

‘19 July 2013’  
Five years have passed

Why does Australia continue to trap about 1,500 refugees in Papua New Guinea and Nauru?

Weeks ago, I read the Hansard record of Senate budget estimates Legal and Constitutional Affairs Committee sitting of Monday 21 May 2018.<sup>1</sup> I read the questions Senator Nick McKim asked about numbers of asylum seekers who arrived to Australia after the critical date of 19 July 2013 – when the current offshore policy regime began – who were either sent to Manus Island and Nauru, or brought to Australia. These questions have not been answered.

Around the same time, I read, yet more of the many questions in tweets and messages from some of the traumatised people among the 2,000 or so who were sent to Manus Island and Nauru at this time. Their endless unanswered questions and calls for help, again, broke my heart. They ask how is it they are still stuck in these island prisons, with no hope in sight for a half-reasonable chance at making their one life on this earth something to live for.

One message in particular got to me, and it somehow connected with Senator McKim’s questions at Senate estimates. Abdul Aziz Adam tweeted from Manus Island about his effort to comprehend the inhumane, and how ‘the pieces of the ghastly jigsaw will never fit together’.<sup>2</sup> Indeed such cruelty cannot be explained.

But I felt that I could, to some extent, answer Senator McKim’s unanswered questions and piece together parts of Aziz’s most ghastly jigsaw. I thought I could write a few short paragraphs to shed some light. As I hit the keyboard, it spanned out to all these pages written through weeks of recalling events, going back over the old reports, looking up laws and policies and justifications and critiques, as I tried to pull it together.

First drafts were pretty messy. I thank my friend and sister freedom fighter, Justine, and my son, Koza, who both helped to shape it in some sort of readable order. I also thanks my friends who have been and are still stuck in this rotten system – on Manus, Nauru, Christmas Island, and all the other black sites, both geographical and psychological, in Australia’s immigration ‘processing’ regime – your kindness to me and sharing of your experience gives me clarity of purpose. I hope I have answered something about why and how Australia has persisted with the extreme cruelty of ‘19 July’ policy over five years, and continuing into the sixth year. This is intended to spell out to some extent – as it is impossible to fully spell out - the wrong in ‘19 July’ policy. It is also a call to rethink our whole approach to Australia’s broader refugee ‘processing’ regime that props up ‘19 July’.

By pulling together some important facts about ‘19 July’ policy, I aim to provide a record and review of available information that significantly improves upon what is readily available. This review of some of the facts about ‘19 July’ policy demonstrates the incoherence and failure of this policy as it inappropriately responds to a humanitarian crisis by falsely framing it as a matter of national security but, really, is little more than fear-mongering to secure votes and wield political power.

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<sup>1</sup> Commonwealth of Australia, *Hansard*, Senate, Legal and Constitutional Affairs Legislation Committee, Estimates (Public), Monday, 21 May 2018, Canberra, viewed at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F0490c3ad-512d-453c-8526-3dff9705b43c%2F0000%22>

<sup>2</sup> Abdul Aziz Adam, *Twitter*, 2 June 2018, viewed at: [https://twitter.com/Abdulaziz\\_Ada/status/1002968405974978565](https://twitter.com/Abdulaziz_Ada/status/1002968405974978565)

This collation of facts also shows how '19 July' policy is part of a long trajectory in this policy area that has become embedded in the Australian system in spite of the serious harm it inflicts on the lives of so many vulnerable people, to the point that Australia's concentration camps in the Pacific – where children, women and men are sent and trapped to die – have become normalised in the Australian psyche. Considering exactly what this policy does to people plainly shows that the policy approach is wrong.

Rethinking Australia's asylum seeker policy must develop an appropriately humane response to asylum seekers in our region that fits within and properly addresses the only appropriate context of the international refugee crisis. Once Australia does the real work required to rewrite our asylum seeker policy in this context, and develop practical ways to assist people who seek refuge in our region, we can begin to take a worthy place as international citizens for a better world.

#### '19 July' policy of deterrence – overview

On 19 July 2013, the Australian government decided that all asylum seekers arriving to Australia without a visa would never reside in Australia.<sup>3</sup> In the months following that decision, Australia transferred some 2,000 or more asylum seekers who had arrived to Australia by boat to the sovereign Pacific island countries of the Independent State of Papua New Guinea and the Republic of Nauru, and imprisoned them in 'regional processing centres'.

In Papua New Guinea, asylum seekers were detained at the Lombrum Naval Base on Los Negros Island which is connected by bridge to the larger Manus Island in the remote Manus Province – about 400 kilometres north of the main island of Papua New Guinea. The Republic of Nauru is even more remote – it is a small island state of 21 square kilometres, more than 1,000 kilometres north-east of the Solomon Islands – its largest neighbouring country, and more than 2,000 kilometres east of Manus Island.

Since 19 July 2013, Australia transferred asylum seekers to these remote Pacific islands by agreement between the governments for their refugee claims to be assessed by the governments of Papua New Guinea and Nauru, according to the *Regional Resettlement Arrangement between Australia and Papua New Guinea* in effect from 19 July 2013,<sup>4</sup> the *Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues* signed on 6 August 2013,<sup>5</sup> and the *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues* signed on 3 August 2013.<sup>6</sup>

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<sup>3</sup> Naomi Woodley, 'Rudd to send all boat arrivals to PNG', *ABC PM*, 19 July 2013, viewed at: <http://www.abc.net.au/pm/content/2013/s3806944.htm>

<sup>4</sup> Australian Government, Department of Foreign Affairs and Trade, *Regional resettlement arrangement between Australia and Papua New Guinea*, Signed in Brisbane 19 July 2013, viewed at: <http://dfat.gov.au/geo/papua-new-guinea/Pages/regional-resettlement-arrangement-between-australia-and-papua-new-guinea.aspx>

<sup>5</sup> Australian Government, Department of Foreign Affairs and Trade, *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues*, Signed 6 August 2013, viewed at: <http://dfat.gov.au/geo/papua-new-guinea/Pages/memorandum-of-understanding-between-the-government-of-the-independent-state-of-papua-new-guinea-and-the-government-of-austr.aspx>

<sup>6</sup> Australian Government, Department of Foreign Affairs and Trade, *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of*

The 19 July 2013 *Regional Resettlement Arrangement* with Papua New Guinea provides that:

3. ... Papua New Guinea undertakes for an initial twelve month period to accept unauthorised maritime arrivals for processing and, if successful in their application for refugee status, resettlement.

...

5. What is unique about this arrangement is that persons found to be refugees will be resettled in Papua New Guinea and any other participating regional, including Pacific Island, state. Persons found not to be refugees may be held in detention or returned to their home country or a country where they had a right of residence.

The 6 August 2013 *Memorandum of Understanding* with Papua New Guinea provides that:

13. The Government of Papua New Guinea undertakes to enable Transferees who enter Papua New Guinea under this MOU who it determines are refugees to settle in Papua New Guinea.

The 3 August *Memorandum of Understanding* with Nauru provides that:

12. The Republic of Nauru undertakes to enable Transferees who it determines are in need of international protection to settle in Nauru, subject to agreement between Participants on arrangements and numbers. This agreement between Participants on arrangements and numbers will be subject to review on a 12 monthly basis through the Australia-Nauru Ministerial Forum.

13. The Commonwealth of Australia will assist the Republic of Nauru to settle in a third safe country all Transferees who the Republic of Nauru determines are in need of international protection, other than those who are permitted to settle in Nauru pursuant to Clause 12.

Under section 15C of the Papua New Guinea *Migration Act 1978*,<sup>7</sup> the transferred asylum seekers were required to reside at Manus Regional Processing Centre while their refugee status was being determined. Their refugee claims were assessed according to section 15A of the Papua New Guinea *Migration Act 1978*. Those found to be refugees were informed in their Notice of Refugee Determination: 'You will receive information from officials about your rights and obligations and about assistance that may be provided to you to apply for an identity document and visa, and to prepare for life in PNG. Should you choose not to remain in PNG, you may receive assistance to voluntarily return to your country of origin or another country where you have a right of residence ...' Yet Papua New Guinea to date has no process or legal framework for resettling the refugees.

In Nauru people were assessed under Part 2 of the Nauru *Refugees Convention Act 2012*<sup>8</sup> that provides for people to be recognised as refugees. Those who were found to be refugees were granted visas for 5 or 10 years. Nauru also has no process or means to resettle refugees.

The legislation of Papua New Guinea and Nauru that enables recognition of refugees has no provisions for grant of visas to refugees.

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persons in Nauru, and related issues, Signed 3 August 2013, viewed at: <http://dfat.gov.au/geo/nauru/pages/memorandum-of-understanding-between-the-republic-of-nauru-and-the-commonwealth-of-australia-relating-to-the-transfer-to-and.aspx>

<sup>7</sup> *Migration Act 1978* (PNG), viewed at: [http://www.paclii.org/pg/legis/consol\\_act/ma1978118/](http://www.paclii.org/pg/legis/consol_act/ma1978118/)

<sup>8</sup> *Refugees Convention Act 2012* (Nauru), viewed at: [http://www.paclii.org/nr/legis/num\\_act/rca2012220/](http://www.paclii.org/nr/legis/num_act/rca2012220/)

The majority of asylum seekers who were transferred to Papua New Guinea and Nauru were assessed as refugees between late 2014 and early 2016. Yet most have not been resettled. In November 2016 Australia and the United States of America agreed on a refugee swap – the US would take up to 1,250 refugees from Manus and Nauru in exchange for Australia taking an unspecified number of central American refugees.<sup>9</sup> In almost two years, only some three hundred or so refugees from Manus Island and Nauru have been resettled in the US.

Approximately 1,500 refugees and asylum seekers remain trapped on Manus Island and Nauru. In Nauru, this number includes more than 100 children, some of whom have attempted suicide.<sup>10</sup> Some of the refugees on Manus and Nauru have close family in Australia. Every single one of these children, women and men are tortured. Everyone is ill. Polls in recent years show that the majority of Australians sympathise with their plight – two-thirds of Australians say they should be resettled and the New Zealand offer accepted,<sup>11</sup> and half of the Australian population think they should be brought to Australia.<sup>12</sup> Yet the Australian government continues to hold these people hostage because they say this deters others from paying people smugglers to come by boat to Australia. This is the basis of the '19 July' policy of deterrence that has bipartisan support in the Australian parliament.

