer there because of the principle of no advantage. Are there actually any existing benchmarks to measure the equivalents of time that people would wait for resettlement in countries like Indonesia or Malaysia, to measure that with how long they'll have to wait in Nauru or Manus Island?*

Bowen: *Well, we will measure that and that's how we'll develop that process. We'll be looking at resettlement from, say, places like Jakarta and Kuala Lumpur and Pakistan. The key here is from the time that somebody's mandated as a refugee to the time that the UNHCR then refers them for resettlement to Australia or the United States or Canada, for example, resettlement countries; how long that process takes. It varies. It's not like there's a rule book as to this. It varies and relates to the circumstances of the case, the priorities of the case, for example.*¹⁴

¹⁴ Chris Bowen MP, 'Expert panel report, offshore processing legislation, Nauru, Papua New Guinea, Malaysia, humanitarian program,' 15 August 2012 available at <http://www.minister.immi.gov.au/media/cb/2012/cb189319.htm> accessed 1 October 2012.

Reading into Bowen's statement, the 'no advantage' principle implies an 'averaging out' of wait times across other settlement source and receiving countries to arrive at an estimate, in years, of how long an asylum applicant will be made to wait before being allowed to enter Australia. As Bowen states above, there is simply no fixed figure, no firm guarantee available, regarding how long asylum applicants will be made to wait – the very definition of indefinite detention.¹⁵

In addition, the Report makes no attempt to reconcile its assurance against 'arbitrary detention' with the lack of representation and recourse to courts and third-party appeal mechanisms in the process of applying for refugee status in Nauru. Whilst assiduously hidden within the terms of the Panel's description of processing in Nauru, it is noted that Australian government officials will no longer be tasked with processing asylum claims offshore—precisely in order to avoid challenges by asylum seekers in Australian courts. Asylum processing in an unaccountable, inexpert manner provides a hotbed for unsystematic, biased and incorrect

¹⁵ The long-term mental health impacts of indefinite detention during the previous episode of offshore processing in Nauru during the Howard era have been prolifically documented. One of the many examples is the body of work of Professor Louise Newman of Monash University's Centre for Developmental Psychiatry & Psychology: see <http://www.monash.edu.au/research/profiles/profile.html?sid=26504&pid=4968>. During a recent public talk through the Castan Centre, it is noted that one of the Report's co-authors, Paris Aristotle AM, acknowledged: "The mental health consequences last time of people being locked up in detention in Nauru for three years...were devastating" see <http://www.youtube.com/watch?v=L-x1taCDhyk>.

decision making. We note that when redress in the courts was made available to applicants following the High Court of Australia's decision in 2010, the courts proceeded to find errors in over 60 percent of refugee determinations.¹⁶

In sum, the current Nauru processing centre will be no different than before—it will offer indefinite detention in line with the 'no advantage' principle and it will expose claimants to the possibility of arbitrary removal at any point depending on the vicissitudes of the protection determination process. The presence of "appropriate mental health" facilities or "vocational training" will do nothing to change the brutal reality of unending, remote detention. In fact there is no indication such far that these measures have been implemented on the island or will be any time soon. Both Nauru and Manus Island detention centres have seen hunger strikes¹⁷, several suicide attempts¹⁸ and concerns about disease outbreaks, some of which are detailed in images and letters smuggled out by detainees themselves.¹⁹

¹⁶ Kristy Needham, 'Refugees Rejected in Error,' *The Age* 4 October 2011 available at <http://www.theage.com.au/national/refugees-rejected-in-error-20111003-1l5ea.html> accessed 25 October 2012.

¹⁷ Ben Packham, "'Recovered' hunger striker sent back to Nauru", *The Australian* December 10 2012 available at <http://www.theaustralian.com.au/national-affairs/immigration/recovered-hunger-striker-sent-back-to-nauru/story-fn9hm1gu-1226533799586> accessed 21 January 2013

¹⁸ Bianca Hall, "Heavy Metal Asylum Seeker from Iran" *The Australian* January 15th 2013 available at <http://www.smh.com.au/opinion/political-news/metal-drummer-flees-iran-danger-20130114-2cps6.html> accessed 21 January 2013

¹⁹ "Open Letter to Australians from Manus Island detainees", 5th January 2013, available at <http://www.independentaustralia.net/2013/australian->

'Regional Cooperation' and the Bali Process

(Recommendations 3; 4; 5; 6 and 17)

