

Front cover: Iranian-Kurdish asylum seeker Behrouz Boochani. Boochani is a writer, journalist and Associate Professor at UNSW, and was held on Manus Island from 2013 until its closure in 2017 (Jonas Grotzer)

Court of Conscience
Issue 13, 2019

Boats and borders:
Australia's response to
refugees and asylum seekers

Court of Conscience respectfully
acknowledges the Bedegal, Gadigal
and the Ngunnawal Peoples as the
custodians and protectors of the lands
where each campus of UNSW is located.

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Content warning

This journal contains articles about sexual assault, mental health issues, self-harm, and suicide which may be confronting to some readers.

Support Services for Victims of Sexual Assault and other Crimes

NSW Rape Crisis Centre provides a 24/7 telephone and online counselling services to victims of sexual assault in NSW.

Call 1800 424 017 or
visit nswrapecrisis.com.au

NSW Victims Services provides information and support services to victims of crime in NSW.

For the Victims Access Line
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For the Aboriginal Contact Line
call 1800 019 123

Sexual Assault Counselling Australia provides counselling, information and referral services to victims of sexual assault in Australia.

Call 1800 211 028 or
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1800 Respect

(National Sexual Assault, Domestic Family Violence Counselling Service)

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Lifeline, call 13 11 14 or
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Painting by Abbas Alaboudi

Editorial

Boats and borders: Australia's response to refugees and asylum seekers

Jacob Lancaster

I Introduction

Welcome to the 13th Issue of *Court of Conscience*. This year's thematic considers Australia's treatment of refugees and asylum seekers. It is a timely and sobering reminder that Australia is failing many of those whom it is bound to protect. This topic was selected for two reasons: first, because Australia's cruel and inhumane treatment of irregular asylum seekers focuses more on discouraging people smugglers and less on upholding our obligations under international law;¹ and second, because human rights are universal and inalienable,² and should not be enjoyed only by some. We must overcome our apathy to those we turn away from our borders and detain offshore in conditions that offend human rights, human dignity, and human conscience.

'Stop the boats!'

The challenge ahead lies in discrediting the three-word slogan, 'Stop the Boats', that has come to characterise Australia's stance toward asylum seekers attempting to enter Australia by sea. Rather than attempting to distinguish claims on the basis of the

refugee definition enshrined in art 1A(2) of the *Refugee Convention*,³ our politicians focus instead on a claimant's mode of arrival.⁴ At a time when refugees and asylum seekers are treated with suspicion and cast offshore, we must remember their humanity and our obligations under international law.⁵

By way of example, on 4 July 2019, the Government introduced the Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (Cth) ('Regional Processing Bill'). If passed as law, it will permanently bar those asylum seekers who attempted to come to Australia by boat, and were taken to a regional processing country after 19 July 2013, from applying for an Australian visa.⁶ It is difficult to square with art 31 of the *Refugee Convention*, which prohibits State signatories from imposing penalties on refugees on account of their illegal entry or presence.⁷ It also fails to acknowledge that it is not illegal, under international law, to seek asylum.⁸ Nevertheless, the Bill is ostensibly compatible with international human rights law because, according to the Government, this 'differential treatment is for a legitimate purpose ... that is reasonable and proportionate in the circum-

stances'.⁹ The Regional Processing Bill was introduced on the same day as the Migration Amendment (Repairing Medical Transfers) Bill 2019 (Cth) which, if passed, will remove an important medical transfer pathway for asylum seekers in regional processing countries to be transferred to Australia for assessment and treatment.¹⁰

Reframing the refugee crisis

Issue 13, titled 'Boats and Borders: Australia's Response to Refugees and Asylum Seekers' attempts to overcome our apathy by humanising these issues, which are too often framed as distant and removed. Our emotional detachment is no accident: the visual framing of refugees in the media as threats to our national sovereignty and security has directly led to their dehumanisation.¹¹ There are few images which depict asylum seekers with clearly recognisable facial features,¹² owing to government policies that prohibit reporters from engaging with, or photographing the faces of, detainees.¹³ Clearly then, the refugee crisis must be reframed — not as a political issue, but as a humanitarian one that demands an equally compassionate response.¹⁴

This year, *Court of Conscience* has encouraged greater activism over this problem. For the first time, we published weekly brochures on our Facebook page which canvassed some of the pressing problems confronting refugees and asylum seekers. We were also fortunate to screen Simon Kurian's critically acclaimed film, 'Stop the Boats', which was followed by a panel with the director, Mr Kurian, and two experts from the Kaldor Centre for International Refugee Law, Dr Claire Higgins and Prof Guy Goodwin-Gill, to whom we are incredibly grateful.

II Overview of Issue 13

This Issue begins with two articles prepared by the Court of Conscience Editorial Team, titled 'A Brief Primer on Australia's Treatment of Refugees and Asylum Seekers' and 'Timeline of Australia's Refugee Policies' to assist readers who are unfamiliar with the Australian refugee law and policy landscape. In addition to the preparatory materials prepared by the Court of Conscience Editorial Team, this Issue features 14 articles written by

academics, legal professionals, and students. A close reading of each text reveals nuanced perspectives covering five areas: 'Rethinking the Popular Narrative', 'Increasing Support to Refugees and Asylum Seekers', 'Scrutinising Government Practices', 'Tension Between the Government and the Courts', and 'The Need for Statutory Reform'.

Rethinking the popular narrative

The first suite of articles challenges us to rethink the popular narrative that is propagated by our politicians and media outlets about refugees and asylum seekers. In 'Whose Island Home? Art and Australian Refugee Law', *Ingrid Matthews* and *Prof James Arvanitakis* provide an insightful, structuralist account of British colonialism and Australian coloniality, and extend this narrative to explain the indefinite offshore detention of asylum seekers who seek to enter Australia by boat.

Dr Eve Lester, in 'Making Migration Law: Courting our Conscience', instead ties the concept of mandatory detention to the Euro-centric concept of absolute sovereignty which emerged during the nineteenth century as a response to 'a political and economic desire to regulate race and labour'. The significance of this piece lies in Dr Lester's rigorous analysis of government rhetoric surrounding the *Migration Act 1958* (Cth), and how it can be used to justify and perpetuate social constructs that impact those who are most vulnerable.

In 'Vanquishing Asylum Seekers from Australia's Borders: Creating Visibility for Justice', *Prof Linda Briskman* argues that our retreat from complying with international treaty obligations has ceded space to nationalistic political responses focused on security. In this context, the normalisation and enactment of rights denying measures, once considered exceptional, has pushed asylum seekers off the precipice of public consciousness.

The impact of government rhetoric also features in *Stephen Phillips'* article, 'Imitation as Flattery: The Spread of Australia's Asylum Seeker Rhetoric and Policy to Europe'. Phillips discusses how Australia's preoccupation with stopping people smugglers, coupled with mass migration in 2015, has influenced a turn in European public discourse that reflects less a focus on human rights than a desire to impose stricter controls on migration flows.

Increasing support to refugees and asylum seekers

The next two articles address an issue that is often overlooked, being how we can increase support to refugees and asylum seekers living in Australia. *Danielle Munro and Niamh Joyce*, in 'An Asylum Seeker's Access to Medicare and Associated Health Services While Awaiting Determination of a Protection Visa Application in Australia', paint a labyrinthine picture of Medicare access for Protection Visa applicants, and highlight the effects of this process on their physical and psychological health.

In 'Community, Belonging and the Irregular Migration', *Violet Roumeliotis* takes us away from the black letter of the law, and forces us to consider the importance of human connection. In doing so, Roumeliotis explains how we can better integrate irregular migrants by boat within our community, and draws attention to a social dimension that is little discussed.

Scrutinising government practices

Changing pace, we have three articles that critically examine current government practices around refugees and asylum seekers. In 'Data Quality and the Law of Refugee Protection in Australia', *Regina Jefferies* examines the Department of Home Affairs's poor data collection practices from an information systems perspective. Poor data quality directly undermines our ability to hold the Department of Home Affairs, and the Australian Border Force, to account for their decisions. This is significant because, as Jefferies explains, asylum seekers who arrive in Australia by air, and seek protection at or before immigration clearance at airports, are unable to seek judicial review if their application for rejection is rejected during the initial screening process by Australian Border Force officials.

Our view of government practices is no doubt obscured by the harsh secrecy offences under the *Australian Border Force Act 2015* (Cth). The constitutionality of these provisions, both as they were enacted in 2015 and amended in 2017, is discussed by *Sophie Whittaker* in 'The Amended Secrecy Provisions of the Australian Border Force Act: An Improvement in Protection for Refugee Whistle-Blowers or Just Another Policy Blunder?'. Whittaker concludes that the amended legislation continues to encroach on the freedom of political communication implied in our

Constitution, although it is more likely to be constitutionally valid than its predecessor.

The consequences that flow from failing to hold our officials to account is clearly evident in the article written by *Dr Antje Missbach* and *Assoc Prof Wayne Palmer*, titled 'Deterring Asylum Seeking in Australia: Bribing Indonesian Smugglers to Return Asylum Seekers to Indonesia'. In this piece, Dr Missbach and Dr Palmer draw our attention to allegations levelled by Indonesia against Australia that Australian Border Force officials bribed Indonesian people smugglers to turnback a vessel, called 'the Andika', heading for New Zealand. The authors also discuss how Australia may have violated domestic and international law, and how this may both jeopardise diplomatic relationships with our geographical neighbours in the Asia Pacific and encourage other countries to adopt a similar approach.

Tension between the government and the courts

The following two papers highlight the tension between the Government and the courts in the context of Australia's oppressive treatment of irregular asylum seekers. In 'Strategic Litigation, Offshore Detention and the Medevac Bill', *Anna Talbot* and *Adj Prof George Newhouse* discuss how litigators, doctors, caseworkers and other members of the community pushed against the cruelty of the Minister to refuse urgent medical care to children and adults living in offshore detention. The stories of those who were initially refused treatment are distressing, especially since many of their health conditions are the direct result of living in these centres.