We know about the endless abuse, violence and neglect that makes explicit the wrong upon wrong that '19 July' has inflicted on about two thousand refugees bound together in longstanding and, for most, ongoing, violation of their legal and human rights. This calculated cruelty continues to cause predictable and preventable death and suffering. Refugees themselves present compelling testimony to this – their bravery, resilience and sheer survival, as they endure this living nightmare, is expressed in hundreds of days of peaceful protests on Nauru<sup>13</sup> and Manus.<sup>14</sup> This testimony is vividly conveyed in their award winning achievements and galvanising works, including the prolific journalism, film making and literature of Behrouz Boochani, the 'Messenger' podcasts of Abdul Aziz Muhamat, the comics of 'Mr Eaten Fish' – Ali Durrani, the poetry of Ravi S Nagaveeran, the music of Farhad Bandesh and Mostafa Azimitabar, the writings of blogger Imran Mohammad, the speeches of Walid Zazai and Naeem Bangash, the paintings of Abbas al Aboudi, the calls in vain from the hearts of children to save their parents and siblings, the tweets of Shahriar Hatami, Nigel (Such a Human), FreethechildrenNauru, Omar Mohamed Jack and many more. Deeply felt bonds have also developed

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<sup>9</sup> Colin Packham, 'Exclusive: Australia to accept first Central American refugees under U.S. deal - sources', Reuters World News, 25 July 2017, viewed at: <https://www.reuters.com/article/us-usa-trump-australia-refugees/exclusive-australia-to-accept-first-central-american-refugees-under-u-s-deal-sources-idUSKBN1AAONO>

<sup>10</sup> Ben Doherty, 'Each time Australia delays bringing a sick child from Nauru, the stakes get higher', *The Guardian*, 12 July 2018, viewed at: <https://www.theguardian.com/australia-news/2018/jul/11/each-time-australia-delays-bringing-a-sick-child-from-nauru-the-stakes-get-higher>

<sup>11</sup> Elle Hunt, 'Two-thirds of Australians want Nauru and Manus refugees to be resettled, poll shows', *The Guardian*, 14 September 2016, viewed at: <https://www.theguardian.com/australia-news/2016/sep/14/two-thirds-believe-australia-should-resettle-refugees-in-detention-by-2017-poll>

<sup>12</sup> Michele Levine, 'Australians divided on whether asylum seekers on Manus Island and Nauru should be brought here to Australia', *Roy Morgan*, 23 February 2017, viewed at: <http://www.roymorgan.com/findings/7159-asylum-seekers-nauru-manus-island-february-2017-201702222052>

<sup>13</sup> 'Australian guards "hit children" at refugee detention camp', *The Observers*, 4 August 2016, viewed at: <http://observers.france24.com/en/20160408-video-nauru-migrants-violence-guards>

<sup>14</sup> 'Papua New Guinea refugees protest detention conditions', *Reuters Video*, 3 November 2017, viewed at: <https://www.reuters.com/video/2017/11/03/papua-new-guinea-refugees-protest-detent?videoid=372901848>

between the exiled refugees and many Australians who continue to stand up for their freedom and will not give up until hashtags #BringThemHere or #LetThemGo become reality for all.

The Australian government continues to justify its cruelty with the rhetoric that '19 July' policy – the blanket banishment of all asylum seekers who arrived to Australia from 19 July 2013 would never reside in Australia – is necessary to protect Australia's borders. Through changes of governments and leaderships, and in spite of the human cost to refugees who continue to die<sup>15</sup> and whose lives are being destroyed, the Australian Parliament as a whole pursues this cruel policy with hardened resolve, pig-headed stupidity, and blatant dishonesty.

#### 'Transitory persons' – how are asylum seekers affected under current Australian law?

Asylum seekers arriving to Australia who are transferred 'offshore' to Nauru and Manus Island not only suffer the trauma and harsh conditions of indefinite offshore detention. Another significant thing happens to them under Australian law. When a person is transferred to a regional processing country, under the current section 198AD of the *Migration Act 1958* (the Act), that person becomes classified as a 'transitory person'.

This legal concept of a 'transitory person' was introduced into Australian law during the 'Pacific Solution'<sup>16</sup> – the Australian government's policy response to asylum seekers arriving to Australia aboard the Tampa and other ships around August-September 2001. At that time the Australian government negotiated and signed agreements with Papua New Guinea and Nauru to hold asylum seekers on Manus Island in Papua New Guinea and in Nauru, for processing of their refugee claims. Under these agreements, asylum seekers would not be left behind in those countries.<sup>17</sup>

When the legal concept of a 'transitory person' was introduced into the Act in April 2002 it included, firstly, a new section 198B providing the power to bring a 'transitory person' from Papua New Guinea and Nauru to Australia for a temporary purpose. Secondly, the new section 198C gave the 'transitory person' the right after they had been in Australia for six months to request to be assessed as a refugee in Australia and to be issued a relevant Australian visa if found to be a refugee. This right under section 198C, however, was subject to a particular barrier or bar. Under a new section 46B a 'transitory person' who is an 'unlawful non-citizen' in Australia – meaning they do not have an Australian visa – is barred from making a valid application for a visa in Australia unless the Minister personally gives written notice to lift the bar to allow them to apply for a visa.

Of these April 2002 amendments – the section 198B power to bring a 'transitory person' to Australia and the section 46B bar preventing a 'transitory person' from applying for a visa unless the Minister lifts the bar – remain. However, the section 198C right of a 'transitory person' to request assessment as a refugee in Australia was omitted from the law on 1 June 2013.

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<sup>15</sup> Ben Doherty, 'Deaths in offshore detention: the faces of the people who have died in Australia's care', *The Guardian*, 20 June 2018. viewed at: [https://www.theguardian.com/australia-news/ng-interactive/2018/jun/20/deaths-in-offshore-detention-the-faces-of-the-people-who-have-died-in-australias-care?CMP=share\\_btn\\_fb](https://www.theguardian.com/australia-news/ng-interactive/2018/jun/20/deaths-in-offshore-detention-the-faces-of-the-people-who-have-died-in-australias-care?CMP=share_btn_fb)

<sup>16</sup> Janet Phillips, 'The 'Pacific Solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island', Parliament of Australia, Social Policy Section, 4 September 2012, viewed at: [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2012-2013/PacificSolution](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/PacificSolution)

<sup>17</sup> Commonwealth of Australia, *A Certain Maritime Incident*, Chapter 10 - Pacific Solution: Negotiations and Agreements, 23 October 2002, viewed at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Former\\_Committees/maritimeincident/report/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/report/index)

The effect of these 'transitory person' provisions took on a grave new dimension when the government announced its new policy on 19 July 2013, that asylum seekers arriving to Australia from that date onwards would never reside in Australia. Some 2,000 people in this new '19 July' cohort were transferred offshore to become 'transitory persons' by law, and exiled by policy. Families, women and children were transferred to Nauru, where there was no prohibition as there was in Papua New Guinea to send the youngest children and babies. Single men were transferred to Manus Island in Papua New Guinea. Some people were transferred offshore within days or weeks of arrival to Australia. Other people were transferred some months after arriving to Australia.

The 'processing' regime for this most unfortunate group of people was not just for a waiting period to process their refugee claims. Although the 'processing' arrangements mirrored the Australian refugee determination process and were managed and directed by Australian immigration authorities with Australian migration practitioners to assist applicants in the claims process, the end goal differed. In departure from all previous refugee determination processes managed by Australia, the '19 July' cohort would be assessed under the immigration laws of Nauru and Papua New Guinea, and people assessed as refugees would not be resettled in Australia.

However, not all of the '19 July' cohort were in fact transferred offshore even though they were subject to Australian law that they would be transferred offshore, never to resettle in Australia. Perhaps due to delays brought about by the pre-transfer assessment or logistics or political events, or maybe simply because the offshore camps were too full or too costly, some people in the '19 July' cohort were never actually transferred offshore and never became 'transitory persons' under Australian law.

It is important to note that some of the pre-transfer assessment criteria, such as consideration of family separation, was clearly not prioritised in a number of cases – families were separated when some family members were transferred offshore to become 'transitory persons', while other members of the same family unit remained in Australia. Many individuals who arrived together on the same boats at the same time were also variously transferred offshore to become 'transitory persons', or not.

#### Questions on notice

We are now going into the sixth year since '19 July' policy began. Senior Australian parliamentarians and officials evidently do not want to acknowledge or reveal the truth about what they are actually doing to people through the protracted adherence to this policy. Put bluntly, politicians and officials are lying to the Australian public.

At Senate budget estimates before the Legal and Constitutional Affairs Committee on Monday 21 May 2018, Senator Nick McKim asked questions that go to some of the lies about what we as a nation have done to people under '19 July' policy. Perpetuation of these lies is evident in the Hansard record of this Committee sitting:

- Commander of Operation Sovereign Borders, Air Vice Marshall Stephen Osborne talked up what he calls successes of '19 July' policy when he said that regional processing 'is underwritten by the quite clearly stated government position that anybody who comes illegally will never be resettled in Australia'.<sup>18</sup> This must be refuted. Firstly, the asylum

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<sup>18</sup> Commonwealth of Australia, *Hansard*, Senate, Legal and Constitutional Affairs Legislation Committee, Estimates (Public), Monday, 21 May 2018, Canberra, page 44, viewed at:

seekers the Commander refers to did not break any law by seeking asylum in Australia. Secondly, legality aside, some, perhaps many, of the asylum seekers the Commander refers to will resettle in Australia. This is already in process. Despite the 'never ever' rhetoric, the government has already enabled resettlement in Australia of some asylum seekers who arrived post 19 July 2013.

- Department of Home Affairs Secretary, Michael Pezzullo, and his staff, could not or would not respond to questions from Senator Nick McKim about numbers of boats and asylum seekers that arrived at different stages in offshore law and policy changes and where these people are now. Pezzullo and his staff gave incomplete and vague responses, and figures that were inconsistent with what they provided to the Committee previously in February 2018. Pezzullo agreed to clarify by taking the questions on notice. When McKim questioned whether about 1,300 people who arrived to Australia by boat after the policy changes were brought to Australia instead of being transferred offshore, Pezzullo answered 'no' and introduced an idea of 'three different inflection points for the policy change' that he said limited his ability to provide clear answers. He said that since the so-called third 'inflection point', when Tony Abbott was elected on 7 September 2013, everyone who arrived from that time on was sent offshore, but if he was wrong he would correct this.<sup>19</sup> He is wrong. We are yet to hear about his corrections. When McKim questioned this further by raising the point that refugees on Manus know others who arrived to Australia together with them on the same boats, but who are now living in the Australian community, Pezzullo said this was because they would have been brought back to Australia from Manus and Nauru for medical treatment.<sup>20</sup> This is also not a complete and correct answer. We are yet to hear about his corrections on this too. In addition to the 'transitory persons' who have been brought back to Australia for medical treatment, some people who arrived after 19 July 2013 and after Tony Abbott was elected on 7 September 2013 were never transferred offshore.
- The Chair of the Legal and Constitutional Affairs Committee, Senator Ian Macdonald, read aloud from a book titled *Manus Days: The Untold Story of Manus* which slandered the deceased Kurdish asylum seeker, Mr Reza Barati, by way of justifying his murder.<sup>21</sup> This 'story' was apparently written by a former soldier under the pen name Michael Coates, who was employed as a security guard on Manus Island – he was employed as member of a team of local and expat staff who were involved in Reza Barati's murder.<sup>22</sup> This 'story' – by someone who may have been involved in Reza's murder, who worked with or may know the murderers, and will not even declare his true identity – is a preferred source of truth of the Chair of the Australian Government Senate Legal and Constitutional Affairs Committee. Moreover, the Chair referred to *The Forgotten Children* report of the Human Rights Commission, resulting from the National Inquiry into Children in Immigration Detention 2014,<sup>23</sup> as being full of errors, and 'hence why none of us bothered to read it or follow it. But

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<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F0490c3ad-512d-453c-8526-3dff9705b43c%2F0000%22>

<sup>19</sup> *Ibid*, page 63.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid*, page 107.