In several of its recommendations, the Expert Panel endorses the 'Regional Cooperation Framework' ("RCF") articulated at the Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, which concluded on 30 March 2011. This conference was the fourth in a series co-chaired by the Australian and Indonesian governments and intended to articulate a multi-lateral system of border control across the Asia-Pacific region. The conference in 2011 was attended by representatives of the 43 Asia-Pacific participating countries, including delegations from the major source countries of asylum-seekers in the region, as well as representatives of the UNHCR and the International Organisation for Migration ("IOM"). Collectively, these conferences and their surrounding multi-lateral discussions are known as the 'Bali Process.'²⁰

The RCF adopted as a result of the March 2011 Bali Process talks sets out a non-binding series of commitments by members states in addressing the illegal movement of people

identity/new-australians/open-letter-to-australia-from-manus-island-detainees/

²⁰ See 'The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime,' available at <http://www.baliprocess.net/> accessed 25 October 2012.

through the region. Whilst setting out a shared commitment by participating states and agencies to consistency of refugee processing across the region and 'durable solutions' for resettlement of refugees in the region, the RCF at the same time promoted the following measures:

- *Arrangements should seek to address the root causes of irregular migration and seek to promote population stabilisation wherever possible;*
- *Any arrangements should avoid creating pull factors to, or within, the region.*
- *Arrangements should seek to undermine the people smuggling model and create disincentives for irregular movement and may include, in appropriate circumstances, transfer and readmission*
- *Arrangements should support and promote increased information exchange, while respecting confidentiality and upholding the privacy of affected persons.*²¹

In short, the Bali Process represents a region-wide system for cooperation to detect and prevent the flow of irregular migrants (including asylum seekers) through the region. This process explicitly includes Australia sharing information and intelligence with source countries for asylum seekers (including Burma, Afghanistan, Sri Lanka and Pakistan) with the view to stemming the flow of 'irregular' migrants from those regions.²² It

²¹ Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, 'Co-Chair's Statement,' Bali, Indonesia, 29-30 March 2011 available at <http://www.baliprocess.net/conferences-and-officials-meetings> accessed 25 October 2012.

²² Both Pakistan and Sri Lanka are members of the Bali Process Ad Hoc group which convenes around specific cooperation issues periodically. The most recent example of cooperation around intelligence sharing was the Bali Process Ad Hoc Group 'Immigration Intelligence Best Practice Workshop,' 7-

includes cooperation with these countries with view to voluntary and involuntary return of irregular migrants.²³ It also includes Australia's financial and operational cooperation with Indonesia and other countries, such as Pakistan with view to detecting, intercepting and halting asylum seekers attempting to travel through the region. The Expert Panel offers endorsement to this process.

The Report lends support to increased 'burden sharing' in the form of the constitution of greater resettlement places for refugees from Indonesia²⁴- at the same time, it supports more extensive maritime co-operation and surveillance, law enforcement and intelligence exchange to prevent illegal migration.²⁵ What this co-operation can mean in practice is evidenced by the close relationship between the Australian Federal Police and the Sri Lankan Navy. In 2012, the Australian Federal Police dropped a war crimes investigation into Sri Lanka's High Commissioner to Australia, former Admiral Thisara Samarasinghe. During the dying days of the Sri Lankan civil war, Samarasinghe was part of the

10 February 2012. The governments of Australia and New Zealand chaired that workshop; representatives of the governments of Pakistan and Sri Lanka were in attendance. For the proceedings of that Workshop, see <http://www.baliprocess.net/files/Bali%20Process%20Ad%20Hoc%20Group%20Immigration%20Intelligence%20Best%20Practice%20Workshop%20-%20Outcomes%20Statement%20ENDORSED.pdf> accessed 20 October 2012.

²³ See for example, Bali Process Ad Hoc Group, 'Technical Workshops on Repatriation and Reintegration,' Manila, Philippines, 23-24 November 2010 available at <http://www.baliprocess.net/ad-hoc-group/ad-hoc-group-workshops> accessed 24 October 2012.

²⁴ Report of the Expert Panel, p 42.

²⁵ Report of the Expert Panel, p42-43.

naval operations “disrupting” Tamil civilians fleeing the war zone - by which we mean to say, shelling near ICRC ships²⁶ and other vessels holding civilians fleeing the conflict.²⁷ The same Sri Lankan Navy now performs its disruption operations with the assistance of AFP officers based in Sri Lanka. In October 2009 Australian media reported on The Department of Immigration and Citizenship-funded cameras in Colombo’s international airport being used to pick up and detain Tamils.²⁸ Human rights activists suggested that such activity was fuelling the rise in boat journeys, now themselves being disrupted with some regional co-operation from Australian authorities.