Jack Zhou, in 'Reforming Judicial Review since Tampa: Attitudes, Policy and Implications', discusses how the scope for judicial review of migration decisions has been whittled down by a series of amendments to the *Migration Act 1958* (Cth) following the Tampa crisis. According to Zhou, the Howard Government introduced privative clauses in an attempt to curtail the availability of judicial review and, when that failed, introduced offshore detention as a means to ouster the jurisdiction of the courts.

The need for statutory reform

The last suite of articles highlights the need for statutory reform from a mix of doctrinal, law reform, and theoretical perspectives. In



A group of protesters from Refugee Action Collective march outside Villawood Detention Centre. Western Sydney, 15 April 2006 (Sergio Dionisio/AAP Image)

'Rethinking the Character Power as it Relates to Refugees and Asylum Seekers in Australia', *Dr Jason Donnelly* discusses the legal implications of the new Ministerial *Direction 79*,¹⁵ which provides for the cancellation, refusal or revocation of visas if an applicant does not satisfy the character test. According to Dr Donnelly, *Direction 79* must be reworked because the principles espoused in this document are not correct as a matter of law and relegate Australia's non-refoulement obligations to a secondary position, beneath the protection of the Australian community.

In 'A 'Legacy' of Uncertainty: The Need to Abolish Temporary Protection Visas', *Sanjay Alapakkam* explains the human cost of Temporary Protection Visas granted to refugees who attempted to enter Australia by boat between August 2012 and July 2013. Alapakkam also traces the political developments that led to their introduction, abolishment, and re-introduction, and proposes how these refugees could be better integrated within our communities.

Finally, in 'Reimagining the Protection Response to Irregular Maritime Arrivals: A Principle-Based Regulation with a Human Security Approach', *Jeswynn Yogaratnam* presents a cross-disciplinary and theoretical account of irregular arrivals intercepted at sea. Yogaratnam argues that we must reimagine our protection obligations to asylum seekers based on human security, which can be operationalised through principle-based (rather than rule-based) regulation.

iii Concluding comments

Australia's contempt for its legal obligations to asylum seekers who arrive by boat is significant, as measures such as boat turnbacks, regional processing and mandatory detention demonstrate.¹⁶ We must hold our politicians to account for snubbing the obligations we voluntarily assumed towards refugees and asylum seekers when we signed the *Refugee Convention*. The media, too, needs to recognise the important role it plays in shaping public and political opinion. Australian mastheads should think twice before painting irregular migrants in broad strokes as threats to our sovereignty or national security,¹⁷ and must provide the public with timely access to information about government practices (to the maximum extent permitted by law). By improving the quality of media reporting, the public will be better able to evaluate the claims, laws and policies of Australian governments — and hold them to account.¹⁸ 🗣️

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- 4 See Sanjay Alapakkam, 'A 'Legacy' of Uncertainty: The Need to Abolish Temporary Protection Visas'

- (2019) 13 *UNSW Law Society Court of Conscience* (forthcoming October 2019) (on file with editors).
- 5 See, eg, Linda Briskman, 'Vanquishing Asylum Seekers from Australia's Borders: Creating Visibility for Justice' (2019) 13 *UNSW Law Society Court of Conscience* (forthcoming October 2019) (on file with editors).
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within a toxic political climate that has
seen a rise in racism directed at new
arrivals'.

18 *Ibid.*

A brief primer on Australia's treatment of refugees and asylum seekers

Court of Conscience
Editorial Team

I What is the difference between refugees and asylum seekers?

Asylum seekers

An asylum seeker is a person seeking protection under international law.¹ Not every asylum seeker will be found to be a refugee; however, every refugee has once been an asylum seeker.²

Refugees

Refugees are asylum seekers who have been declared to be refugees under the 1951 *Refugee Convention* and 1967 Protocol (collectively, the '*Refugee Convention*').³ The test for refugee status is set out in art 1A(2) of the *Refugee Convention*, which defines a refugee as a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual

residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁴

According to the UNHCR Handbook:

Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.⁵

Economic migrants

In contrast to refugees and asylum seekers, economic migrants leave their country for financial reasons (such as for a better life) rather than for international protection from persecution.⁶

II How does Australia determine refugee status?

As a signatory to the *Refugee Convention*, Australia has incorporated many of its obligations into the Migration Act 1958 (Cth) ('Migration Act'). However, contrary to art 42 of the *Refugee Convention*, it has qualified the circumstances in which persecution will be



Asylum seekers arriving by boat are escorted by Australian navy boats operating under the Border Protection Command. Flying Fish Cove, Christmas Island, 16 August 2012 (Scott Fisher/AAP Image)

established.⁷ Australia has also codified the refugee definition for applications made on or after 16 December 2014 under s 5H, and further defined the ‘particular social group’ ground under s 5L.⁸

Australia has different systems in place for processing Protection Visa applications, depending on the asylum seeker’s mode of entry.

Onshore processing – arrival with a valid visa

An asylum seeker arriving with a valid visa (eg student or tourist visa), usually by plane, has their claim for protection assessed onshore, in Australia.⁹ These asylum seekers can apply for a Permanent Protection Visa, which grants them the right to live and work as a permanent resident.¹⁰

An asylum seeker whose refugee status is to be assessed onshore must first lodge a claim for protection with the Department of Home Affairs.¹¹ A Department official assesses the claim on the basis of the asylum seeker’s reasons for seeking refuge in Australia.¹² If the claim is approved, the asylum seeker is granted refugee status.¹³ If the claim is rejected, the applicant has a three-level avenue of appeal: first, to the Migration and Refugee Division of the Administrative Appeals Tribunal (MRD-AAT); second, to the courts; and finally, to the Minister.¹⁴ This is the standard process for refugee status determination.¹⁵

Offshore processing – arrival without a valid visa

Asylum seekers who arrive by boat, without a valid visa, are either turned back or forcibly transported to have their refugee status assessed at an offshore processing facility.¹⁶ Asylum seekers who arrive without a valid visa cannot apply for Permanent Protection Visas, but can apply for a Temporary Protection Visa or a Safe Haven Enterprise Visa, which last for three and five years respectively.¹⁷

Asylum seekers who arrived without a valid visa, on or after 1 January 2014, are also subject to the standard process of refugee status determination.¹⁸ However, their claims are processed offshore and they will not be settled in Australia.¹⁹

Fast-track processing

Asylum seekers who arrived in Australia without a valid visa between 13 August 2012

and 1 January 2014 were not taken to Manus Island and Nauru for offshore processing. These applicants are subject to ‘fast track’ processing,²⁰ which involves an expedited review of each refugee status claim and limited avenues for appeal.²¹

iii Australia’s policy on asylum seekers and refugees

How much does Australia spend on offshore asylum seekers and refugees?

The Refugee Council of Australia estimates that Australia spends \$573,000 a year per asylum seeker in offshore detention compared to \$346,000 per person in onshore detention.²² At only \$10,221 per person, it costs significantly less for asylum seekers to live in the community on a Bridging Visa.²³

What access do asylum seekers have to welfare benefits?

If an asylum seeker is living in the community while their Protection Visa claim is processed, they will have access to benefits worth up to 89% of the Newstart Centrelink benefit.²⁴ These benefits are accessed through two government support schemes: the Asylum Seeker Assistance Scheme and the Community Assistance Support Program.²⁵ Whilst asylum seekers detained onshore can receive a small weekly allowance for daily expenses, asylum seekers detained in offshore facilities have no access to any welfare benefits.²⁶ If their Protection Visa is approved, an asylum seeker has access to the same Centrelink benefits as other Australians.²⁷

How does Australia’s intake of refugees compare to other countries?

Of the 2.3 million refugees recognised in 2018, Australia hosted 56,993 refugees, ranking 45th in comparison to other countries.²⁸ Despite settling relatively few refugees, Australia has a comparatively generous resettlement program. In 2018, Australia resettled 12,700 refugees, placing it third worldwide, behind Canada and the United States.²⁹ Despite this, less than 10% of global resettlement needs were met in 2018.³⁰ 🇺🇸



Iranian refugee interacting with local children on Manus Island (Jonas Gratz)

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MV Tampa (Remi Jouan/Wikimedia Commons)

Timeline of Australia's refugee policies

Court of Conscience
Editorial Team

I 1950s–60s

World War Two and the Refugee Convention

The 1951 *Refugee Convention*¹ was adopted by the United Nations in 1951 to address the displacement of millions of European refugees during World War Two ('WWII').²

In 1967, the *Protocol Relating to the Status of Refugees* (the 'Protocol')³ expanded the 1951 *Refugee Convention's* application beyond Europeans displaced by WWII.⁴ Australia ratified the Protocol in 1975, but never entirely incorporated its obligations under the Protocol into domestic legislation such as the *Migration Act 1958* (Cth).⁵

Currently, there are 148 State signatories to one or both of these instruments.⁶

The origins of offshore processing

In the 1960s, Australia set up its first offshore refugee processing centre (the Salasia Camp) on Manus Island, Papua New Guinea, to process thousands of refugees fleeing from Indonesia, which was planning a military takeover of West New Guinea.⁷

II 1970s–90s

During this period, maritime asylum seekers arriving in Australia were mostly from Indo-China following various wars and regime changes in the region. Vietnamese asylum seekers constituted the majority of boat arrivals between 1969–1982,⁸ before a 'second wave' of asylum seekers from the broader spread of Cambodia, Southern China and Vietnam arrived during the 1980s–mid 1990s.⁹

The end of the White Australia Policy

Before 1973, Australia's refugee policy was not distinguished from its immigration policy (the White Australia Policy) embedded in the *Immigration Restriction Act 1901* (Cth).¹⁰ Movement towards the abolition of the White Australia Policy began in 1966 and was completed by the Whitlam Government in 1973.¹¹