<sup>22</sup> Eric Tlozek, 'Reza Barati death: Two men jailed over 2014 murder of asylum seeker at Manus Island detention centre', *ABC News*, 19 April 2016, viewed at: <http://www.abc.net.au/news/2016-04-19/reza-barati-death-two-men-sentenced-to-10-years-over-murder/7338928>

<sup>23</sup> Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, 2014, viewed at: <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children>

that's old history.'<sup>24</sup> This is an extraordinary statement – the children and their families remaining trapped on Nauru would not consider their predicament to be 'old history'. The Chair then refers to a report of Amnesty International by saying: 'And, again, as with the Human Rights Commission report on children in detention, I don't think I'd bother reading it, because clearly they haven't sought the facts—confirmation from the only people who have the facts, which is the department.'<sup>25</sup> It is no doubt true that the Department has the facts. The problem is that the Department has not presented these facts fully and truthfully. And the Chair of the Committee remains apparently content that he is not informed of the facts held by the Department. This is our government at work.

In response to Commander of Operation Sovereign Borders, Air Vice Marshall Stephen Osborne's lie that anybody who comes 'illegally' will never be resettled in Australia, in the absence of Department of Home Affairs Secretary, Michael Pezzullo's correct response to McKim's questions taken on notice, and in the face of the Chair of the Legal and Constitutional Affairs Committee, Senator Ian Macdonald's slander and ignorance, let us begin to piece together some of the facts from available information.

#### '19 July' policy of deterrence – what actually happened?

Since 19 July 2013, certain events have affected those who arrived from that date in different ways. Many of this '19 July' cohort remain in limbo on Manus and Nauru. Many others are in Australia – some were never transferred offshore to Manus or Nauru, and some were transferred offshore but were brought back to Australia and still remain in Australia. Some of this is not clear. The official rhetoric is that everyone in this cohort was transferred offshore. This rhetoric has overshadowed the truth. In fact it is a lie. As Senator Macdonald says, the Department has the facts. But it is not straightforward extracting these facts from the Department. This is evident in the very Senate estimates hearing chaired by Senator Macdonald on 21 May 2018, referred to above, when the Department did not provide the facts requested by Senator McKim.

Some facts were provided at the 21 May 2018 Senate estimates, such as the total of 460 'transitory persons' as of that date who were transferred back to Australia from Manus Island and Nauru for medical reasons, and who remain in Australia.<sup>26</sup> This number is growing, most recently with very ill and suicidal child refugees from Nauru.<sup>27</sup>

The refugees who have been returned to Australia from Nauru have been through the Nauruan refugee determination process. Their refugee status was determined either while they were still in Nauru, or in Australia after being transferred back to Australia for medical treatment. These 'transitory persons' from Nauru, whose refugee claims were assessed in Australia, were still assessed under Nauruan law. Interestingly, all of these 'transitory persons' from Nauru who were assessed in Australia under Nauruan law were found to be refugees. Yet they had been pre-warned, when invited to proceed with their refugee application process in Australia, that: 'Being determined to be

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<sup>24</sup> Commonwealth of Australia, *Hansard*, Senate, Legal and Constitutional Affairs Legislation Committee, Estimates (Public), Monday, 21 May 2018, Canberra, page 125, viewed at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F0490c3ad-512d-453c-8526-3dff9705b43c%2F0000%22>

<sup>25</sup> *Ibid*, page 126.

<sup>26</sup> *Ibid*, page 57.

<sup>27</sup> Ben Doherty, 'Each time Australia delays bringing a sick child from Nauru, the stakes get higher', *The Guardian*, 12 July 2018, viewed at: <https://www.theguardian.com/australia-news/2018/jul/11/each-time-australia-delays-bringing-a-sick-child-from-nauru-the-stakes-get-higher>

a refugee by Nauru means that your family would be eligible for resettlement in a third country such as the USA or Cambodia. However, it would not change your family's status under Australian law.'

Many of the asylum seekers and refugees who were transferred back to Australia from Manus Island came for treatment of serious injuries, including a bullet wound, a lost eye and a cut throat,<sup>28</sup> at the same time Reza Barati was murdered on 17 February 2014. They were brutally beaten, knifed, bludgeoned and shot at by local and expat security guards at that time.

These 'transitory persons' who are now in Australia are still subject to the '19 July' never-ever-resettle-in-Australia regime but have sought injunctions against their removal back to Manus Island and Nauru. Some remain in closed 'onshore' detention centres. Most are living in the Australian community – their immigration status in Australia is either by way of community detention orders or bridging visas granted on the basis that they are preparing to depart Australia, even despite that many of them are determined to be refugees.

Central to many of the injunctions preventing removal of those who are still subject to being sent back to Nauru was a pending decision in the M68 High Court matter, in which the lead plaintiff challenged whether her detention on Nauru was Constitutional.<sup>29</sup> On 3 February 2016, the High Court decided against the M68 plaintiff.<sup>30</sup> However, the impact of the case remains significant in a number of ways. It helped to expose the cruelty of the system and galvanised the Australian community in its successful 'Let Them Stay' campaign.<sup>31</sup> Around the same time, on 26 April 2016, the Supreme Court of Papua New Guinea ruled that Australia's holding of asylum seekers and refugees on Manus Island was unconstitutional and a breach of their human rights.<sup>32</sup> This also hampered Australia's ability to return 'transitory persons' to Manus Island.

Through these tensions, the Department has given an undertaking to some 460 'transitory persons' in Australia but still subject to the '19 July' regime that it will give 72 hours' notice of an intention to remove them from Australia back to Manus Island or Nauru, in which time they may seek an injunction to prevent their removal.

These are not the only people in the '19 July' cohort who are in Australia. The facts about others remaining in Australia are obscured. As outlined above, at Senate budget estimates on 21 May 2018 Senator McKim asked whether 1,300 people who had arrived to Australia by boat after the policy changes were brought to Australia instead of being transferred offshore. Pezzullo answered 'no', but said he would correct this if he is wrong. He is wrong. We are still waiting for his correction. Some light may be shed on this here and now.

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<sup>28</sup> Michael Gordon, 'Manus Island: asylum seeker who lost eye in riot has claim against government, G4S settled', *The Sydney Morning Herald*, 18 December 2015, viewed at: <https://www.smh.com.au/politics/federal/government-security-firm-settle-manus-damages-claim-20151218-glqxot.html>

<sup>29</sup> Case M68/2015, *Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Ors*, viewed at: [http://www.hcourt.gov.au/cases/case\\_m68-2015](http://www.hcourt.gov.au/cases/case_m68-2015)

<sup>30</sup> *Plaintiff M68-2015 v Minister for Immigration and Border Protection [2016] HCA 1* (3 February 2016), viewed at: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2016/1.html>

<sup>31</sup> Thomas Oriti, 'Let Them Stay labelled a success, more than half of 267 asylum seekers in community detention', *ABC News*, 2 April 2016, viewed at: <http://www.abc.net.au/news/2016-04-02/let-them-stay-labelled-success-asylum-seeker-community-detention/7294456>

<sup>32</sup> *Namah v Pato [2016] PGSC 13; SC1497* (26 April 2016), viewed at: <http://www.paclii.org/pg/cases/PGSC/2016/13.html>

In February 2014, the Government released on the Department of Immigration and Border Protection website the personal information of 9,258 asylum seekers in immigration detention in Australia as of 31 January 2014.<sup>33</sup> This breach of the privacy of those affected, and the breach of Australia's privacy laws, became known as the major immigration privacy or data breach and was subject to investigation by the Office of the Australian Information Commissioner (OAIC).<sup>34</sup>

This privacy breach raised serious questions about whether those affected were now placed at risk by the Department if they were to be returned to their country of origin. In addition to the OAIC's investigation into the privacy breach, thousands of affected asylum seekers became party to a complaint lodged with the OAIC. Their complaint sought resolution that they be granted protection in Australia due to the danger placed upon them by the privacy breach. This breach of privacy included some of the '19 July' cohort who were detained in Australia on 31 January 2014 – some who had not yet been transferred to Manus or Nauru, and some 'transitory persons' who had been brought back to Australia from Manus and Nauru for medical reasons. To my knowledge, some people in the '19 July' cohort affected by this privacy breach have not been transferred to Manus and Nauru since the privacy breach. On lodging their complaints about the privacy breach, people subject to being sent or returned offshore looked to the OAIC who was confident that everyone affected by the privacy breach would have the right to apply for protection in Australia. According to the government's official figures of people sent to Manus Island and Nauru<sup>35</sup> from the critical date of the privacy breach – 31 January 2014 – it seems possible that some people exposed to the privacy breach could have been sent offshore.

Around August-September 2014, other events impacted the '19 July' cohort still being held in 'onshore' Australian immigration detention and had not been transferred 'offshore'. At North West Point on Christmas Island, tension had been brewing between men of the '19 July' cohort who were subject to being transferred to Manus Island and to never resettle in Australia, and the 'pre-19 July' cohort who were still being threatened with the possibility of being sent to Manus while they were waiting to be 'processed' for resettlement in Australia. Some men in the '19 July' cohort had been protesting against their impending transfer to Manus Island and wanted others to join the protests.