In Pakistan, this co-operation has included assisting in the racial profiling of Hazara Shias at Pakistan’s borders to prevent them fleeing genocidal violence carried out by militant groups alleged to be financed by the Pakistani security services:

“Since 2009, officers of the Australian Federal Police (AFP) and Australian intelligence agents have been part of an increased effort to stem the movement of asylum seekers, according to interviews with Pakistani law-enforcement officers, publicly available Australian Senate

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http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf, 209 (pg 59-60)

²⁷ Ben Doherty, October 17th 2011, ‘Sri Lankan Diplomat Accused of War Crimes,’ *Sydney Morning Herald* <http://www.smh.com.au/national/sri-lanka-diplomat-accused-of-war-crimes-20111016-1lrm.html>

²⁸ Matt Wade, October 28 2009, ‘Australian cameras linked to Tamil arrests,’ *Sydney Morning Herald* <http://www.smh.com.au/world/australian-cameras-linked-to-tamil-arrests-20091027-hj3b.html>

records, and annual reports of the AFP. A large part of this has involved co-operation with Pakistan’s civilian Federal Investigation Agency (FIA), which investigates crime and also manages immigration at Pakistan’s borders and ports.

In part, this co-operation — which has involved intelligence sharing, technical help and training — has been focussed on catching people smugglers. But increasingly the pressure applied by Australian authorities has resulted in Pakistan using ethnic profiling to try to seal off its borders to Hazaras trying to escape.”²⁹

The Panel notes that across 2011-2012, some \$70 million was allocated to ‘international engagement and capacity-building activities related to people smuggling and border control’³⁰ and apportioned as follows:

“[S]upport for regional cooperation and capacity building in regional and source countries (\$47 million); management and care of irregular immigrants in Indonesia (\$10 million); initiatives in relation to displaced persons in source or transit countries, and sustainable returns (\$7 million); and returns and reintegration support programs (\$7 million).”³¹

The Expert Panel recommends that Australia ‘significantly increase its allocation of resources’

²⁹ Aubrey Belford, “Australia’s Deadly Game” December 12 2012, *The Global Mail*

<http://www.theglobalmail.org/feature/australias-deadly-game/519/>

³⁰ Report of the Expert Panel, p 44.

³¹ Report of the Expert Panel, p 44.

towards these efforts.³² The Panel does not make clear what the largest allocation of \$47 million-towards 'support for regional cooperation and capacity building in regional and source countries'- is precisely intended for. One measure of the success of "regional co-operation" is the fact that asylum seekers from Afghanistan increasingly report that they require smugglers to assist them to avoid detection at Bangkok International Airport and smugglers to take them by road and by boat through Thailand and Malaysia to Indonesia. Even those Afghans and Pakistanis with papers find themselves barred from receiving visas to countries such as Indonesia as a result of regional co-operation. Rather than break the people smuggling business model, the model has been significantly diversified, as asylum seekers are forced to play cat-and-mouse games with authorities in Thailand and Malaysia before they can even get to Indonesia for the final crossing. They are forced to make multiple dangerous boat and road journeys because enhanced regional co-operation means expanding the black list of countries whose nationals cannot move legally around the region; refugees and potential refugees that states are cooperating to keep imprisoned in the places from which they are seeking to flee. What is plain is the significant allocation of resources towards an enhanced capacity of regional partners to detect, intercept and return asylum seekers to source countries. This will of course mean that asylum seekers in our immediate region face even greater likelihood of detection and return before being able to reach a country, like Australia, where their claims can

³² Report of the Expert Panel, p 44.

be processed. People will die at sea off the coast of Thailand and Malaysia because they cannot travel by air to Indonesia. People will die at sea at the hands of the Sri Lankan Navy, with their Australian counterparts no doubt at safe distance. 'Regional cooperation,' as a manifestation of the 'no advantage' principle, is intended to be punitive in every sense.