The development of Australia's refugee policy

Following a 1976 inquiry by the Senate Standing Committee on Foreign Affairs and Defence into the possibility of an Australian

refugee policy, the Government declared a formal refugee policy and determination procedure in 1977.¹²

By 1979, the suggestion of detention centres for asylum seekers arriving by boat was raised, although the Government refused to pursue this due to unfavourable public opinion and perceived impracticality.¹³

However, by 1989, after settling another wave of South-East Asian boat arrivals, the Australian Government's asylum seeker policy became increasingly restrictive.¹⁴ One element of the Government's refugee policy was the introduction of a 'planned system' to prevent immigration intakes from being 'undermined by unplanned (unauthorised) arrivals' who may not actually require international protection.¹⁵ Another element of the Government's refugee policy in the 1990s was the introduction of mandatory detention by the 1992 *Migration Reform Act* (Cth) ('*Reform Act*').¹⁶ Under the *Reform Act* (which remains in force), all non-citizens without a valid licence are detained while their visa claim is processed.¹⁷

iii Late 1990s–mid 2000s

1999

In 1999, the Government introduced Temporary Protection Visas. It also enacted people smuggling offences, and gave itself powers to search ships at sea and detain asylum seekers.¹⁸ At around the same time, a 'third wave' of maritime asylum seekers from the Middle East began arriving in Australia.¹⁹ These refugees fled primarily from the Taliban in Afghanistan and Saddam Hussein's regime in post-Gulf War Iraq.²⁰

The Tampa Incident and the Pacific Solution

On 29 August 2001, a Norwegian vessel, MV Tampa, arrived near Christmas Island carrying 430 people it had rescued earlier from a sinking fishing boat.²¹ The refugees on MV Tampa were mainly from Afghanistan.²² Australia tried to turn the Tampa away and deployed military force to board the ship and prevent it from approaching Christmas Island.²³

Following the Tampa incident, Australia introduced the 'Pacific Solution', a swathe of harsh laws directed at asylum seekers who entered Australia without a visa (referred to by the Government as 'unlawful' or 'unauthorised'

arrivals).²⁴ The Pacific Solution aimed to further deter 'unauthorised' maritime arrivals by introducing offshore detention centres to assess their visa claims. The Government also excised thousands of islands from Australia's migration zone to prevent asylum seekers who reached those islands by boat from applying for visas.²⁵

Late 2000s–2010: The abolition of the Pacific Solution, the closing and reopening of Manus Island and Nauru

In 2008, the newly elected Rudd Government dismantled the Pacific Solution and declared a more compassionate approach to the treatment of asylum seekers.²⁶ The Rudd Government abolished the temporary protection regime, and closed the detention centres on Manus Island and Nauru, but continued to process asylum seekers on Christmas Island.²⁷

Following the closure of Manus Island and Nauru, the number of boat arrivals increased 100-fold, far beyond the capacity of Christmas Island.²⁸ In response to public scrutiny and political pressure, the Government reoriented its asylum seeker policy in 2010 by increasing Australia's refugee intake, allowing the removal of asylum seekers to any country, introducing a 'no advantage' policy for asylum seekers arriving by boat (compared to those waiting in camps), and reopening the Manus Island and Nauru detention facilities.²⁹ This policy shift effectively reinstated the Pacific Solution.³⁰

iv 2010s

2011: Malaysian transfer deal

In July 2011, the Gillard Government signed a transfer agreement with Malaysia whereby 800 asylum seekers would be transferred from Australia to Malaysia in return for Australia's commitment to resettle 4000 refugees from Malaysia.³¹ The High Court held the agreement to be invalid as it would leave asylum seekers without legal protection from persecution, in contravention of the *Migration Act*. Nevertheless, the Government pledged to resettle 4000 refugees from Malaysia, as promised, albeit using part of its existing Humanitarian Programme quota.³²

Domestic policy

In 2013, the Coalition Government introduced Operation Sovereign Borders, under which

it adopted a 'zero tolerance' stance towards maritime arrival asylum seekers.³³ Operation Sovereign Borders involved a more militarised approach to intercepting and turning boats back.³⁴ The new policy also created the Australian Border Force, removed government funded legal aid for asylum seekers arriving by boat, and reintroduced the temporary protection regime but without the possibility of permanent resettlement in Australia.³⁵

The processing centres on Manus Island and Christmas Island were closed in October 2017 and October 2018, respectively.³⁶

Resettlement deal with New Zealand

Australia has repeatedly rejected a standing New Zealand offer to resettle 150 refugees.³⁷ Home Affairs Minister Peter Dutton has argued that accepting the deal would encourage more maritime arrival asylum seekers to use New Zealand as a backdoor entry option into Australia. As of July this year, Minister Dutton indicated that Australia may accept the resettlement deal 'when and if' doing so will not encourage boat arrivals.³⁸

Resettlement deal with the United States (US)

In November 2016, Australia announced a deal with the US which would resettle 1250 refugees from Manus Island and Nauru.³⁹ In a leaked 2017 phone call between US President Donald Trump and former Australian Prime Minister Malcolm Turnbull, President Trump emphasised that the US retains discretion as to whether it honours this target.⁴⁰

In September 2017, a small group of refugees were resettled in the US under this deal.⁴¹ However, the US has rejected 300, primarily Iranian, refugees,⁴² despite the Iranian refugees comprising the largest population of refugees on Manus Island.⁴³ In June 2019, Minister Dutton declared that the

target of 1,250 refugees would not be met and only 531 refugees had been resettled under the deal so far.⁴⁴

In return for the US resettling refugees from Manus Island and Nauru, Australia was reportedly to accept dozens of Central American Refugees and two Rwandans accused of mass murder in the US. However, as of June 2019, only those two Rwandans have been resettled in Australia.⁴⁵

The closure of the Manus Island detention centre

In April 2016, the Supreme Court of Papua New Guinea held that the detention of asylum seekers on Manus Island violated the country's constitutional right to personal liberty.⁴⁶ As a result, the Manus Island detention centre was closed in October 2017.⁴⁷ Hundreds of detainees refused to leave the centre due to concerns over the safety of their new accommodation arrangements.⁴⁸ After vital services such as electricity, water and healthcare were shut down, Papua New Guinean authorities forcefully removed the remaining asylum seekers.⁴⁹

Medevac Bill

In February this year, the Medevac Bill was passed,⁵⁰ allowing asylum seekers requiring urgent medical assistance to be temporarily transferred to Australia upon the recommendation of medical professionals.⁵¹ After passing the Bill, the Government announced it would reopen Christmas Island, where it would treat asylum seekers requiring medical treatment.⁵² However, the Government later announced that Christmas Island would again be closed less than four months after its reopening.⁵³ This July, Minister Dutton introduced a new Bill to Parliament to repeal the Medevac legislation.⁵⁴ At the time of writing, the lower house has voted in favour of the repeal.⁵⁵

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Rethinking the popular narrative



Sunrise over Aleppo (Luke Cornish)

Whose island home?

Art and Australian refugee law

Ingrid Matthews and
Prof James Arvanitakis

I Introduction

It is a truth too rarely acknowledged that there is no evidence to support the claim that refugees are a national security threat if they arrive by boat to seek asylum. Asylum seekers entering the Australian migration zone by boat are not an invading force, nor are they 'preparing, planning, assisting in or fostering the doing of a terrorist act'.¹ Seeking asylum is a human right.²

In Australia, accounts of how refugees came to be falsely conflated with national security typically begin with the 2001 'Tampa Affair'.³ We argue that a longer timeframe reveals socio-cultural norms, founded in British colonialism and Australian coloniality, that offer a fuller explanation for the bipartisan support of indefinite offshore detention.

We begin with the political narrative that is used to rationalise ever-harsher laws and allay concerns about human rights violations. This is followed by a brief survey of island prisons since 1788, sketching a history of banishment and isolation as punishment, to ask: is this how offshore detention is allowed to continue? To explore this possibility, we

place the foundational myth *terra nullius* at the intersection of law and culture, contrasting the role of colonial artists in furthering imperialism, with the ideal of art as a medium for truth, and law as a vehicle for justice.

II International and domestic law

The extent to which Australians endorse detention of asylum seekers arriving by boat is both contested and subject to dramatic shifts over time.⁴ Here, we proceed from the position that whether or not Australians believe or support this rhetorical nexus linking refugees to national security, it is not founded in fact.⁵

The universal right to seek asylum is codified in the Convention Relating to the Status of Refugees (*Refugee Convention*).⁶ The Menzies government ratified it in 1954 and passed the *Migration Act* in 1958. The Act has been amended over 100 times,⁷ which is often an indicator of highly politicised subjects. In particular, the politicisation of transport mode, is reflected in gradations of language. What are 'unauthorised maritime arrivals' in law⁸ are called 'illegal arrivals'

by ministerial direction⁹ and even ‘illegals’ in public discourse.

People who seek asylum after arriving by boat are now excluded from our refugee resettlement program, while our political leaders call Australia the ‘most successful’ multicultural/migrant country in the world.¹⁰ The public are also assured that our government is ‘absolutely confident’ of meeting international obligations.¹¹ How does this add up? Together, our domestic law and political rhetoric operate to authorise and rationalise practices that prima facie violate international law. We suggest the ‘confidence’ our political leaders proclaim turns on the wording of two *Refugee Convention* articles.

First, the *Refugee Convention* proscribes penalties for unauthorised entry (no visa) for those who come ‘directly from a territory where their life or freedom was threatened’.¹² In Australia — an island far from the violence that causes people to flee, including wars in which we participate — asylum seekers coming by boat tend to arrive via other territories.¹³ Secondly, article 33(2) qualifies the prohibition on refoulement where ‘there are reasonable grounds for regarding [a refugee] as a danger to the security of the country’. Here, narratives that frame refugees arriving by boat as a terror threat are used to maintain claims about abiding by international law.