On 5 September 2014, these tensions erupted in violence between Iranian and Vietnamese men detained at North West Point.<sup>36</sup> This was on the day news broke<sup>37</sup> of the tragic and avoidable death

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<sup>33</sup> Oliver Laughland, Paul Farrell and Asher Wolf, 'Immigration Department data lapse reveals asylum seekers' personal details', *The Guardian*, 19 February 2014, viewed at: <https://www.theguardian.com/world/2014/feb/19/asylum-seekers-identities-revealed-in-immigration-department-data-lapse>

<sup>34</sup> Office of the Australian Information Commissioner, *Department of Immigration and Border Protection: Own motion investigation report*, November 2014, viewed at: <https://www.oaic.gov.au/privacy-law/commissioner-initiated-investigation-reports/dibp-omi>

<sup>35</sup> 'Operation Sovereign Borders: log of boat arrivals and other asylum seeker incidents', *ABC News*, 9 May 2016, first posted 25 October 2013, viewed at: <http://www.abc.net.au/news/2013-10-25/log-of-boat-arrivals-and-other-asylum-seeker-incidents/5014496>

<sup>36</sup> Alexandra Fisher, 'Vietnamese asylum seekers say dozens hurt in targeted attack at Christmas Island centre, Scott Morrison says claims 'grossly inaccurate'', *ABC News*, 8 September 2014, viewed at: <http://www.abc.net.au/news/2014-09-08/christmas-island-detainees-allege-attacks/5726136>

<sup>37</sup> Sarah Whyte, 'Second death: Manus detainee Hamid Kehazaei has life support switched off', *The Sydney Morning Herald*, 5 September 2014, viewed at: <https://www.smh.com.au/politics/federal/second-death-manus-detainee-hamid-kehazaei-has-life-support-switched-off-20140905-10d2II.html>

of Hamid Kehzaei<sup>38</sup> who died from an infected scratch on his foot that developed into septicaemia before his delayed evacuation from Manus Island to Brisbane.<sup>39</sup> Some 17 men involved in the fight at North West Point on the day of Hamid's death, including about 10 Iranians who were part of the '19 July' cohort, were identified on CCTV footage and charged with criminal offences. They remained in detention in Australia while their court proceedings dragged on for years. By about early 2016, all of the Iranians had been released from detention on bridging visas after they pleaded guilty to a minor charge of being involved in unlawful assembly and their court proceedings were resolved. They did not become 'transitory persons' under Australian law.

On 11 September 2014, a unanimous decision of the High Court set limits on Australia's mandatory detention laws.<sup>40</sup> The case challenged the Government's determination to deny permanent protection to asylum seekers arriving to Australia by boat. The government was instead granting a form of temporary protection visa to people who had made valid applications for permanent protection visas. The plaintiff had applied for a permanent protection visa. He contested the Government's grant of a temporary safe haven visa valid for seven days and a temporary humanitarian concern visa valid for three years after holding him in immigration detention for more than two years for 'processing' while he was actually ready to be granted a visa. Relevantly, the High Court not only ruled against the grant of the temporary visas, but also set out the constitutional limits on immigration detention.<sup>41</sup> The decision ruled that the government can only lawfully detain someone for as long as reasonably practicable to consider whether or not to let someone apply for a visa, to consider an application for a visa, or to remove someone. If none of these three processes were taking place, detention was ruled unlawful.

In the weeks and months following this High Court decision, the Government granted bridging visas to hundreds of asylum seekers and released them from detention. They had been detained for between one and two years or more, and included some in the '19 July' cohort who had not yet been transferred offshore. The 'pre 19 July' cohort had been languishing in detention through deliberate delays to processing their claims, firstly under the 'no advantage' policy of the former Gillard-Rudd Labor government and then through the Abbott Liberal government's frustrated efforts, to that point in time, to introduce some form of temporary protection visas. The '19 July' cohort who remained in Australian detention at that time simply had no process in place for their protection claims.

The Government remained determined not to grant permanent protection to asylum seekers arriving to Australia by boat, and began work on legislative amendments for temporary protection visas and a new assessment process for asylum seekers who had arrived to Australia by boat and were still waiting to make their protection claims through a refugee determination process.

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<sup>38</sup> Stefan Armbruster, 'Khzaei inquest: Hamid's death linked to 'deficient' emergency evacuation policy', *SBS News*, 15 February 2017, viewed at: <https://www.sbs.com.au/news/khzaei-inquest-hamid-s-death-linked-to-deficient-emergency-evacuation-policy>

<sup>39</sup> Ben Doherty, 'Hamid Kehzaei left critically ill on Manus because Australia delayed transfer, inquest told', *The Guardian*, 30 November 2016, viewed at: <https://www.theguardian.com/australia-news/2016/nov/30/hamid-kehzaei-left-critically-ill-on-manus-because-australia-blocked-transfer>

<sup>40</sup> *Plaintiff S4-2014 v Minister for Immigration and Border Protection [2014] HCA 34* (11 September 2014), viewed at: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2014/34.html>

<sup>41</sup> Joyce Chia, 'High court verdict spells the end for Australian immigration detention as we know it', *University of New South Wales Newsroom*, 11 September 2014, viewed at: <https://newsroom.unsw.edu.au/news/law/high-court-verdict-spells-end-australian-immigration-detention-we-know-it>

In the early hours of the morning on 5 December 2014, after prolonged debates in the Senate through the night before, the Government sealed a deal with Senator Ricky Muir<sup>42</sup> to pass the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*.<sup>43</sup> The Bill would introduce greater ministerial powers for intercepting, detaining and removing asylum seekers at sea. It would also create law to grant a new class of temporary protection visas through a 'fast track' assessment process for the so-called legacy caseload of asylum seekers who had arrived to Australia by boat and whose claims the Government was not processing until it could grant temporary visas. The Bill has been described as introducing some of the 'draconian pieces of refugee legislation ever to be introduced into the Australian Parliament'.<sup>44</sup> It also created Australian law that circumvents Australia's obligations under international law to uphold the fundamental *non-refoulement* principle of refugee law and the UN Refugee Convention – that is the principle that forbids returning people to where they may be persecuted or tortured.<sup>45</sup>

When the Senate was evenly divided except for the one deciding vote of Senator Ricky Muir, the Government secured Senator Muir's vote in exchange for promising to release children from detention on Christmas Island by Christmas day. The deal also included something for 'transitory person' families in the '19 July' cohort who had been brought to Australia from Nauru for the birth of their babies, whose babies were born in Australia before 4 December 2014, and who were still in detention in Australia. The government agreed that these families were allowed to remain in Australia, would be exempt from the '19 July' offshore regime, and included in the fast track assessment process to be assessed for temporary protection in Australia.<sup>46</sup>

Also of relevance to the '19 July' cohort in this 'Ricky Muir deal', among the children in detention on Christmas Island at that time were some whose families were subject to the '19 July' policy, but had not yet been transferred 'offshore' to Nauru. There were also some single men detained on Christmas Island at that time, who were subject to the '19 July' policy, but had not yet been transferred 'offshore' to Manus Island – some were adult brothers and uncles of the family groups at Christmas Island who were also subject to the '19 July' policy. Although these people were out of sight and out of mind on Christmas Island, they were not yet 'transitory persons' under Australian law.

This group included families with children detained on Christmas Island who had indeed arrived at the same time on the same boats as people who had already been transferred to Manus Island and Nauru. They became part of the 'Ricky Muir deal' and were released from detention by Christmas day and included in the fast track application process to be assessed for temporary protection in Australia.

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<sup>42</sup> Louise Yaxley, Jane Norman and Jonathon Gul, 'Temporary protection visas: Senate votes to bring back temporary visas after deal to get children off Christmas Island', *ABC News*, 5 December 2014, viewed at: <http://www.abc.net.au/news/2014-12-05/senate-agrees-to-reintroduce-temporary-protection-visas/5945576>

<sup>43</sup> *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, viewed at:

[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r5346](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5346)

<sup>44</sup> Jane McAdam, 'One step forward, many steps back for refugees', *ABC News*, 3 December 2014, viewed at:

<http://www.abc.net.au/news/2014-12-03/mcadam-one-step-forward-many-steps-back-for-refugees/5936960>

<sup>45</sup> Don McMaster, 'New law gives Morrison unprecedented control over asylum seekers', *The Conversation*, 6 December 2014, viewed at: <https://theconversation.com/new-law-gives-morrison-unprecedented-control-over-asylum-seekers-35106>

<sup>46</sup> Paul Farrell, 'Some babies born to asylum seekers in Australia may be allowed to stay', *The Guardian*, 18 December 2014, viewed at: <https://www.theguardian.com/australia-news/2014/dec/18/some-babies-born-asylum-seekers-australia-may-allowed-stay>

Likewise, many of the single men in the '19 July' cohort remaining on Christmas Island who had arrived at the same time on the same boats as people who had already been transferred to Manus Island and Nauru were also included in the fast track process for temporary protection in Australia. Most of these people were released from detention and have been living in the Australian community since then. Whether this occurred as part of the mix of the Ricky Muir deal, or whether in response to the High Court ruling that limited mandatory detention, or whether it was perhaps due to a confusion of factors, is unclear. What is clear, however, is that these people also became exempt from the 'offshore' regime and remain exceptions to the '19 July' policy and rhetoric that anyone who arrived after 19 July 2013 would never resettle in Australia. In fact, these people were allowed to remain in Australia and were allowed to apply for temporary protection in the fast track process as part of the 30,000 odd 'legacy caseload' who had to submit their visa application by 1 October 2017. Most of them applied for temporary protection while living in the Australian community on bridging visas. However, some who remained in Australian detention were also invited to apply for temporary protection in Australia. No doubt some have already been granted temporary protection visas or safe haven enterprise visas, some may have been refused visa grant and could be in a review and appeal process, and some would still be waiting for the Department to assess their claims.

All of these different groups of people that arrived from 19 July 2013 but are in Australia comprise a significant number of people. Possibly as many as 1,300 as Senator McKim queried. We await Pezzullo's clarification of the facts that the Department holds, as ascertained by Chair of the Legal and Constitutional Affairs Committee Senator MacDonald.

#### Political background – how did we get here?

The particular cruelty of '19 July' policy is not a sudden or big departure from previous ways Australia has responded to refugees seeking asylum in Australia. Australia's 'off-shore processing' of asylum seekers – imprisoning men, women and children in remote locations and torturous conditions<sup>47</sup> that brutalise<sup>48</sup> and harm<sup>49</sup> all involved – was not new on 19 July 2013.