The Families

(Recommendations 2; 11; 12 and 21)

One of the deterrent components of the Report of the Expert Panel is to divest asylum claimants arriving by boat of the ability to propose their immediate family members for entry into Australia under the Special Humanitarian Program.³³ This recommendation serves to eradicate the scope of possibilities for family reunion for IMAs; in addition to clearing the backlog in the Special Humanitarian visa program thereby reducing the wait for the grant of such visas, for those who remain eligible. Effective immediately, the Report recommends that people who have arrived by boat should not automatically be able to propose their family members for entry into Australia. Instead, applicants who are proposing their spouses and children should be made to apply under the 'standard' Family visa provisions.³⁴ Unauthorised boat arrivals who are minors should eventually be denied the ability to

³³ Report of the Expert Panel, p 40.

³⁴ Report of the Expert Panel, p 40.

propose any of their family members, according to the Panel's recommendations.³⁵

The effect of forcing humanitarian applicants into the 'standard' framework for Family visa application procedures is punitive in several respects. The sizeable fees associated with Partner and Child visa applications may not be within reach for humanitarian applicants until many years after their arrival in Australia. On 22 October 2012, the government announced an increase to the Offshore Partner visa application fee effective from January 2013- from \$2060 to "around" \$2700.³⁶ The increase in fees was justified in part by increased expenditure on the opening of offshore facilities in Nauru.³⁷ Additionally, the normative criteria for Partner visa applications (requiring copious documentation) will become particularly unattainable for applicants who have fled their countries and are without such forms of documentation, or who were illegal residents in transit countries and as such have no such documents to provide evidence of their relationships. The Department of Immigration's policy has not been changed or ameliorated to provide for the particular circumstances of 'split family' applicants who will be sponsoring their

³⁵ Report of the Expert Panel, p 40.

³⁶ ABC Radio National, 'Australia Raises Visa Fees to Balance the Books,' 22 October 2012 available at <http://www.radioaustralia.net.au/international/radio/program/asia-pacific/australia-raises-visa-fees-to-balance-the-books/1034352?autoplay=1034346> accessed 25 October 2012.

³⁷ ABC Radio National, 'Australia Raises Visa Fees to Balance the Books,' 22 October 2012 available at <http://www.radioaustralia.net.au/international/radio/program/asia-pacific/australia-raises-visa-fees-to-balance-the-books/1034352?autoplay=1034346> accessed 25 October 2012.

spouses or children under the 'regular' family migration visa categories. In fact, the Department is now routinely asking the spouses and children of refugees to obtain the necessary documents from the country in which they fled persecution. Afghan Hazaras who fled Afghanistan and are now residing illegally in Pakistan are being asked to return to Afghanistan to get identity documents from the Ministry of Interior in Kabul, though an office exists in Quetta, Pakistan.

Lastly, even if sponsors are able to provide evidence of their relationships to the satisfaction of the Department of Immigration (which itself is an impervious undertaking), the wait to obtain Partner visas in offshore locations is currently up to two years; the waiting period following the influx of failed 'split family' humanitarian applicants will no doubt balloon. Though the Report recommends an increase of 4000 places in the family stream for humanitarian applicants,³⁸ it seems implausible that this increase will be adequate to cater for the families of humanitarian sponsors - remembering there are currently more than 16,300 split family applications awaiting decision, nearly 80% of which are for the spouses of humanitarian entrants to Australia.³⁹

The consequence of these punitive proposals will be to effect the permanent separation of families on account of the mode of their arrival. Rather than to curb boat arrivals, these proposals are likely to encourage the staggered arrival of families in different boat journeys as the wait and uncertainty regarding family reunion becomes

³⁸ Report of the Expert Panel, p 41.

³⁹ Report of the Expert Panel, p 137.

intolerable (it should be recalled that the great majority of the 350 people who drowned in the sinking of SIEV X were the wives and children of men in Australia on Temporary Protection Visas who were not afforded provisions for their families to travel to Australia.)⁴⁰ Many Afghans and Pakistanis awaiting family sponsorship continue to die in sectarian violence in Pakistan, as do their sponsors, who risk travel when waiting times balloon out.⁴¹

Deportation

(Recommendations 16 and 17)

The Expert Panel offers its endorsement to the return of asylum seekers to their home countries in two ways. Firstly, the Panel's endorsement of increased disruption and operations by personnel in Indonesia and Malaysia (neither country being a signatory of the *UN Refugees Convention*) is a tacit endorsement for intercepted asylum seekers to be interred and to face removal to their home nations, given that there are no recognised asylum processing procedures in either Indonesia or Malaysia. This aspect of the 'regional cooperation' framework and the risks

⁴⁰ Tony Kevin, p 42.