Meanwhile, consecutive United Nations reports have found that Australia violates the rights of asylum seekers and refugees, such as ‘to be free from torture or cruel, inhuman or degrading treatment’.¹⁴ These findings are not contested by the government, but rather justified: ‘[t]he most humanitarian, the most decent, the most compassionate thing you can do is stop these boats’.¹⁵

This type of justification relies on an essentially utilitarian calculus. It says that the horrors of offshore detention for the few are necessary for the security of the many — a ‘greater good’ that hypothetically extends to deterring refugees from boarding unseaworthy vessels and potentially drowning. Yet this ‘security’ is achieved by real life ‘turnbacks’, which involve towing boats into international waters, an action likely to cause deaths at sea and in breach of the maritime duty to render assistance.¹⁶

III Island prisons

As mentioned, the refugee-terror nexus is usually traced to MV Tampa, a Norwe-

gian-flagged ship that rescued 433 Afghan refugees off the Western Australian coast. The then-Howard Government ordered SAS troops to forcibly transfer those rescued to a naval troop carrier and transported them to detention camps on the remote Pacific island of Nauru. A habeas corpus application initially succeeded, handed down on 11 September 2001 (Australian time).¹⁷ The government successfully appealed to the Full Court of the Federal Court, and a final attempt to see the initial order upheld by the High Court also failed.¹⁸

Analysing the case history, Head observes that:

as the Full Court deliberated, government leaders and media commentators applied intense pressure to the judges, arguing that the terrible events in the United States on 11 September 2001 made it essential for the government to wield wider powers. The Commonwealth Solicitor-General, David Bennett QC, told the court that North J’s decision could restrict the government’s ability to avoid such disasters as the attack on the World Trade Center. In the media, Defence Minister Peter Reith insisted that, if North’s ruling stood, it would open the floodgates for terrorists to enter the country on refugee boats. Without offering a skerrick of evidence, a junior minister, Peter Slipper, claimed there was ‘an undeniable linkage between illegals and terrorists’.¹⁹

In a decision Head describes as having ‘rewarded the government for thumbing its nose at the legal process’,²⁰ the High Court found the application had been ‘overtaken by events’.²¹

Offshore detention is not, however, merely a 9/11 politic. From ‘secondary’ punishment of convicts, banishing First Peoples in aid of ‘manifest destiny’ mythology, and ‘offshore detention’ today, the island prison is a prototype of the imperial ethno-state. On this view, the island prison sits on a continuum from British colonialism to Australian coloniality, from 1770 to the present. The model is marked by brutal structural violence and the epistemic dishonesty of formalism. Presumption of innocence and habeas corpus are discarded, by gubernatorial fiat in the colonies, and by the Parliament and courts today.

In this context, the camps on Manus and Nauru are not 'a new low' as is sometimes claimed, but a contemporary iteration of the foundational structure of the Australian state, the island prison. Having established its penal colony at Warrane (now Circular Quay) in 1788, the British authorities created second-tier island prisons for control of specific populations within the first year. In the harbour, a punishment site was set up on Mat-te-wan-ye (later Pinchgut Island, now Fort Denison). Another penal colony was built in the lands of the Palawa Peoples (then Van Diemen's Land, later Tasmania), and off Tasmania yet another was set up on Langeraroune (now Sarah Island).

As the colonisers spread out in what Professor Megan Davis, a Cobble Cobble woman, calls 'the pattern of killing that was the political economy of Australian settlement',²² the convict population declined. The island prison model shifted and was turned on First Peoples: Cape Barren for Palawa who survived the Tasmanian genocide; 'lock hospitals' on Dorre and Bernier islands off the West Australian coast; the eugenicist practices that created a population of over 50 different language groups on Palm Island, Queensland.

The colonisers hailed from island homes ravaged by waves of invasion and a culture defined by violence. In contrast, some 350 distinct First Peoples, who maintained international relations across the biggest island on earth, had 'invented society', their 'culture based on peace'.²³ The impossibly cruel and traumatic act of banishing survivors of violence to island prisons was done then — by colonial authorities who arrived by boat — to First Peoples, and is done now by Australian authorities to refugees who arrive by boat.

It is an Anglo-Australian weltanschauung that directs the fate of asylum seekers in boats at our borders. While the Commonwealth of Australia is a direct descendant of British imperialism and asserts a singular sovereignty, the law of the land and its sovereign custodians were not willed out of existence by imperial force.²⁴ As Professor Irene Watson of the Tanganekald, Meintang Boandik First Nations writes: 'First Nations have grown from ancient treaties amongst themselves; those treaties acknowledge the ancient borders we care for and within which we belong.'²⁵ One fascinating illustration in

this context is 400 Aboriginal Nation passports issued to refugees on Manus Island.²⁶

iv Terra nullius

Despite being set aside by our highest court in 1992,²⁷ Australian cultural life retains multiple manifestations of terra nullius mythology. One example is the way colonial artists depicted First Peoples in the landscape as 'noble savages', a reductionist rendering that worked in tandem with scientific racism to rationalise colonial violence.²⁸

In *Picturing Imperial Power*, Tobin examines the role of art at the intersection of visual culture and political power.²⁹ Building on this, Macneil found a significant presence of Aboriginal people at first contact by colonial era artists was followed by their near absence by the mid-nineteenth century. In this way, colonial art sits alongside the physical world of dispossession by force and its intellectualisation, the evolutionary paradigm that posited Aboriginal people and their culture would 'disappear'.³⁰ The *Cornwall Chronicle*, reporting on works by colonial artist Robert Dowling in March 1857 illustrates this worldview: '[s]uch works of art as these become more valuable with age, even now these must be looked upon as historical paintings, of the primitive state of society in these colonies, banished by the light and progress of civilisation'.³¹

The move to federation was specifically buoyed by a nationalist mood of celebrating white settlers' triumph over a land and her people, reflected in the work of colonial artists: 'This exclusion of Aboriginal people from the conceptualisation of the Australian nation reflects the effectiveness with which a visual discourse of 'Australia' painted Aboriginal people out of existence'.³²

The colonial artist then 'painted in' white frontiersmen. Chillingly, Lehman has found 'there is a repeated absence of Aboriginal presence in Tasmania' where even artists who painted Aboriginal people into mainland scenes would omit Aboriginal people from Tasmanian landscapes.³³ Here again the artist reflects the acts of his compadres: even today, Tasmania is notorious for the most brutal forms of penalty and its genocidal 'Black Line'.³⁴

These themes are taken up by Australian artist Danie Mellor. In *Maba-I-Bala Rugby (Of Power in Darkness)*,³⁵ Mellor juxtaposes



Dora (Luke Cornish)

the coloured presence of Aboriginal people within a blue-and-white imperialist landscape that politically and artistically attempted to eradicate them, thereby reuniting First Peoples with their lands.

The line from colonial to contemporary displacement can also be seen in the work of Australian street artist Luke Cornish (ELK), who uses stencil art to highlight the plight of refugees and to remind us of the fragility of memory.³⁶ In *The Sea*, Cornish reminds audiences of the plight of displaced persons in conflict zones. While victims of war and catastrophe, from Syria or Yemen, scroll regularly across our screens, most touch our thoughts for a very short time. We may feel simultaneously sad and lucky to be living in Australia: comfortable, safe and secure. How do the narratives offered by the political leadership, messages that promotes refugees as terrorists, take root in the public mind in this context? More recently, Cornish has been the subject of controversy for his 'Not Welcome to Bondi' mural depicting 24 Australian Border Force officers standing in a line to represent the 24 suicides that have occurred in Australian detention facilities since 2010 — a mural that faced a conservative backlash and was eventually defaced.³⁷

Just as quickly as images of war and destruction appear, they disappear. The starving children that captured our attention are replaced with an emerging conflict, a new disaster in another part of the world, perhaps one we cannot locate on a map. Our attention shifts and we see a decontextualised horror, not knowing the history, background or reasons for what is going on.

v The art of memory

If the colonial artist erases First Peoples from depictions of their lands, the law underwrites that removal by force. Similarly, law provides a set of tools to counter regimes that perpetuate exclusion and persecution; while the work of artists can provide alternative entry-points to public engagement with complex histories that transcend the boundaries of the legal fraternity.

This becomes critical in our contemporary society, where the apparent permanency of institutional cruelty meets a fragile and fracturing human memory. In a world of distractions, our memories can disappear very quickly. The important role of the

artist and their art in our world are not simply an aesthetic intervention — art and artists present us with dimensions that no other medium possesses. To complete this paper, we present three such dimensions.

The first is art as a mirror, reflecting our failings and triumphs, or who we are in visual terms. Syria is not only far removed from most Australian lives, it is a conflict with generational roots, understood by Syrian migrants here, but not by our elected leaders who lack the skill, will or political capital to effect an intervention. In *The Sea*, Cornish presents a series of burnt out buildings which confront us with more than the war in Syria — they reflect the failing of our political system and futility of still, after all these years, trying to present war as a solution.³⁸

A second dimension is that art confronts our forgetfulness. While we struggle not to lurch from distraction to distraction, artists act as an external conscience, never permitting us to forget. Like Picasso's *Guernica*,³⁹ the images Cornish presents are designed to represent the humanity of those who are otherwise too easily removed from our memories.

Beyond being a mirror on the world, the final dimension is art turning its lens into ourselves. From the way Mellor replaces First Peoples into colonial portrayals of Australian flora to Cornish creating and curating images of refugees who stare relentlessly back at viewers, we are compelled to think about ourselves: whether our own fortune, our own families, or our own culpability in maintaining a colonial system is constructed on invasion and maintained by exclusion.