Since 1992, the then new laws of mandatory detention<sup>50</sup> have inflicted years of untold suffering on asylum seekers arriving to Australia by boat. Under mandatory detention, asylum seekers were first held at remote parts of Western Australia and South Australia. The first camp was set up at a disused mining camp in Port Hedland in Western Australia.<sup>51</sup> After that we created the notorious 'psychiatric catastrophe' at the Royal Australian Airforce Base at Curtin in Western Australia.<sup>52</sup> There were also

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<sup>47</sup> Australian Human Rights Commission, *A last resort? report of the National Inquiry into Children in Immigration Detention*, 2004, viewed at: <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/projects/last-resort-report-national-inquiry-children>

<sup>48</sup> 'Detention centre staff 'cracked' under conditions', *ABC News*, 16 September 2008, viewed at: <http://www.abc.net.au/news/2008-09-15/detention-centre-staff-cracked-under-conditions/511216>

<sup>49</sup> Michelle Grattan, 'Hundreds in detention attempt self-harm', *The Age*, 19 September 2005, viewed at: <https://www.theage.com.au/national/hundreds-in-detention-attempt-self-harm-20050919-ge0w8p.html>

<sup>50</sup> Janet Phillips and Harriet Spinks, *Immigration detention in Australia*, Parliament of Australia, Social Policy Section, 20 March 2013, viewed at:

[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2012-2013/Detention](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Detention)

<sup>51</sup> 'Port Hedland Detention Centre: Carmen's eye witness report', *The Sydney Morning Herald*, 2 September 2003, viewed at: <https://www.smh.com.au/opinion/port-hedland-detention-centre-carmens-eye-witness-report-20030902-gdhhbqh.html>

<sup>52</sup> 'Hope turns to dust in the middle of nowhere', *The Sydney Morning Herald*, 3 May 2010, viewed at: <https://www.smh.com.au/national/hope-turns-to-dust-in-the-middle-of-nowhere-20100502-u1ja.html>

the Department of Defence sites in South Australia at Woomera<sup>53</sup> in the desert near the prohibited site of 1950s and 1960s British nuclear bomb tests, and at Baxter<sup>54</sup> near Port Augusta where Australian resident Cornelia Rau was unlawfully detained and harmed for several months.<sup>55</sup> Riots and demonstrations<sup>56</sup> were eventually followed by closures. These remote locations are just some of the many mainland sites loaded with histories of detaining and tormenting asylum seekers out of sight and out of mind of the general public.

Australia established its first island prisons for refugees on Christmas Island, on the land of a phosphate mining lease, where Australia has detained asylum seekers since late 2001. In 2003 Australia officially opened an immigration detention centre on the island. Although Christmas Island is just south of the equator in the distant Indian Ocean 2,605 kilometres north-west of the Perth, the island is Australian territory and described officially as an 'onshore' immigration detention location.<sup>57</sup> A number of detention centres have been variously built, moth-balled, destroyed in fire and riots, closed and reopened on Christmas Island. Its history of protest and harm of asylum seekers,<sup>58</sup> including a suspicious death,<sup>59</sup> matches or surpasses other Australian places of detention of refugees.

Christmas Island is close to Asia, and its people and culture are rich in Asian heritage – their languages, religions, performing arts and culinary practices are alive. Yet this is subsumed under the dominant Euro-Australian culture and establishment. Local people of Asian backgrounds who work in what has been described as apartheid like conditions<sup>60</sup> in the phosphate mines achieved equitable pay and conditions as late as the 1990s. The significance of this is nowhere more evident than annual workers day when the whole island comes together for cultural feasting and festivities that celebrate the diverse Asian heritages of the islanders, with stunning performances of Malay drummers, Chinese singers, Muslim Indonesian dancers and more.

With its close proximity to Asia, and as an arrival point for refugees desperate to reach Australian territory, Christmas Island served as a stepping stone for Australia to shift its immigration detention regime from remote 'onshore' locations to 'offshore' and 'regional' island prisons where Australia subjects local islander peoples and smaller sovereign states to a kind of neo-colonialism. Christmas Island remains a key part of Australia's immigration detention network. The currently operating

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<sup>53</sup> Ramesh Fernandez, 'Others need not suffer my living hell', *The Sydney Morning Herald*, 20 April 2013, viewed at: <https://www.smh.com.au/opinion/others-need-not-suffer-my-living-hell-20130419-2i5nf.html>

<sup>54</sup> 'Baxter Detention Centre to close in SA', *The Sydney Morning Herald*, 17 August 2007, viewed at: <https://www.smh.com.au/national/baxter-detention-centre-to-close-in-sa-20070817-tsz.html>

<sup>55</sup> Robert Manne, 'The unknown story of Cornelia Rau', *The Monthly*, September 2005, viewed at: <https://www.themonthly.com.au/monthly-essays-robert-manne-unknown-story-cornelia-rau-often-she-cried-sometimes-she-screamed-she-be>

<sup>56</sup> 'Three arrests in Baxter protest', *The Age*, 19 April 2003, viewed at: <https://www.theage.com.au/national/three-arrests-in-baxter-protest-20030419-gdvkgi.html>

<sup>57</sup> Giselle Wakatama, 'Christmas Island detention centre transfers raise doubts about timeline for closure', *ABC News*, 6 April 2018, viewed at: <http://www.abc.net.au/news/2018-04-06/christmas-island-detention-centre-transfers-raise-closure-doubts/9621626>

<sup>58</sup> Megan Mackander, 'Timeline: Christmas Island Detention Centre unrest', *ABC News*, 23 February 2018, viewed at: <http://www.abc.net.au/news/2015-11-09/timeline-incidents-of-protesting,-rioting-on-christmas-island/6923318>

<sup>59</sup> Lisa Cox, 'Riot breaks out at Christmas Island detention centre after detainee death: reports', *The Sydney Morning Herald*, 9 November 2015, viewed at: <https://www.smh.com.au/politics/federal/riot-breaks-out-at-christmas-island-detention-centre-after-detainee-death-reports-20151109-gktwam.html>

<sup>60</sup> Mathew Kelley, *Big Brother of Christmas Island*, National Film and Sound Archive of Australia, 1999, viewed at: <https://www.kanopy.com/product/big-brother-christmas-island>

detention centre at North West Point is slated, once again, for closure<sup>61</sup> and 'contingency'<sup>62</sup> in the coming months. Whether it does close or not, Immigration presence on the island will no doubt remain, including at the Commonwealth yards on Phosphate Hill where former PM Tony Abbott's obsolete Operation Sovereign Borders disposable one-time-use-\$70k-a-pop orange fibreglass 'turn-back' lifeboats<sup>63</sup> are stored. (It's not easy to get big pieces of rubbish off an island.) This is just a stone's throw from the moth-balled Construction Camp<sup>64</sup> – where until Christmas 2014 families with children were virtually caged, where almost all children were sick,<sup>65</sup> where many children had no education for more than a year,<sup>66</sup> and where some children<sup>67</sup> were possibly sexually assaulted<sup>68</sup> – ready for contingency. This 'contingency' camp was used to literally cage men for some days, with no facilities of any kind, after riots and arson at North West Point in November 2015, in the wake of the mysterious death of Fazel Chegeni.<sup>69</sup> Fazel was a Kurdish refugee who had been re-detained at Minister Peter Dutton's discretion. Fazel was not the first or last refugee to die as a direct result of the specific pressures in Australia's refugee processing and detention regime.<sup>70</sup>

Amidst all of this, amidst Australia's ever-increasingly brutal and thoroughly inhumane 'onshore' immigration detention system, the significance of '19 July' is not obvious. Holding refugees and asylum seekers on Manus Island and Nauru as hostages to a policy of deterrence is the worst extreme of our dreadful system. Yet the terrible deaths and suffering of refugees 'offshore' in a drawn out and cruel 'processing' regime runs in tandem with Australia's 'onshore' refugee 'processing'.

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<sup>61</sup> *Ibid.*

<sup>62</sup> Department of Home Affairs, 'Closure of additional immigration detention facilities', 2018, viewed at: <https://www.homeaffairs.gov.au/about/immigration-detention-in-australia/locations/closure-of-detention-facilities>

<sup>63</sup> Paul Toohey and Cindy Wockner, 'Vietnamese fishing boats latest weapon in fight to stop asylum seekers from reaching Australia', *News.com.au*, 13 November 2015, viewed at: <https://www.news.com.au/national/vietnamese-fishing-boats-latest-weapon-in-fight-to-stop-asylum-seekers-from-reaching-australia/news-story/8e589638e0fee6d9898bef731be45d55>

<sup>64</sup> Daniel Hurst, 'Christmas Island detention centres to close as part of immigration savings', *The Guardian*, 12 May 2015, viewed at: <https://www.theguardian.com/australia-news/2015/may/12/christmas-island-detention-centres-to-close-as-part-of-immigration-savings>

<sup>65</sup> Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, 2014, viewed at: <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children>

<sup>66</sup> Ben Doherty, 'Children in detention exposed to danger, Human Rights Commission finds', *The Guardian*, 11 February 2015, viewed at: <https://www.theguardian.com/australia-news/2015/feb/11/children-in-detention-scathing-criticism-in-human-rights-commission-report>

<sup>67</sup> Sarah Whyte, 'Detention centre child sex abuse claims number in dozens', *The Sydney Morning Herald*, 30 September 2014, viewed at: <https://www.smh.com.au/politics/federal/detention-centre-child-sex-abuse-claims-number-in-dozens-20140930-10o7pv.html>

<sup>68</sup> *Ms AR on behalf of Mr AS, Master AT and Miss AU v Commonwealth (DIBP) - Report into protection from sexual abuse, arbitrary detention and interference with family*, Australian Human Rights Commission, 2016, viewed at: [https://www.humanrights.gov.au/sites/default/files/document/publication/MsAR\\_v\\_DIBP\\_2016\\_AusHRC110.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/MsAR_v_DIBP_2016_AusHRC110.pdf)

<sup>69</sup> Lisa Cox, 'Riot breaks out at Christmas Island detention centre after detainee death: reports', *The Sydney Morning Herald*, 9 November 2015, viewed at: <https://www.smh.com.au/politics/federal/riot-breaks-out-at-christmas-island-detention-centre-after-detainee-death-reports-20151109-gktwam.htmls>

<sup>70</sup> Marie Segrave, Sharon Pickering and Leanne Weber, *Documenting border-related refugee deaths in Australia*, Monash University, 7 December 2017, viewed at: <https://lens.monash.edu/@politics-society/2017/12/06/1235004/documenting-border-related-refugee-deaths-in-australia>

No government authority collects information about deaths related to Australia's border protection policies. An independent database set up by Monash University criminologists has documented, to date, 52 people who have died in onshore and offshore immigration detention since 1 January 2000.<sup>71</sup> Although the most recent deaths are mainly in offshore camps, most of these people have actually died in onshore detention. Many more 'border deaths' – that is people who have died through 'a broader part of the border management regime'<sup>72</sup> – occurred in recent years in the Australian community. The deaths of Hazara man Khodayar Amini and Sri Lankan man Leo Seemanpillai while living on bridging visas in the community in Victoria, in 2015 and 2014 respectively, come to mind – they both set themselves on fire in apprehension of decisions and possible re-detention or deportation relating to decisions on their refugee applications.