⁴¹ Amanda Hodge, January 16th 2013, "Aussies die in Hazara blast in Pakistan" *The Australian* <http://www.theaustralian.com.au/national-affairs/immigration/aussies-die-in-hazara-blast-in-pakistan/story-fn9hm1qu-1226554699633>
Amanda Hodge, January 17th 2013, "Deaths thwart family reunion prospects", *The Australian* <http://www.theaustralian.com.au/national-affairs/immigration/deaths-thwart-family-reunion-prospects/story-fn9hm1qu-122655404752>

inherent in asylum claimants falling into the hands of authorities who recognise no obligation towards asylum seekers fail to be addressed in the Expert Panel's Report. In addition, the Report lambasts current processing practices in Australia for their insufficient ability to remove or deport asylum seekers who have not been recognised as refugees. The Panel notes '*after completion of the lengthy assessment and review processes, the removal of persons not in need of Australia's protection is proving increasingly difficult.*'⁴² This difficulty comes down to a 'prolonged' protection determination with access to the courts for review; final appeals to the United Nations and the lack of cooperation with source countries to accept the involuntary return of their nationals.⁴³ With view to improving Australia's success rate with regard to involuntary returns, the Expert Panel recommends the inauguration of a joint DIAC and DFAT working group to explore 'whole of government' approaches to negotiate with receiving countries regarding the acceptance of involuntary returns.⁴⁴

Whilst voluntary returns are exceedingly rare and involve direct negotiations with the asylum applicant, the Expert Panel notes that involuntary returns are contingent on Australian negotiations with the asylum seeker's source country. This cooperation extends to confirming identity with the authorities of the source country as well as travel documents for the asylum seeker's forced return.⁴⁵ Whilst the Report notes that Australia has secured such cooperation with the

⁴² Report of the Expert Panel, p 28.

⁴³ Report of the Expert Panel, p 28.

⁴⁴ Report of the Expert Panel, p 55.

⁴⁵ Report of the Expert Panel, p 118.

governments of Afghanistan and Sri Lanka for forced returns, it states that DIAC continues to engage with 'interlocutors' from Iran and Iraq to secure similar cooperation.⁴⁶

The Expert Panel's approach to forced return is revealing in several respects. The implicit reference to international appeals as 'delay' tactics thwarting forced removal discloses the Panel's disregard for these international procedures. Further, the Panel's focus on the logistics of involuntary return manages to elide the reality that the majority of those now in 'queue' for forced removal have been subject to the highly questionable offshore Refugee Status Assessment process which has been broadly criticised as producing defective, erroneous and biased outcomes.⁴⁷

The Victorian Foundation for Survivors of Torture (or "Foundation House"), founded by Expert Panelist Paris Aristotle AM, is privy to information about countless examples of asylum seekers who are victims of torture and trauma having their claim rejected because of poor representation or hostile and inexperienced decision makers. Despite this, and in the face of deteriorating country circumstances in Afghanistan in particular, the Expert Panel lends its support to expedited forced returns to these countries.

⁴⁶ Report of the Expert Panel, p 118.

⁴⁷ Kristy Needham, 'Refugees Rejected in Error,' *The Age* 4 October 2011 available at <http://www.theage.com.au/national/refugees-rejected-in-error-20111003-1l5ea.html> accessed 25 October 2012.

The alarming consequences of bilateral cooperation and an increased focus around forced returns are clearest in the forced return of failed Sri Lankan asylum seeker Dayan Anthony in July 2012. Mr Anthony's claims to protection had been compromised by inadequate representation at the primary level. He had been assessed by senior professionals at Foundation House and the head of the Royal College of Physiotherapists as suffering injuries attributable to torture and trauma in his home country. At the time of his removal, Mr Anthony had pending complaints before the UN Special Rapporteur on Torture and the UN Committee Against Torture, both bodies had communicated with the Australian government to halt Mr Anthony's release to no avail. On his return to Sri Lanka, Mr Anthony was interrogated for 16 hours by Sri Lanka's Criminal Investigations Department ("CID").⁴⁸ He was then made to recant in great detail his claims to protection in Australia, before a Sri Lankan media junket.⁴⁹ During an interview with Australian media after his return, he was accompanied by a senior Sri Lankan Defence Ministry official.⁵⁰ This course of events orchestrated by Sri Lankan officials appears thoroughly sinister, and as such this treatment

⁴⁸ Amanda Hodge, 'Tamil Man Dayan Anthony Questioned, Recants on Torture Claims,' *The Australian* 27 July 2012 available at <http://www.theaustralian.com.au/national-affairs/immigration/tamil-man-dayan-anthony-questioned-recants-on-torture-claims/story-fn9hm1gu-1226436367903> accessed 25 October 2012.