Picasso proclaimed that 'painting is not done to decorate apartments. It is an instrument of war'.⁴⁰ But art can also be an intervention, one that leaders rarely mobilise, and their sponsors do not care to underwrite. This is because art and artists expose the best and the darkest elements of our society, and the failings that lead to conflict, loss and displacement. At the same time, art at its best is integral to celebrations of community and to communicating empathy, a medium that transcends the rigidity of institutions and restores our humanity.

vi Conclusion

This article seeks to shed light on how Australia's offshore detention regime has

been allowed to continue, as well as offer some hope for bringing it to an end, from a number of different angles. We do this not least because the problem seems intractable, suggesting the need for multi-variant and less conventional viewpoints. The horror of indefinite detention on island prisons established by Australia on Manus and Nauru is not only authorised by domestic law, it is legitimised by narratives that resonate a white Australian hegemony of fear and isolation that is constitutive of the nation state. This is why we must look beyond the law of the coloniser to the law of the land, and beyond political culture to the arts, for hope of a moral resolution. 🏠

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Protesters from Whistleblowers, Activists and Citizens Alliance block entry to Australian Border Force headquarters. The group supports refugees detained on Manus Island. Melbourne, 10 November 2017 (Tracey Nearmy/AAP Image)

Making migration law

Courting our conscience

Dr Eve Lester

In May 1992, I was representing members of a group of about 30 Cambodian asylum seekers who sought their release from detention in the Federal Court of Australia. They were among a cohort of 389 so-called ‘boat people’ who had arrived in Australia over the preceding few years.¹ Two days before the hearing, and without notice to the applicants or to us as their representatives, Migration Amendment Bill 1992 (Cth) was introduced into Parliament. With bipartisan support, it passed both Houses that same evening. Specifically designed to stymie the case before the Federal Court, the legislation provided that ‘boat people’ *must* be detained and that a court was not to order their release from custody.² This mandatory detention framework was, the Act said, in ‘the national interest’.³

The significance of this legislative framing was in the silence it created. Detention was by operation of law. There was no actual decision to detain. Because mandatory detention was decision-less, there was nothing for a court to review. The Bill suggested that detention was to last for a limited time — 273 days (or about nine months) (*not* counting the more than two years detention the

Cambodians had already endured). However, the legislation distinguished between what was called ‘application custody’, which was limited to 273 days, and ‘custody’, which was not. According to the legislative formula, the clock stopped on ‘application custody’, but not custody, every time progressing a claim was out of the Immigration Department’s hands (for example, if the detainee exercised appeal rights). Thus, detention could be much more prolonged, and possibly indefinite. Indeed, some of this cohort would be held in ‘*application* custody’ for less than 273 days but would not be released from ‘*custody*’ until 1995.

How could legislation with such ramifications pass so effortlessly onto the statute books? How could the High Court uphold the constitutional validity of legislation that is so manifestly oppressive? What is it about migration lawmaking that enables responses such as this to unsolicited migration seem thinkable? These are the questions that animate my book, *Making Migration Law: The Foreigner, Sovereignty and the Case of Australia* (*‘Making Migration Law’*).⁴ In other words, I ask: How have we got into this mess? For, wherever one

stands on the political spectrum, few would deny we are in a mess. And, if we do not understand how we got into it, we stand little chance of being able to navigate our way out of it, legally or politically.

This article provides an overview of the approach I take in the book and offers some of my key findings and conclusions. First, it explores how we have inherited the (highly contestable) claim that there is an absolute sovereign right to exclude and condition the entry and stay of aliens, which I term ‘absolute sovereignty’.⁵ Second, it uses the example of mandatory detention, one of two case studies analysed in the book,⁶ to show how we use that inheritance in contemporary practice. This pairing enables us to think about the past in order to illuminate what contemporary lawmakers do and why they do it. It makes visible how deeply ingrained ‘absolute sovereignty’ has become as a system of thought and practice. What we see is that the emergence of an international human rights framework and the end of the White Australia immigration policy were not harbingers of a new dawn in migration lawmaking, despite having been events of great historical moment.

I Early international law and the foreigner

From its earliest conceptions (European) international legal theory contemplated the foreigner’s mobility in rights terms; rights to set forth and travel, to sojourn, to hospitality, to trade, and to share in common property. Free movement rights all found voice in the work of early international jurists, including rights of passage, the right to leave one’s country, the right of asylum, and (perhaps most striking for the modern international lawyer) the right to enter and reside in the territory of *another* state. Likewise, the right of necessity played a significant and evolving role in shaping how international law framed and conditioned the foreigner’s stay. By any measure, it is a dazzling array of rights. But who was the foreigner in this early international legal paradigm? And why did he (a pronoun I use advisedly) enjoy such rights?

In Chapter 2 of the book I examine the seminal international legal texts of Francisco de Vitoria, Hugo Grotius, Samuel Pufendorf and Emmerich de Vattel between the

sixteenth and eighteenth centuries, which makes visible that the foreigner in early international law was a figure of privilege and power — a European insider, aligned with the sovereign and sovereign interests.⁷ Above all, he was either an imperialist, conquering and claiming the coastlines of the New World, or an intra-European foreigner, whose mobility was enabled and authorised by international law, whether as trader or exile. That is why he had rights. And that is why these early texts disclose no references to the idea of ‘absolute sovereignty’. Instead, the foreigner’s treatment in early international law was informed by considerations such as necessity, humanity, hospitality and tolerance. In contrast to the ‘foreigner’, it was the ‘barbarian’ of early international law who was the outsider, a non-European made subject to the law yet unworthy of its protection; subjugated rather than outlawed.

II The 19th century: a changing migratory landscape

A changing migratory landscape and political-economic conditions in the nineteenth century marked a shift in how the figure of the foreigner was conceptualised.⁸ A new kind of foreigner — a (presumptively) hostile non-European ‘barbarian’ outsider — was now on the move. It was this shift and a desire, particularly in white settler societies, to regulate the mobility and labour of non-Europeans such as the Chinese that prompted the common law innovation of ‘absolute sovereignty’. So, its emergence was neither historically accidental nor juridically inevitable.

What becomes clear is that ‘absolute sovereignty’ as a claim emerged because of a political and economic desire to regulate race and labour. And, no sooner had it appeared than the courts began treating it as a ‘settled’ common law doctrine that was ‘not open to controversy’⁹ even though, as we will see, it relied on selective and instrumentalist readings of early international legal theory.¹⁰

A judiciary in lockstep

In the second half of the nineteenth century, particular (instrumentalist) readings of early international law by the courts overlooked significant qualifications to the power of the sovereign. The Privy Council, the US Supreme Court and later the High Court of

Australia all relied on the following proposition attributed to Vattel:

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.¹¹

Yet, none of the aforementioned courts saw fit to consider the implications of a tempering proviso in the same paragraph 'not [to] refuse human assistance to those whom tempest or necessity obliged to approach their frontiers'.¹² Elsewhere, Vattel qualified his position on the sovereign power to exclude with a rhetorical question: 'can it be necessary to add, that the owner of the territory ought, in this instance, to respect the duties of humanity?'¹³

These qualifications were overlooked by a judiciary in lockstep with the legislative and societal expectations of white settler societies, which were unapologetically doing all that they could to keep out non-Europeans. So, although we cannot forget that the foreigner in the work of Vattel and his predecessor publicists was a European, we can also see that the courts had hewn the doctrine of 'absolute sovereignty' out of a body of international law in a way that overlooked that dazzling array of rights that had been conferred on the (European) foreigner.

iii The 20th century constitutional entrenchment

Upon the Federation of Australia in 1901, 'absolute sovereignty' was constitutionalised in what was described at the time as the 'freest Constitution in the world'.¹⁴ Given expression through the inclusion of plenary powers in the *Commonwealth Constitution* — powers to make laws with respect to aliens and naturalisation, and immigration and emigration — it thus became even more deeply entrenched.

No debate and no due process right

So uncontroversial had these powers of exclusion been during the Constitutional Conventions that they engendered *no debate*. Indeed, the only debate on immigration arose when a proposal for a Four-

teenth Amendment style due process right was defeated for fear that it may give such rights to people of 'undesirable races or of undesirable antecedents'.¹⁵ Even a weaker proposal providing that people should not be deprived of life, liberty or property, without due process of law was rejected. As one delegate put it in defence of the doctrine of responsible governance, Australia was far too civilised to need to entrench a due process right in its constitution:

Why should these words be inserted? They would be a reflection on our civilisation. Have any of the colonies of Australia ever attempted to deprive any person of life, liberty, or property without due process of law? I repeat that the insertion of these words would be a reflection of our civilisation. People would say — 'Pretty things these states of Australia; they have to be prevented by a provision in the Constitution from doing the grossest injustices.'¹⁶

In 1901, when debating the two Bills that were foundational to the White Australia policy (the Immigration Restriction Bill 1901 (Cth) and the Pacific Island Labourers Bill 1901 (Cth)), the new legislature embarked on the task with full confidence in the (absolute) scope of the aliens and immigration powers that had been described as a 'handsome new year's gift for a new nation'.¹⁷ During that debate, Isaac Isaacs, MP (later Attorney-General, Chief Justice of the High Court and then Governor-General), proposed incorporating an 'instant power in any emergency to exclude any person whom this country thinks is undesirable'.¹⁸ One MP admonished him for making a proposal that was 'despotic'.¹⁹ The response of the future Chief Justice was candid and un-defensive: 'if we are going to offer a reproach to a measure because it is despotic, we must not forget that without a despotic provision we cannot do what we want at all'.²⁰

iv Mid century: curtailing 'naked and uninhibited' powers

In 1958, migration law in Australia underwent a major overhaul. The notorious dictation test, whereby an 'undesirable' migrant could be excluded if they failed a dictation test of 50 words in a European language of the immi-

gration officer's choice, was abolished.²¹ However, the reform agenda was broader, covering deportation and detention powers.