Moreover, the '19 July' policy of exile to 'offshore' prison camps introduced in 2013 was not entirely new nor shocking to many Australians. The die had been cast long before through the October 2001 federal election. Then Prime Minister John Howard clung to power in the wake of the Tampa crisis<sup>73</sup> when his Government wilfully misled the Australian people on the eve of a Federal election that refugees aboard 'SIEV 4' (Suspected Illegal Entry Vehicle 4) had thrown their children overboard.<sup>74</sup> He launched the 'Pacific Solution' – asylum seekers who arrived to Australia by boat were sent to Manus Island in Papua New Guinea and Nauru for 'processing'. In that 'process', asylum seekers were sent to offshore immigration prisons on Manus and Nauru. But this was not a policy of permanent exile. The policy of deterrence from that time intended that asylum seekers were held offshore for 'processing' their refugee claims. Those determined to be refugees in this 'process' could be resettled in Australia.<sup>75</sup>

The 'Pacific Solution' was contentious policy<sup>76</sup> and practice that many Australians abhorred. Its legality<sup>77</sup> and morality<sup>78</sup> were subject to widespread criticism.<sup>79</sup>

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<sup>71</sup> Border Crossing Observatory, *Australian Border Deaths Database*, Monash University, current as of July 2018, viewed at: <https://arts.monash.edu/social-sciences/border-crossing-observatory/australian-border-deaths-database/>

<sup>72</sup> Marie Segrave, Sharon Pickering and Leanne Weber, *Documenting border-related refugee deaths in Australia*, Monash University, 7 December 2017, viewed at: <https://lens.monash.edu/@politics-society/2017/12/06/1235004/documenting-border-related-refugee-deaths-in-australia>

<sup>73</sup> Andrew and Renata Kaldor Centre for International Law, 'The Tampa affair: 15 years on', University of New South Wales, 25 August 2016, viewed at: <http://www.kaldorcentre.unsw.edu.au/news/tampa-affair-15-years>

<sup>74</sup> Commonwealth of Australia, *A Certain Maritime Incident*, Chapter 6 - The Failure to Correct the Record, 23 October 2002, viewed at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Former\\_Committees/maritimeincident/report/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/report/index)

<sup>75</sup> Janet Phillips, 'The 'Pacific Solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island', Parliament of Australia, Social Policy Section, 4 September 2012, viewed at: [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2012-2013/PacificSolution](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/PacificSolution)

<sup>76</sup> Andrew Hewett and Kate Gauthier, 'Six years on, Pacific Solution a big problem', *ABC News*, 30 August 2007, viewed at: <http://www.abc.net.au/news/2007-08-30/six-years-on-pacific-solution-a-big-problem/655368>

<sup>77</sup> Rachel Mansted, 'The Pacific Solution - Assessing Australia's Compliance with International Law', *Bond University Law Review*, Volume 3, Issue 1, 2007, viewed at: <https://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1000&context=buslr>

<sup>78</sup> Andrew Hewett and Kate Gauthier, 'Six years on, Pacific Solution a big problem', *ABC News*, 30 August 2007, viewed at: <http://www.abc.net.au/news/2007-08-30/six-years-on-pacific-solution-a-big-problem/655368>

<sup>79</sup> Australian Catholic Social Justice Council, 'Discussion Guides - The 'Pacific Solution'', Australian Catholic Bishops Conference, 2002, viewed at: <http://www.socialjustice.catholic.org.au/publications/discussion-guides/134-the-pacific-solution>

With the political rise of 'Kevin 07', Kevin Rudd finally delivered government to the Labor Party in 2007, after 11 long years of John Howard's Liberal government. Buoyed by his extraordinary popularity and driven by his seemingly high principles, PM Rudd 'mark 1' abolished John Howard's offshore 'processing' regime with a new humanitarian approach to refugees that fitted his seemingly nuanced internationalist outlook. He held steadfast to this approach throughout his first stint as Prime Minister. Yet as Rudd's popularity soon declined both in the general voting public, and particularly within the Labor Party, Rudd's hold on the Party leadership was coming unstuck. Despite internal Labor Party moves against his leadership and the tendency of some in the Labor Party to pander to xenophobia and fear of asylum seekers arriving in boats, Rudd held tight.

On 23 June 2010, the very night before an internal Labor Party leadership challenge, Rudd promised, 'If I return as the leader of the Government and Prime Minister, I will be very clear of one thing, this party and Government will not be lurching to the right on the question of asylum seekers'.<sup>80</sup>

On 24 June 2010, Rudd resigned from the leadership when it was clear he did not have the numbers to contest the party leadership ballot. Julia Gillard won the leadership unopposed, owing her new Prime Ministership not to the people of Australia, but to supporters within the parliamentary party whose votes were delivered to her by 'factional Labor Party warlords'.<sup>81</sup> Notably, this included rising right-wing powerbroker Bill Shorten, who clearly had his own ambition to be Prime Minister.

Everyone has a view about this. Mine is that Shorten had to speed up the leadership cycle of the Labor Party. General wisdom at the time held that Rudd's popularity would deliver him a second term in office, followed by rising star, Deputy PM Julia Gillard to whom, rumour had it, Rudd had promised would be next in line for the leadership and likely Prime Ministership. This could have taken a decade or more, and would likely be followed by maybe another decade of Liberal government. By this time Shorten would no longer be in good time for a shot at the Prime Ministership. In my view, Shorten's ambition meant he had a vested interest, if not a hand in, the declining popularity of Kevin 07 (before he could become Kevin 11). The sooner Rudd's leadership was done with, and Gillard had her turn, the better the timing for Shorten.

After the 21 August 2010 election resulted in a hung parliament, Gillard formed minority government with a tenuous hold on power. In this political stew, asylum seeker policy did, in Rudd's words, lurch to the right, under his successor Prime Minister Julia Gillard, backed by factional warlords. Gillard's leadership began with a mix of failed attempts at asylum seeker policy 'solutions' and language appealing to some few xenophobic voters in key marginal seats. First came her announcement during the July-August 2010 election campaign of the 'East Timor Solution' – Gillard planned to 'wreck the people smuggling trade' by starting a regional processing centre in East Timor.<sup>82</sup> East Timor never agreed to the plan. In 2011, Gillard's 'Malaysia People Swap' almost came to be – Australia would have sent 800 asylum seekers to Malaysia in exchange for 4,000 already-processed refugees. This failed too when the High Court ruled it unlawful mainly because Malaysia was not a party to the UN Refugees Convention.<sup>83</sup>

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<sup>80</sup> 'Gillard moves on Rudd', *ABC News*, 24 June 2010, viewed at: <http://www.abc.net.au/news/2010-06-23/gillard-moves-on-rudd/878810>

<sup>81</sup> *Ibid.*

<sup>82</sup> Karlis Salna, 'Gillard unveils 'East Timor solution'', *The Sydney Morning Herald*, 6 July 2010, viewed at: <https://www.smh.com.au/national/gillard-unveils-east-timor-solution-20100706-zy9s.html>

<sup>83</sup> Jeremy Thompson, 'High Court scuttles Malaysia swap deal', *ABC News*, 6 September 2011, viewed at: <http://www.abc.net.au/news/2011-08-31/high-court-rules-on-asylum-seeker-challenge/2864218>

On 28 June 2012 then Prime Minister Julia Gillard established the Expert Panel on Asylum Seekers, led by former defence force chief Angus Houston.<sup>84</sup> The Panel's brief was to advise the government on policy options to prevent asylum seekers taking boat journeys to Australia. The Panel released its Report<sup>85</sup> on 13 August 2012. Gillard vowed to immediately adopt all of the Report's 22 recommendations.<sup>86</sup> This included to urgently re-instate 'offshore processing' of asylum seekers that was central to former Prime Minister John Howard's 2001 'Pacific solution'.<sup>87</sup> With Royal Assent on 17 August 2012, the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*, provided for transferring people to regional processing arrangements and to increase processing capacity in Nauru and Papua New Guinea.<sup>88</sup>

This was based on the 'no advantage' principle that has been described as a myth – a variation of the fiction that an orderly 'refugee queue' exists.<sup>89</sup> People fleeing by boat were seen as somehow jumping this fictional queue and should be placed at the end of it, thereby achieving 'no advantage' by taking a boat journey to Australia. The Refugee Council of Australia described this as 'more punishment for asylum seekers who arrive by boat seeking Australia's protection'.<sup>90</sup> The new no advantage policy and enabling legislation would ensure that all future arrivals would wait indefinitely for a protection visa – even after being recognised as refugees.

Incidentally, Angus Houston was the Australian Prime Minister's Special Envoy to lead Australian delegations on missions for the Australian Government in early 2013 to Sri Lanka<sup>91</sup> and Vietnam<sup>92</sup> to meet with high level government officials. In Sri Lanka the stated purposes of the meeting related to 'people smuggling issues' and 'combating irregular migration'. In Vietnam, a stated purpose of the meeting included 'that both sides will work closely together on matters of mutual concern, such as migration and immigration'. It appears to be more than coincidence that around this time Australia hardened its resolve to never release from detention a group of Tamil refugees from Sri Lanka due to

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<sup>84</sup> Harriet Spinks, 'Breaking the deadlock? The Report of the Expert Panel on Asylum Seekers', Parliament of Australia, 13 August 2012, viewed at: [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2012/August/Breaking\\_the\\_deadlock\\_The\\_Report\\_of\\_the\\_Expert\\_Panel\\_on\\_Asylum\\_Seekers](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2012/August/Breaking_the_deadlock_The_Report_of_the_Expert_Panel_on_Asylum_Seekers)

<sup>85</sup> *Report of the Expert Panel on Asylum Seekers*, August 2012, viewed at: [http://artsonline.monash.edu.au/thebordercrossingobservatory/files/2015/03/expert\\_panel\\_on\\_asylum\\_seekers\\_full\\_report.pdf](http://artsonline.monash.edu.au/thebordercrossingobservatory/files/2015/03/expert_panel_on_asylum_seekers_full_report.pdf)

<sup>86</sup> Phillip Coorey, Judith Ireland and Jessica Wright, 'Gillard backs experts' asylum seeker report', *The Sydney Morning Herald*, 13 August 2012, viewed at: <https://www.smh.com.au/politics/federal/gillard-backs-experts-asylum-seeker-report-20120813-24417.html>

<sup>87</sup> Janet Phillips, 'The 'Pacific Solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island', Parliament of Australia, 4 September 2012, viewed at: [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2012-2013/PacificSolution](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/PacificSolution)

<sup>88</sup> *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*, viewed at: <https://www.legislation.gov.au/Details/C2012A00113>

<sup>89</sup> Kerry Murphy, 'The 'no advantage' myth in refugee processing', *The Conversation*, 22 November 2012, viewed at: <https://theconversation.com/the-no-advantage-myth-in-refugee-processing-10940>

<sup>90</sup> 'No Advantage' is Maximum Disadvantage for Boat Arrivals', Refugee Council of Australia, 21 November 2012, viewed at: [https://www.refugeecouncil.org.au/n/mr/121121\\_noadvantage.pdf](https://www.refugeecouncil.org.au/n/mr/121121_noadvantage.pdf)

<sup>91</sup> Media release: 'An Australian delegation led by Air Chief Marshal Angus Houston AC, AFC (Ret'd) paid a courtesy call on Hon. Neomal Perera Acting Minister of External Affairs', Ministry of Foreign Affairs - Sri Lanka, March 2013, viewed at: <http://www.mfa.gov.lk/ta/3905-an-australian-delegation-led-by-air-chief-marshal-angus-houston-ac-afc-ret-d-paid-a-courtesy-call-on-honneomal-perera-acting-minister-of-external-affairs/>

<sup>92</sup> 'Deputy PM receives [sic] Australian special envoy', *The Voice of Vietnam*, 28 May 2013, viewed at: <https://english.vov.vn/diplomacy/deputy-pm-receives-australian-special-envoy-260876.vov>

adverse ASIO assessments that have never been disclosed,<sup>93</sup> introduced 'enhanced screening'<sup>94</sup> that resulted in some 2,500 Sri Lankan asylum seekers being excluded from the protection process, deported close to a thousand asylum seekers to Sri Lanka while denying them the opportunity to formally present their claims for asylum in a refugee determination process,<sup>95</sup> and invited a delegation from Vietnam to arrange deportations<sup>96</sup> of asylum seekers to Vietnam<sup>97</sup> by force, also denying them the opportunity to formally present their protection claims.