⁴⁹ *ibid*

⁵⁰ Amanda Hodge, 'Deported Tamil Recants Tales of Torture,' 28 July 2012 *The Australian* available <http://www.theaustralian.com.au/national-affairs/deported-tamil-recants-tales-of-torture/story-fn59niix-1226437204627> accessed 25 October 2012.

can be understood as a vindication of Mr Anthony's fears regarding his forcible deportation.

Since Dayan Anthony's deportation, Sri Lankan asylum seekers arriving by boat are now routinely deported before even having their claims assessed. Using military transport from RAAF base Darwin⁵¹, asylum seekers are being *refouled* to Sri Lanka and often find themselves in Negombo Prison. About 650 Sri Lankans were forcibly deported in 2012.⁵² The Australian government is so determined to keep the asylum assessment process used to so rapidly determine that the Australian government has no protection obligations to Sri Lankans quiet, that it allowed a group of 50 Sri Lankans due to be returned to Sri Lanka to stay⁵³, after their lawyers demanded to have access to the screening interviews used to determine that they were not owed protection.⁵⁴ In late December 2012, the Australian Foreign Minister Bob Carr shared a platform with Sri Lankan Defence Minister Gotabaya Rajapakse in Sri Lanka and declared all Sri Lankan asylum

seekers to be economic refugees.⁵⁵ His department, the Department of Foreign Affairs and Trade writes reports on the political situation in Sri Lanka that form a crucial part of the 'independent' country information used by the Refugee Review Tribunal to determine refugee claims.

Conclusion

It is difficult not to interpret The Report of the Expert panel as a document that thinly veils its brutality by the magnanimity produced by the centrality of a spurious ethical dilemma. The ideological ground upon which to justify the re-assertion of Howard era policy is provided within the Report according to a framework of 'altruistic' consideration – that of preventing deaths at sea. However, we find ourselves presented with a report whose solutions, in a sinister tautological movement, happen to function in accordance with the determined causes of the very 'tragedies' the Expert Panel pretends that it is striving to prevent. There appears to be a pertinent omission of the real and established operations functioning as the main contributing factors to deaths at sea by the Expert Panel. On closer inspection we are able to discern the absolute hollowness of the moral considerations that are

⁵¹ <http://bramijegan.wordpress.com/2012/12/03/from-inside-northern-immigration-detention-centre-at-darwin/>

⁵² Ben Doherty and Bianca Hall, "Asylum denied, a penalty waits at home" December 8 2012, available at <http://www.smh.com.au/world/asylum-denied-a-penalty-waits-at-home-20121207-2b0qi.html> accessed 21 January 2013

⁵³ "Bowen defends asylum 'screening'" December 6th 2012, *SBS World News* available at www.sbs.com.au/news/article/1718211/Bowen-defends-asylum-screening accessed 21 January 2013

⁵⁴ "Asylum seekers drop court challenge" December 5 2012, available at <http://www.news.com.au/breaking-news/national/asylum-seekers-drop-court-challenge/story-e6frfku9-1226530752084>

⁵⁵ Ranil Wijayapala, 23rd December 2012 "SL and Australia set up unit to check people smuggling and transnational crime : Visible links to terrorism by human smugglers - Australian FM Sen. Bob Carr" *The Sunday Observer* <http://www.sundayobserver.lk/2012/12/23/fea03.asp>

presented as justifying an aggressive campaign of regional policy and border control. The report also appears to condone co-operation with any government or military apparatus in its quest to prevent 'irregular border movement'. The outsourcing of the more gruesome aspects of disruption operations to those who are not Australian government officials (the Sri Lankan Navy, Indonesian police, Malaysian border guards) guarantees no oversight, no scrutiny, no inquiries. In a bizarre feat of 'humanitarianism' the proposals made by the Report makes it not only admissible, but advisable to act in order to prevent family reunions for refugees arriving in such a way that constitutes 'irregular border movement'. In addition to which it provides justification for the undertaking of misconceived deportations. Despite the fabrication of a fictitious ethical imperative, the Report of the Expert Panel presents a kind of sanguinary specter in its construction of policy recommendations that prove both brutal and punitive.