In his Second Reading Speech,²² then Minister for Immigration Alexander Downer Sr did something that seems astonishing now, given current authoritarian approaches to unsolicited migration: he resolved to place legislative limits on his own powers by subjecting them to judicial scrutiny. In doing so, he highlighted the Minister's 'solemn responsibility' to 'wield' powers he recognised to be 'arbitrary' in a manner that preserved national security but was also 'humane and just to the individuals concerned' — powers that he recognised were 'capable of the gravest abuse'.²³ With this in mind, he foreshadowed the imposition on the Minister's broad deportation powers of 'important checks on his authority'. Underscoring that his department dealt 'first and last' with human beings and their future welfare, he opined: 'as human values change, so the law must change'.²⁴

As to the arrest and detention of 'suspected prohibited immigrants', Downer stated in the same speech that:

[T]he present act empowers an officer without warrant to arrest any person reasonably supposed to be a prohibited immigrant offending against this act. *A moment's thought will show the latent dangers here.* Accordingly ... the Bill provides for a person so arrested to be brought within 48 hours, or as soon as practicable afterwards, before a prescribed authority, who must inquire into whether there are reasonable grounds for supposing the person to be a prohibited immigrant. If the authority finds such grounds, he will order continued detention for a maximum period of seven days pending the Minister's decision as to deportation.²⁵

Downer added further that 'naked and uninhibited' powers of arrest (and detention) provided for in existing legislation had the capacity to 'cause great injustice'.²⁶ Having declared a maximum period of seven days detention pending a decision to deport, he then detailed 'elaborate safeguards' against such injustice, including retention of the 'overriding power of [the courts to order] a person's release from custody if the court finds that the deportation order is invalid.'

In addition to the right to apply for a writ of habeas corpus or injunctive relief, he added, the Bill would '[go] further', also providing for 'reasonable facilities for obtaining legal advice and taking legal proceedings'.²⁷

Perhaps the most striking example of the reforms that the Minister outlined was the establishment of detention centres, which he characterised as a 'humanistic innovation'.²⁸ Describing as 'undesirable' what we now call co-mingling (that is, detaining immigration detainees in prisons together with convicted criminals), particularly because deportees 'very often' had a 'blameless record', he declared that there was 'a compelling case' for reform in the treatment of people he called 'statutory offenders'. In making these reforms, Downer described his own experience as a prisoner of war of the Japanese for three years as a 'comparable situation'. Gaols, he said, were 'depressing places, especially when you are not in any true sense an offender'. It was on this basis that he hailed the introduction of detention centres as a welcome innovation out of which he was 'sure' that 'nothing but good will come'; an innovation that, along with other ameliorating effects of the legislation, he believed would 'place Australia in advance of any other country in the world.'

v The 1990s: mandatory detention

In 2019, the *Migration Act 1958* (Cth) that was introduced by Sir Alick Downer is still in force in Australia. However, it has been amended so many times that it is unrecognisable. Nevertheless, in 1992 the substance of the safeguards outlined in Downer's Second Reading Speech remained in place; that is that detention was to be for a limited period of seven days (or longer with the detainee's consent), and that detention was subject to review by an independent authority. However, for the Cambodian 'boat people', whose situation provided the setting for this piece, the Immigration Department had elected to detain them under a different provision.²⁹ Designed for stowaways, this other provision was intended to apply as a short-term measure.³⁰ Although its use was doubtful, and, the High Court would eventually conclude, unlawful,³¹ its value to the Immigration Department was that it lacked the safeguards (and inconvenience) of periodic review and independent

scrutiny. Like the ‘barbarians’ of early international law, it enabled ‘boat people’ to be treated as subject to the law but unworthy of its protection; subjugated but, as the High Court would later remind us, not outlaws.³²

As readers will recall, mandatory detention as it was originally formulated occurred by operation of law, and the legislation sought to place such detention beyond the scrutiny of the courts. My analysis in the book of the parliamentary debates around this first legislative framing of mandatory detention, as well as the transcript, court file and judgment in the constitutional challenge to it reveals the operation of parallel and mutually self-validating speech choices and techniques that are illuminating. On the one hand, a theme of (state) control and restraint relies on two claims: that there is an absolute sovereign right to control borders, and that the state can be trusted to exercise that right responsibly. On the other hand, a theme of (asylum seeker) deviance and opportunism ascribes to so-called ‘boat people’ illegality, lawlessness and impropriety, as well as volition. The speech choices and techniques that give effect to these themes reinforce the perception that complete control is valid and necessary and that the silence of decision-less detention is justified. Together they underpin political and jurisprudential pronouncements that regard the mandatory and non-reviewable detention of ‘boat people’ as an appropriate means of regulating entry into Australia.

No debate and no due process right

Bipartisan support for the Bill meant there were speeches but *no debate* in the House of Representatives, and though the lack of due process was raised by the Australian Democrats and Independent Senator Brian Harradine in the course of debate in the Senate, it did not hold sway.³³ Instead, parliamentarians offered a smorgasbord of immigration metaphors and other rhetorical flourishes, designed to drive home the enormity of the problem posed by ‘boat people’.³⁴ The oppressive consequences of the Bill were pitched as tough but necessary; rational and restrained. In both Houses, ‘boat people’ were maligned as queue-jumpers engaging in illegal conduct; as people ‘simply ... expecting to be allowed into the community’, not people who may need protection.³⁵

In his Second Reading Speech, the Minister self-presented as the epitome of moral restraint, and his Government and his Department as models of good governance. He claimed ‘no wish’ on the part of the Government ‘to keep people in custody indefinitely’. Indeed, he ‘could not expect Parliament to support such a suggestion’. To this end, he asserted that custody would be for a ‘limited period’, being the 273 days (or about nine months) referred to earlier, and implied that processing of their claims would be completed much more quickly.

Additionally, the Minister positioned himself as entitled to and capable of adjudging the motives and behaviours of the ‘boat people’ and their lawyers. Indeed, he had described immigration lawyers in Cabinet as ‘the worst kind of human beings’ he had ever encountered.³⁶ He attributed delays in processing times to their ‘calculated tactics’,³⁷ thereby papering over governmental flaws and inefficiencies and the full implications of ‘application custody’ and the ‘273 day rule’. The clock stopping formula was, he said, designed as an ‘incentive for the parties involved in the process not to embark on tactics calculated to delay the final processing of claims.’

Working up his moral identity as a reluctant jailer, the Minister re-emphasised that the Government had ‘no desire to keep these people in custody longer than necessary’,³⁸ thereby amplifying his repeated insistence that he was doing only what was necessary and that the detainees had only themselves (or their lawyers) to blame for their continuing detention.³⁹ This linguistic interplay, which juxtaposes institutional restraint with a projection of deviance, constructed the ‘boat people’ as responsible for their own detention; a technique that strategically inverted the foreigner to sovereign power relation by presenting the deprivation of liberty as entirely within the control of those who were subject to it.

Chu Kheng Lim: the High Court proceedings

The ascription of responsibility and control on the part of ‘boat people’ for any encounter with Australia’s unscalable wall of ‘absolute sovereignty’ would prove central to the constitutional case that came before the High Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (‘Lim’).⁴⁰ As the transcript shows, in the course of



Refugees waiting inside a hospital
at Lorengau on Manus Island
(Jonas Gratzer)

proceedings the Solicitor-General deployed with alacrity the rhetorical force of repetition to impress upon the Court that mandatory detention was the detainees' choice.⁴¹ They were, he said, engaging in a voluntary activity, were voluntarily detained, had come voluntarily to Australia and were free voluntarily to depart at any time. A number of judges seemed unimpressed by this discursive strategy during the proceedings. But the Solicitor-General pressed on. Indeed, he cautioned the Court against being tempted to look behind the facelessness of the legislative scheme at the people affected as *people*:

The problem is, Your Honour, when one gets close enough to these people as people who have committed no offence, who have a sincere desire to enter Australia, who have been detained for lengthy periods, one can obscure the basic issue of ... legislative power in respect of aliens that we are dealing with here.⁴²

In other words, the Solicitor-General argued that the humanity of the detainees should not be permitted to obscure the 'basic issue'; the basic issue being power — an absolute sovereign power of exclusion. Conversely, it would seem, 'absolute sovereignty' trumps respect for those duties of humanity that Vattel viewed as so self-evident that he scarcely thought them necessary to mention.

Lim: the High Court's judgment

In its judgment and relying on the instrumental readings of Vattel by the nineteenth century Anglo-American courts that erased the duties of humanity, the majority in *Lim* concluded that mandatory detention was a lawful exercise of the sovereign right to exclude embodied in the aliens power. The Court also concluded that the judiciary had no role in overseeing the detention because the detention was not punitive. It was not punitive because the detainees could always leave. To stay in detention was, therefore, their choice. Furthermore, the Court concluded that the measure of mandatory detention was one that was reasonably capable of being seen as a necessary and appropriate means of regulating entry; a measure that was found to be well within the same power — the same 'despotic' power — that had been innovated in the nineteenth century and was handsomely gifted to the nation in 1901. In other words, the unin-

vited migrant engages in an encounter with absolute sovereignty at their peril.

iv The 21st century: mandatory detention

In his Second Reading Speech when introducing the mandatory detention Bill in 1992, Minister Hand acknowledged the 'extraordinary nature of the measures', but reassured Parliament that the legislation was 'only intended to be an *interim* measure'.⁴³ As we know, more than 25 years later, mandatory detention is still government policy and to date has survived every challenge to its constitutional validity. Even as it seems to be overshadowed by the stridency of more recent responses to unsolicited migration, it remains a keystone policy, underpinning, for example, offshore processing of 'boat people' on remote Pacific islands and detention and turnaround policies implemented on the high seas.