How far we travelled from the 1970s-80s when our politicians responded to a similar xenophobic resistance to Vietnamese refugees arriving to Australia in boats. A hi-jacked fishing trawler, the *Song Be*, and another boat, carrying 181 Viet refugees, were escorted into Darwin harbour by *HMAS Ardent* in late November 1975. Then foreign minister Andrew Peacock and immigration minister Michael MacKellar urged politicians 'not to subordinate the issues to electoral considerations, not to exaggerate the dimensions of the problem, not to attempt to exploit the assumed fears of sections of the Australian public, and not to forget the human tragedy represented by these few small boats.' The two ministers further vowed that their government would not 'make examples' of the refugees 'by indiscriminately turning some of them back' and would not 'risk taking action against genuine refugees just to get a message across.' Doing so, they said, 'would be an utterly inhuman course of action.'<sup>98</sup>

Fast forward to 2012, when inhumane and dishonest politicians appealing to the same 'assumed fears' became the order of the day. The 'no advantage' policy and its enabling legislation fed off, fuelled, and perhaps even created, those fears. The policy enforced that people arriving by boat to seek asylum would be transferred to Nauru or to Manus Island in Papua New Guinea if, in the Department's assessment, their transfer was considered reasonably practicable. This pre-transfer assessment considered such things as the person's health needs, whether a family would be split and, in the case of children, an apparently unresolved dilemma as to whether the Department could execute a transfer at the same time as executing its guardianship responsibilities. The Department's responsibility as guardian of children did not deter the Department from executing the transfer, under the premise that although it was a primary consideration it was not the only consideration.<sup>99</sup>

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<sup>93</sup> Mark Baker, 'Locked away without hope', *The Sydney Morning Herald*, 11 July 2013, viewed at: <https://www.smh.com.au/national/locked-away-without-hope-20130710-2pqic.html>

<sup>94</sup> *Tell Me About: The 'Enhanced Screening Process'*, Australian Human Rights Commission, 2013, viewed at: <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/tell-me-about-enhanced-screening-process>

<sup>95</sup> Emma Hunter (writer's pseudonym), 'My experience as a nurse on Christmas Island changed me to the core', *The Guardian*, 21 November 2013, viewed at: <https://www.theguardian.com/commentisfree/2013/nov/21/my-experience-as-a-nurse-on-christmas-island-changed-the-core-of-my-being>

<sup>96</sup> Melanie Arnost, 'Vietnamese asylum seekers 'set for deportation'', *ABC News*, 23 Sep 2013, viewed at: <http://www.abc.net.au/news/2013-09-23/vietnamese-asylum-seekers-set-for-deportation-from-darwin/4974556>

<sup>97</sup> 'Operation Sovereign Borders: log of boat arrivals and other asylum seeker incidents', *ABC News*, 9 May 2016, viewed at: <http://www.abc.net.au/news/2013-10-25/log-of-boat-arrivals-and-other-asylum-seeker-incidents/5014496>

<sup>98</sup> Klaus Neumann, "'Queue jumpers" and the perils of crossing Sydney Harbour on a Manly ferry', *Inside Story*, 1 October 2014, viewed at: <http://insidestory.org.au/queue-jumpers-and-the-perils-of-crossing-sydney-harbour-on-a-manly-ferry/>

<sup>99</sup> National Inquiry into Children in Immigration Detention, Australian Human Rights Commission 2014, Sydney Public Hearing, Thursday 31 July 2014, viewed at: <https://www.humanrights.gov.au/sites/default/files/Mr%20Lake.pdf>

Further in regard to children, the pre-transfer assessment criteria prohibited the transfer of children under seven years of age to Papua New Guinea because they could not be inoculated against Japanese encephalitis. It is worth noting that just last month the Australian government transferred a two-year old refugee girl suffering life-threatening encephalitis from Nauru to Papua New Guinea despite doctors in Papua New Guinea advising she could not be treated there.<sup>100</sup> She is one amidst a recent spate of refugee children on Nauru at risk of imminent death who the Australian government was forced by legal actions to bring back to safety in Australia.<sup>101</sup>

Former Department Director Gregory Lake explained, at the public hearing on 31 July 2014 of the Australian Human Rights Commission for the National Inquiry into Children in Immigration Detention,<sup>102</sup> how the first children were selected for offshore transfer in 2012. He told the Inquiry that under this policy of deterrence, the Minister's office instructed Department officers to select families with the smallest children so as to send a message that would give the appearance that even very small children were not exempt from this policy.<sup>103</sup>

This assessment and selection process applied to all post 13 August 2012 arrivals – their arrival date being the primary eligibility criteria for transfer. The assessment and selection process resulted in some people who were 'eligible' for transfer actually being transferred, and some not being transferred despite their eligibility. Whether they were transferred to 'offshore processing' or not, resettlement in Australia was still the end result if they were eventually determined to be refugees and granted protection visas, albeit after a very long wait in punishing conditions for those who were transferred 'offshore'. Similarly punishing conditions, and indefinite waiting for an uncertain outcome applied to those who languished in 'onshore' detention a very long time, including on Christmas Island which is officially part of Australia's 'onshore' detention network.<sup>104</sup> Many who were released into the Australian community on bridging visas while being 'processed' also suffered uncertainty, anxiety and inability to settle into a new life, often with the threat of re-detention and deportation.

Against this history, and after another leadership coup in the Labor government, on 19 July 2013 then Australian Prime Minister Kevin Rudd 'mark 2' was in the midst of an election campaign. He had wrestled the leadership back from Julia Gillard and badly wanted to prove he was worth it by winning the unwinnable election. All polls indicated the Labor government faced certain defeat. It was only a question of how big would be the loss. As he completely abandoned his capacity to lead, short circuited his own powerful intellect, and shelved his purported humanitarian values, with no moral compass whatsoever Rudd pulled a time-honoured political stunt. No two ways about it. He

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<sup>100</sup> Calla Wahlquist and Ben Doherty, 'Toddler born on Nauru to be brought to Australia for vital health tests', *The Guardian*, 3 July 2018, viewed at: <https://www.theguardian.com/australia-news/2018/jul/03/toddler-born-on-nauru-to-be-brought-to-australia-for-vital-health-tests>

<sup>101</sup> Ben Doherty, 'Each time Australia delays bringing a sick child from Nauru, the stakes get higher', *The Guardian*, 12 July 2018, viewed at: <https://www.theguardian.com/australia-news/2018/jul/11/each-time-australia-delays-bringing-a-sick-child-from-nauru-the-stakes-get-higher>

<sup>102</sup> National Inquiry into Children in Immigration Detention 2014, Australian Human Rights Commission, Transcripts from the inquiry's public hearings, viewed at: <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigration-detention-2014-1>

<sup>103</sup> National Inquiry into Children in Immigration Detention, Australian Human Rights Commission 2014, Sydney Public Hearing, Thursday 31 July 2014, viewed at: <https://www.humanrights.gov.au/sites/default/files/Mr%20Lake.pdf>

<sup>104</sup> Giselle Wakatama, 'Christmas Island detention centre transfers raise doubts about timeline for closure', *ABC News*, 6 April 2018, viewed at: <http://www.abc.net.au/news/2018-04-06/christmas-island-detention-centre-transfers-raise-closure-doubts/9621626>

dug the boot into a most vulnerable group of people – refugees – in a bid to win votes in marginal seats.

You've got to hand it to him though. He did it in style, like no other had done before. He wasn't sloganeering, he didn't just use words to appeal to fear and racism. This man of action meant business. Skilled in international diplomacy, Rudd stitched together a deal that surpassed the severity of all previous and existing refugee policy in Australia and, arguably, in the post-Holocaust enlightened world<sup>105</sup> that was supposed to never again – as the 1951 UN Refugee Convention determined<sup>106</sup> – see refugees turned away as they escaped persecution. So much for our signature to the Convention. And so much for Rudd's hero Dietrich Bonhoeffer<sup>107</sup> – it seems Rudd left his own good faith and reason at the Great West Door-Step of Westminster Abbey, by the statues of twentieth century martyrs, as he framed refugees arriving to Australia to be a new generation of twenty-first century martyrs of the free world.

On 19 July 2013 PM Rudd 'mark 2' stood side by side with Prime Minister of Papua New Guinea Peter O'Neill, and infamously announced a new Regional Resettlement Arrangement. Rudd went far beyond the regional processing of previous arrangements as he announced that any asylum seeker arriving to Australia by boat from this time on will never reside in Australia. The reason, he said, was: 'The boats are not going to stop coming tomorrow, in fact it is more probable that the people smugglers will try and test our resolve for the period ahead. It's important however to look how measures such as this work over the months and years ahead.'<sup>108</sup> This new hard line that would hold a group of people hostage to a policy of deterrence was, as clearly intended, set in place for the long haul.

As we prepared to transfer this new '19 July' cohort of people to Nauru and Manus Island, the 'pre 19 July' cohort of 'transitory persons' were gradually transferred back to Australia, mostly by early July 2013. This would make room for the new '19 July' cohort. But Australia held some of the 'pre 19 July' cohort offshore longer – those with criminal charges and allegations made against them. For example, some who were alleged to have been involved in a fight on Manus Island remained there until late 2013, and some people alleged to have been involved in the riots and arson of the prison camp on Nauru on 19 July 2013<sup>109</sup> remained on Nauru until as late as November 2014.<sup>110</sup> However, apart from these exceptions, the two cohorts of 'transitory persons' – one group of people who were transferred offshore between 13 August 2012 and 19 July 2013, and another group of people

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<sup>105</sup> Steve Kates, 'Australia's pitiless migrant policy', *Financial Times*, 20 June 2018, viewed at: <https://www.ft.com/content/456ac3be-6fc4-11e8-8863-a9bb262c5f53>

<sup>106</sup> Azadeh Dastyari, 'Explainer: Australia's obligations under the UN Refugee Convention', *The Conversation*, 18 July 2013, viewed at: <https://theconversation.com/explainer-australias-obligations-under-the-un-refugee-convention-16195>

<sup>107</sup> Kevin Rudd, 'Faith in politics', *The Monthly*, October 2006, viewed at: <https://www.themonthly.com.au/monthly-essays-kevin-rudd-faith-politics--300>

<sup>108</sup> Naomi Woodley, 'Rudd to send all boat arrivals to PNG', *ABC PM*, 19 July 2013, viewed at: <http://www.abc.net.au/pm/content/2013/s3806944.htm>

<sup>109</sup> '125 asylum seekers charged over Nauru riot which caused \$60m worth of damage', *ABC News*, 22 July 2013, viewed at: <http://www.abc.net.au/news/2013-07-22/125-asylum-seekers-charged-over-violent-nauru-riots/4834098>

<sup>110</sup> Zach Hope, Ben Smee and Jill Poulsen, 'Morrison silent on Nauru's "worst of the worst" transferred to Darwin', *NT News*, 12 November 2014, viewed at: <https://www.ntnews.com.au/news/northern-territory/morrison-silent-on-naurus-worst-of-the-worst-transferred-to-darwin/news-story/417ce2781ee8386bea9885d9431e3462>

who were transferred offshore after 19 July 2013 – were separated physically and by the Australian policy that applied to the processing of their protection claims.

In the intervening five years to date, the inhumanity surrounding ‘19 July’ is evident, yet obfuscated by the kinds of machinations that politics does best.

On the one hand, in upholding ‘19 July’ as a solution to border control, our pumped up politicians feed the fear and misconceptions about one very small part of a much bigger reality. Behind ‘Operation Sovereign Borders’ they hide the facts of ‘on water matters’<sup>111</sup> at the same time as diverting attention from the reality that much larger numbers of people arriving by plane defy Australia’s border controls with virtual impunity – some 64,600 visa over-stayers were living in the community unlawfully as of June 2017.<sup>112</sup> Our politicians also fail to address the impact of the world-wide refugee crisis in our region. They circumvent our obligations as signatory to the UN Refugees Convention. They shame us as one of the richest countries yet leading the world<sup>113</sup> with the meanest of spirits as we refuse to shoulder our responsibility to lend a hand to people in need. Rather, our politicians cling to power with slogans of stop-the-boats-save-lives-at-sea-break-the-people-smuggler’s-business-model.

Lives have been lost at sea, it is true. Yet this does not justify the lies about refugees, and the deliberate cruelty and negligence towards a group of most vulnerable refugees who we should, can and will inevitably help. It does not make sense at all to hold some lives hostage as a means to claim to save the lives of others. Nor does it suffice to avoid the hard yards of developing a humane response to a human crisis rather than simply sloganeering about border control and wrongfully regarding peaceful, lawful asylum seekers as a threat.

On the other hand, this rhetoric of ‘19 July’ blindsides us to its own facts. The almost frenzied crafting of legislation around ‘19 July’ policy and its propping up with ad hoc political deals and manoeuvres around legal challenges are the sum parts in reactive crisis management of this high maintenance low substance policy regime.

This ‘19 July’ policy must be acknowledged as the botched job that it is, and must be appropriately dismantled, once and for all. We must repeal the bad laws and replace them with a genuine humanitarian response.

The refugees now under our ‘care’ offshore – why do we continue to detain about 1,500 people offshore, and why must we change policy?

About 1,500 refugees, including children, remain in Nauru and Papua New Guinea – they are now into their sixth year of limbo. It is now almost two years since the US resettlement deal was announced<sup>114</sup> and only some 300 have gone to resettle in the United States so far. The US assessment process is very slow and a maximum of 1,250 may be accepted. This will leave at least

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<sup>111</sup> Michael Slezak, 'Asylum seekers: Australia's silence over 'on-water matters' faces legal test', *The Guardian*, 8 August 2016, viewed at: <https://www.theguardian.com/australia-news/2016/aug/08/asylum-seekers-australias-silence-over-on-water-matters-faces-legal-test>

<sup>112</sup> Tom McIlroy, 'More than 64,000 people overstaying visas in Australia', *The Sydney Morning Herald*, 18 July 2017, viewed at: <https://www.smh.com.au/public-service/more-than-64000-people-overstaying-visas-in-australia-20170718-gxdddj.html>

<sup>113</sup> Steve Kates, 'Australia's pitiless migrant policy', *Financial Times*, 20 June 2018, viewed at: <https://www.ft.com/content/456ac3be-6fc4-11e8-8863-a9bb262c5f53>

<sup>114</sup> Morgan Winsor, 'What We Know About the Refugee Resettlement Deal Obama Forged With Australia', *ABC News [USA]*, 2 February 2017, viewed at: <https://abcnews.go.com/Politics/refugee-resettlement-deal-obama-forged-australia/story?id=45219111>

600 or so people behind, and possibly many more. There is no timeline nor a known figure of the total number of people who will be accepted to go to the US. New Zealand has offered to resettle some but Minister Dutton continues to rule out New Zealand as a 'dangerous' option until we are down to 'a trickle' of refugees remaining on Manus and Nauru, and until laws prevent them coming from New Zealand to Australia.<sup>115</sup> Under the current regime, 'a trickle' remaining offshore will never be.

Hundreds of refugees on Manus and Nauru are from countries subject to Trump's Muslim ban and will not be accepted to resettle in the US in the foreseeable future. Some who remain on Manus and Nauru have negative refugee determinations – they have been assessed not to be refugees. This includes stateless people who cannot return to their country of origin. It also includes men on Manus who did not engage in the refugee determination process because they feared being resettled in Papua New Guinea. They saw Reza Barati murdered and have themselves been victims of violence and threatened with violence simply because they are there, and in part because Australia has fuelled tensions between them and the local people. They have no option. As they now enter into their sixth year of exile, they are plainly trapped, with no hope in sight.

Everyone remaining offshore is tortured. Everyone is ill. Children on Nauru are attempting suicide. Most recently a 14 year old refugee girl is the eighth child since last Christmas who Australia has been compelled by courts to bring back from Nauru to Australia. This young girl's mental health is such that she almost set herself on fire.<sup>116</sup> Adults are attempting and sometimes completing suicide. Most recently a brother, son, husband, and fine athlete, brought his life to an end on Nauru,<sup>117</sup> and a Rohingya refugee on Manus who fled genocide and is fondly remembered as a man of flowers, threw himself off and under a bus to end his misery.<sup>118</sup> This brings the death toll in Australia's island prisons to 12, for the sake of '19 July' policy – five of these people, almost half of the total, died in the last year since 19 July 2017.

These are just some of the losers in Australia's human rights lottery. It is a far cry from any coherent, let alone humane, response to the international refugee crisis as it impacts our region. Purporting to protect Australia's borders, this is the poorest effort and sickest joke of policy development that does not befit a wealthy democratic country of educated people who claim to espouse to a tradition of a 'fair go' for all. By contrast, Bangladesh, a poor country, now hosts one million Rohingya refugees who have fled genocide.

How many more people must die and how many lives destroyed in our name and by our hand?

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<sup>115</sup> Katherine Murphy, 'Peter Dutton contradicts Morrison and says migrant cut positive for the economy', *The Guardian*, 15 July 2018, viewed at: <https://www.theguardian.com/australia-news/2018/jul/15/peter-dutton-contradicts-morrison-and-says-migrant-cut-positive-for-the-economy>

<sup>116</sup> Ben Doherty, 'Refugee girl at risk of suicide to be moved from Nauru to Australia after court action', *The Guardian*, 7 July 2018, viewed at: <https://www.theguardian.com/world/2018/jul/07/refugee-girl-at-risk-of-suicide-to-be-moved-from-nauru-to-australia-after-court-action>

<sup>117</sup> Ben Doherty and Saba Vasefi, 'Iranian asylum seeker dies by suicide on Nauru', *The Guardian*, 15 June 2018, viewed at: <https://www.theguardian.com/world/2018/jun/15/iranian-asylum-seeker-dies-by-suicide-on-nauru>

<sup>118</sup> Behrouz Boochani, 'Salim fled genocide to find safety. He lost his life in the most tragic way', *The Guardian*, 25 May 2018, viewed at: <https://www.theguardian.com/commentisfree/2018/may/25/salim-fled-genocide-to-find-safety-he-lost-his-life-in-the-most-tragic-way>

Even some who have now found freedom are still suffering the trauma we have inflicted upon them<sup>119</sup> – they may never recover. All of this is a direct result of Australia’s laws and policies of hatred against refugees. No other plan is in sight for the lives of these people who want nothing more than their freedom. They are owed freedom and much more. Yet they remain indefinitely in this hell on earth, of human making. Meanwhile, Minister Dutton espouses his nonsensical and wicked mantra of ‘no compassion’ – that we cannot bring as few as 20 refugees from Manus or Nauru for the sake of upholding his policy.<sup>120</sup>

In fact, we must bring all of the 1,500 or so refugees and asylum seekers who remain on Manus and Nauru out of these death traps. We have no real choice. We owe it to them to assist them to rebuild their lives after wasting five whole years of each of their lives, of torturing them with hostility, violence and uncertainty. They have each lost five years of their lives, and we have lost their 7,500 combined years of potential contribution to society.

To use the words of Abdul Aziz Adam,<sup>121</sup> we need that piece of humanity brought back into this ghastly jigsaw. This is the only way it will fit together.

And Senator McKim’s questions of Monday 21 May 2018 now remain on the table of the Senate budget estimates Legal and Constitutional Affairs Committee.<sup>122</sup> Will Pezzullo answer these questions on notice? And if so, will his answers stack up?

In any case, #BringThemHere or #LetThemGo *now*, for goodness sake.

Tanya McIntyre  
19 July 2018

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<sup>119</sup> Andra Jackson, 'We thought we'd never get out': a refugee from Manus starts life in the US', *The Guardian*, 20 June 2018, viewed at: <https://www.theguardian.com/australia-news/2018/jun/20/we-thought-wed-never-get-out-a-refugee-from-manus-starts-life-in-the-us>

<sup>120</sup> 'Compassion can undo efforts against people-smugglers: Dutton', *SBS News*, 23 June 2018, viewed at: <https://www.sbs.com.au/news/compassion-can-undo-efforts-against-people-smugglers-dutton>

<sup>121</sup> Abdul Aziz Adam, *Twitter*, 2 June 2018, viewed at: [https://twitter.com/Abdulaziz\\_Ada/status/1002968405974978565](https://twitter.com/Abdulaziz_Ada/status/1002968405974978565)

<sup>122</sup> Commonwealth of Australia, *Hansard*, Senate, Legal and Constitutional Affairs Legislation Committee, Estimates (Public), Monday, 21 May 2018, Canberra, viewed at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F0490c3ad-512d-453c-8526-3dff9705b43c%2F0000%22>