Since August 2012, 4,177 people have been sent to and detained on Nauru or Manus Island, Papua New Guinea, as part of Australia's offshore processing arrangements.⁴⁴ As of 26 March 2019, there were 359 people left on Nauru and 547 left on Manus Island (915 people in total), with a further 953 of 1,246 medical transferees to Australia remaining here.⁴⁵ In addition to this, of the 1,285 people in immigration detention as at 31 December 2018, 380 were 'boat people' mandatorily detained in Australia, with a further 15,674 having spent often long periods in immigration detention but now, pursuant to the exercise of a non-compellable ministerial discretion, living in the community on short-term Bridging Visas.⁴⁶ Of these, 60.3 per cent (774 people) had been detained for 183 days (six months) or more, and 22.2 per cent (285 people) had been detained for in excess of 730 days (or two years).⁴⁷ Thus we see that the policy of mandatory detention still enjoys bipartisan support and continues to exact a grave human toll. And, to date, it remains firmly embedded in contemporary jurisprudence.

vii Acknowledging an unedifying backstory

As I argue in *Making Migration Law*, if we are to find a way out of this mess, we need to understand how we got into it. Importantly, we need to understand contemporary migration

law as part of a longer, profoundly unedifying, and highly racialised jurisprudential tradition embedded within the broader context of a political economy of the movement of people. For it was in this context that the relationship between the 'sovereign' and the figure of the 'foreigner' was shaped into the claim of 'absolute sovereignty' and respect for the duties of humanity was erased. Thus, by locating contemporary Australian migration law within this longer trajectory, it becomes possible to track the way in which claims of 'absolute sovereignty' came together as practice, doctrine and authority. Popularised by Prime Minister John Howard's statement that 'we will decide who comes to this country and the circumstances in which they come',⁴⁸ it is this deeply entrenched 'absolute sovereignty' talk that today makes the policy of mandatory detention 'thinkable' and, for some, seem inevitable as an institutional response to unsolicited migration.

Understanding 'absolute sovereignty' as an idea or claim, not an unassailable or inevitable truth, enables us to notice and critically re-evaluate how power and law are understood and used to mediate the relationship between the foreigner and the sovereign. Making visible what we have inherited and how we use it impels ownership of the power relation that inheres in both 'absolute sovereignty's' past and its present. It obliges us to pay attention to what happens when contemporary migration lawmakers and policymakers rely on and perpetuate institutional practices that have, through the ostensible neutrality and restraint of law and legal process, enabled them to grow accustomed to having at their disposal absolute power over the movement and activities of foreigners. It enables us to see that even though many of us are exercised by the dehumanising effects of these policies, the claim of 'absolute sovereignty' has become such a deeply ingrained system of thought and practice that there is no political or juridical obligation to think about the people whose lives are (knowingly) being shattered by it. We struggle to find purchase in our opposition to it because where absolute power is at work there is nothing to push against.

viii Where to from here?

I conclude the book with a provocation for a new conversation; one through which we

resist 'absolute sovereignty' as an impenetrable claim; through which we *resist* the assumptions that have authorised, upheld and normalised the claim of 'absolute sovereignty'; and through which we *resist* the structural indifference to the duties of humanity towards 'boat people' — those 'barbarians' at our border — that is embedded in the claim of 'absolute sovereignty'.

What, then, are the possibilities? Can we think and do migration law in Australia without feeling impelled to make a claim on sovereignty in absolute terms? Can we turn 'absolute sovereignty' into a question — even a problem — rather than treating it as a given? Can we rethink the unregulated or under-regulated space in which the claim of sovereignty resides as an accountable space; open to meaningful scrutiny? If we could do this — even try — would the way in which we talk and think about both unsolicited migrants and ourselves assume a different quality?

As a first step, I suggest that we could engage more consciously with the dynamic potential of the relationship between the foreigner and the sovereign. We could court our conscience by eschewing the totalising claim of 'absolute sovereignty' as the unanswerable answer to unsolicited migration and repudiating the inevitability of the structural violence of the border. Instead, the relationship between the foreigner and the sovereign would be (re)imagined as one of vitality and exchange, one that recognises and respects the duties of humanity. Recalling the dazzling array of rights the foreigner enjoyed in early international law, it is a reimagining that is not as radical as it may seem. 📖

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A navy dingy approaches a wooden refugee vessel that is sinking in waters off Christmas Island. Claims that asylum seekers were throwing their children over the sides of the boat were found to be false.
Christmas Island, 17 February 2002
(Australian Defence Video/AAP Image)

Vanquishing asylum seekers from Australia's borders

Creating visibility for justice

Prof Linda Briskman

I Introduction

Banishing asylum seeker 'boat people' from the nation state has been a cornerstone of Australian politics.¹ This casting asunder is so normalised that the majority of the population barely notices, or hardly cares, with cruel politics, invisibility and apathy combining in a human rights-denying combination. Regrettably, the global increase in the volume of asylum seekers has normalised, removing immigration spaces of incarceration from the archetypal list of exceptionality.²

In 2016, I wrote for *Court of Conscience* about resisting the silence that shrouds asylum seeker advocacy.³ This paper takes a new turn by examining the binary of asylum seeker invisibility (desired by the state) and visibility through both imagery and messaging. In doing so, I present examples of how policies and practices are difficult to challenge when hidden from public knowledge and view. To set the scene for the paper, I first provide an overview of some of the harsh 'casting out' policies.

II Casting out

Mandatory detention in Australia, introduced by the Labor government in 1992, is the foundation of asylum seeker subjugation. This provision is condemned by human rights organisations, the asylum seeker advocacy movement, professional bodies and refugees. Immigration detention is not only a way of controlling borders and migration, a key policy plank of government, but of placing lawful asylum seekers out of the gaze of humanity, lest humanising rather than criminalising boat arrivals might weaken the deterrence narrative. On a global scale, numbers of 'unauthorised' arrivals are relatively low in Australia, as vast sea borders create a natural barrier. Nonetheless, as the Geneva-based research centre (Global Detention Project) posits, Australia has the most restrictive immigration control regime in the world.⁴

When immigration detention was enshrined in legislation, it was unlikely that the policy architects anticipated what would follow. The policy was such that all 'unauthorised' asylum seekers, mainly boat arriv-

als without valid visas, were to be detained until granted refugee status or removed from Australia.⁵ What began as detention in metropolitan, rural and remote sites extended to distant island locations including Australia's Indian Ocean Territory of Christmas Island and subsequently to the countries of Nauru and Papua New Guinea (Manus Island), the latter known as offshore processing centres. The indefinite nature of immigration detention is frequently prolonged, with serious mental health implications. Although mandatory detention legislation remains in place, policies have been devised that allow people to be released into either community detention (residence determination) or a Bridging Visa E.⁶ These strategies have created additional problems including inadequate financial support, lengthy periods before claims are processed and flow-on effects such as disallowing family reunion.⁷ As neither of the major political parties in Australia want people to arrive by boat, an array of policies and legislation has been incrementally introduced for the purpose of deterrence.⁸ While it is beyond the scope of this paper to provide a full description of the harsh deterrent measures, it should be noted that the most publicly criticised has been the so-called 'Pacific Solution', which paradoxically is the most invisible.

Bacon et al. describe 'Pacific Solution' detention in the sovereign nations of Nauru and Papua New Guinea as marking the point 'at which Australia began moving away from its international treaty obligations – to one of crude and pragmatic national politics based on fear and vilification'.⁹ The trajectory of exclusion includes the announcement by the Rudd Labor government in July 2013, declaring that no asylum seeker who arrived by boat would ever be given the chance to settle in Australia.¹⁰ For the first time ever, Australia would be totally closed to those arriving by boat even when found to be refugees¹¹ and has resulted in some asylum seekers and refugees remaining immobilised in Nauru and on Manus Island, with others resettled in the United States under a 'swap' deal negotiated between Australia and the US, even further alienating asylum seekers from the view of the Australian public.

III The visibility/invisibility binary

At a global level, movement of asylum seekers and refugees has become increasingly observ-

able outside the realm of human connection. Our online screens, social media sites such as Facebook and Twitter along with Instagram networks remind us of the sheer velocity of people on the move with the destruction of nations, communities and peoples.¹² Roland Bleiker writes of the power of visual imagery in the global political arena, noting that 'we live in a visual age', with images of international events shaping our understandings, including digital media.¹³

Imagery can be evocative in producing emotion. Take for example the global circulation of a 2015 image of three-year old Syrian Kurd, Alan Kurdi, lying dead on a Turkish beach, a child like any other. More recently, in June 2019, the picture of a father and toddler daughter broke compassionate hearts, with both lying face down in waters on the Mexican side of the Rio Grande. Particularly poignant was the child lying still in her father's lifeless protective embrace. Los Angeles Times journalist declared that: 'Sometimes an image is so powerful, it cuts through almost any noise', although others questioned the benefit of disseminating through social media the photograph that was first published in Mexico by *La Jornada*.¹⁴

Even though such images are powerful, they are few and far between. In the Australian context there are many factors that converge to hide asylum seekers from public view. Immigration detention in remote sites is one way in which humanising of asylum seekers has been restricted. When Christmas Island was a major detention site, a four-hour plane trip from Perth and expensive fares and accommodation were prohibitive for people wishing to visit asylum seekers and hear from them directly. With the advent of offshore detention, there have been restrictions in place that prevent people gaining visas to the countries in question, including journalists.

An additional means of purging asylum seekers from public view via distance is naval interception at sea, including the 2001 Operation Relex, reinvented in 2013 as the military-led Operation Sovereign Borders, which continues.¹⁵ Because of Australia's vast sea borders and the secrecy of 'national security' operations, the plights of those who have been intercepted and removed from Australian waters are largely unknown. Furthermore, most people would not be aware

of Australia's obligations under the 1951 *Refugee Convention*, particularly the principle of refoulement, which prohibits people being sent back to places of possible persecution. Nor are they likely to be aware of how Australia violates other international norms to which it subscribes, including the *Convention on the Rights of the Child*, the *International Covenant on Civil and Political Rights* and the *Convention against Torture*. There was inadequate publicity given to an early action of the re-elected conservative government, which opportunistically declared that it had saved the lives of 41 Sri Lankan asylum seekers at sea,¹⁶ but not enough lifesaving it seems to fully hear out their claims before returning them back to Sri Lanka. Sending back people without giving each person a chance to fully present their claim including 'fast-tracking' has been criticised by the Kaldor Centre for International Refugee Law which calls for compliance with Australia's international legal commitments.¹⁷

On mainland Australia, asylum seekers are 'less place based, less contained and less spoken about'.¹⁸ With asylum seekers now more commonly in the community than detention, this is deceptively touted as a humane approach. However, with the diminishment of the previous safety net of the Status Resolution Support Service (SRSS), many vulnerable asylum seekers are forced into destitution and at best reliant on charity, community goodwill or state government intervention.¹⁹ Arising from this, interaction and connection are not easy to foster. Waiting for years for claims to be processed has a negative impact on personal wellbeing, which does not bode well for a conventional social life, social interaction, community visibility and empathy.

In attempts to create alternative visibilities, approaches are adopted through persuasive language and metaphor. Yet, these may be subject to harsh rebuke by influential groups. One recent example is the criticism of well-respected author Thomas Keneally. Executive Director of the Sydney Institute Gerard Henderson condemned Keneally for adopting the term 'concentration camp' for the asylum seeker/refugee camp, with his usage of this term seen by Henderson as 'grossly inaccurate'.²⁰ When criticism is levelled at advocates who may be less emboldened than Keneally, it can create a

cycle of silencing with advocates disinclined to speak their minds and talk from the heart. In a less provocative ways and with a strong and convincing evidence base, human rights reporting presents information on harms that have been inflicted on asylum seekers and refugees, particularly in offshore sites. The vast array of factual and analytical documents from reputable organisations such as Amnesty International, the Australian Human Rights Commission and United Nations agencies are unlikely to be perused other than by those who are already committed to asylum seeker justice; although the asylum seeker social movement is robust, numbers are not high enough to create a groundswell of policy influence.

For non-state actors who profit from colluding with government, almost total invisibility about their detention activities is the norm unless their activities are exposed by investigative journalists. Private corporations conspire in a silent manner, no doubt because of commercial-in-confidence contractual arrangements. These include companies tasked to run detention prisons on behalf of government and others who provide services within, including health services that have been exposed as manifestly inadequate. Non-governmental organisations have also uncritically co-operated with government, with their staff unable to speak out about what they have witnessed.²¹

Sustained asylum seeker/refugee endeavours to expose practices and harms are relatively new. Despite the transportation of asylum seekers offshore, the incarcerated have found ways to defy their concealment in order to bring attention to their suffering and the policies that create anguish and despair. The refugee movement has applauded asylum seeker voice including Manus Island detainee of six years, Behrooz Boochani, whose book *No Friend but the Mountains* received national acclaim and awards.²² Boochani also produced a film from within Manus, *Chauka, Please Tell Us the Time*, filmed on his mobile phone, and he regularly writes articles for media outlets. Another man who was imprisoned on Manus Island, Abdul Aziz Muhamat, is the winner of an international human rights award and now resettled in Switzerland. In 2019, he spoke to the United Nations Human Rights Council of the humanitarian crisis on Manus



Still image of Behrouz Boochani
from Simon Kurian's documentary,
'Stop the Boats' (Simon Kurian)

Island, particularly the spate of attempted suicides,²³ a speech that entered the public domain through sympathetic media outlets.

As alluded to above, despite potential transformation created through exposure and visibility, it is difficult to appeal to those other than committed asylum seeker rights advocates. The power and resources of government and sections of the media far exceed those available to civil society. Government also uses imagery and narrative, including to promote the criminalising of asylum seekers through incarceration. Messages are initiated by government and then disseminated through media sources. One example is the fabricated Children Overboard affair in 2001, when the Howard government deceptively asserted that asylum seekers had thrown their children into the sea to gain protection in Australia; images were released to support this false contention. Another example is the 2002 escape from Woomera detention facility in South Australia, where visuals of desperate asylum seekers jumping over the containment wire reached our television sets and produced fear. Through constant imaging of the boat tragedy on Christmas Island in 2010, we saw on our televisions an asylum seeker boat crashing into rocks, killing 50 people – men, women, children. Instead of engendering sympathy, the government distorted compassion for political purposes, declaring that subsequent harsh policies were designed to stop deaths at sea. The asylum seeker boat is an effective visual, with invasion and fear striking the hearts of the populace and washing away humanitarian sentiments.²⁴

iv Restoring human rights and human dignity

The difficult problematic is how to rupture the asylum seeker system, within a context where Josh Lourensz warns: 'Be prepared: Kafka wasn't writing fiction'.²⁵

In his seminal work on *Inhuman Rights*, Winin Pereira speaks of how dissemination of distorted information results in 'thought control' that is effective because it is so subtly carried out. The right to information, he argues, becomes a restricted right, with information not forthcoming even when requested, meaning that people are rarely informed of all the effects flowing from policy

and activity, including health, impoverishment and cultural damage.²⁶

Through making the invisible visible, there is some optimism that asylum seekers/refugees and advocates can defeat government legitimacy in carrying out human rights abuses, creating change from the bottom up. The win at the 2019 federal election has enabled the federal government to gloat about being election-victorious, but running government does not give licence to state-sanctioned cruelty. We need to unravel the discourse of national security, selectivity of entry and the mythical queue to avoid public manipulation by 'thought control'. This remains work in progress.

This paper has discussed converging factors that create a climate of both tacit and overt community acquiescence to asylum seeker policies, and the use of imagery to both contest and maintain the ongoing human rights predicament. In concluding, it seems essential to centre efforts on the entrenched law pertaining to mandatory detention and the harmful policies that follow and bring them more directly into public view. Governments and colluding non-state actors must be called to account as Ghassan Hage potently states when referring to 'caging' and its link to observable racism. He says:

Today, as we witness Aboriginal deaths in custody, asylum seekers immolating themselves for finding their caging intolerable, people dying while trying to break free from claustrophobic national borders behind which they are kept against their will, we also face the fact that the caging of mainly black and brown people has become a racist technique of extermination. Those responsible for legitimising and deploying such a technique need to be held accountable for the impact of their actions.²⁷ 🗨️

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Imitation as flattery

The spread of Australia's asylum seeker rhetoric and policy to Europe

Stephen Phillips

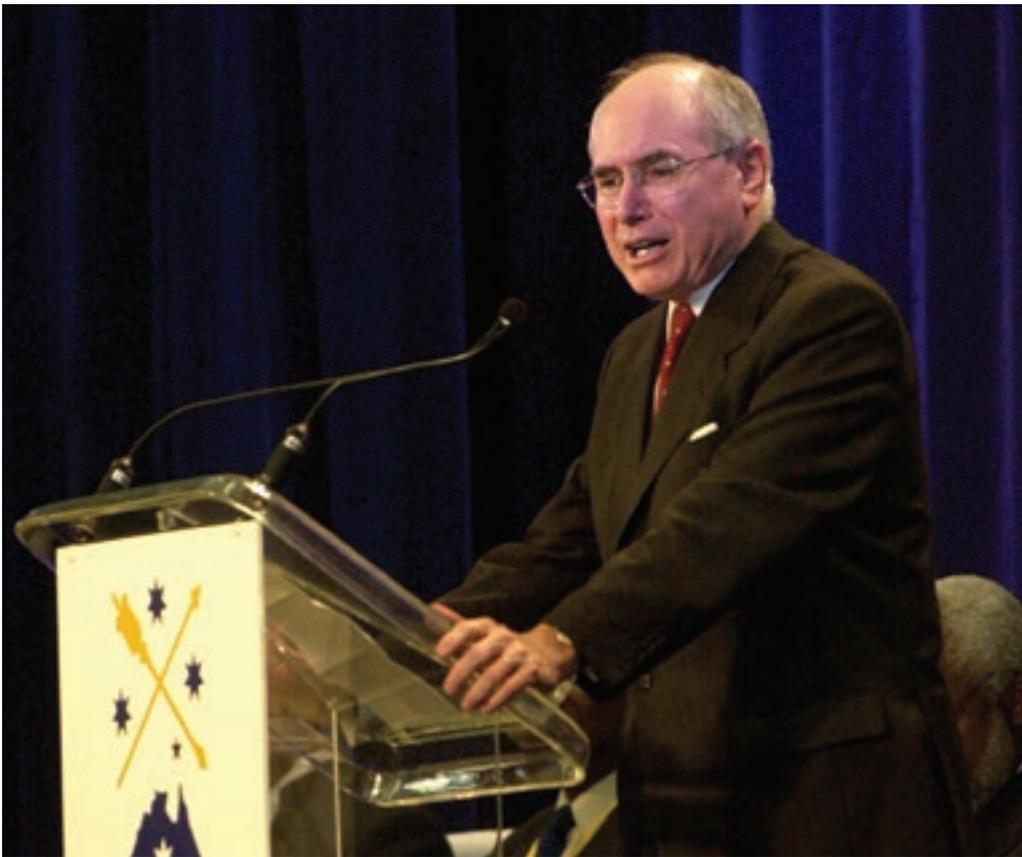
I Introduction: the Tampa Affair and emerging challenges to human rights

In August 2001, the Australian Government, a conservative coalition, was at risk of losing the election that was to be held later that year.¹ The governing Liberal-National Coalition had been trailing the opposition Labor Party in opinion polls for most of the year, in particular due to general dissatisfaction with the government's economic reforms and social policies.² Three months later, following an election that saw the Labor Party record its lowest share of the primary vote since 1934,³ the Liberal-National Coalition was still in power, and with an increased majority.

Boat people and the vulnerability of Australia's borders was a central theme throughout the election campaign, which was dominated by the leaders of the Liberal-National Coalition and the Labor Party. The minor parties ultimately played a relatively small role on polling day (none received higher than five percent of the primary vote in the House of Representatives,⁴ and none higher than seven percent in the Senate)⁵ but the shadow of

one particular minor party hung prominently in the background. In 1998, the One Nation Party, a right-wing nationalist populist party, had emerged as a genuine force in both state and federal politics in Australia, winning 22 percent of the vote at the 1998 Queensland state election⁶ and having a candidate elected to the Senate at the 1998 federal election.⁷ Its leader, Pauline Hanson, had famously stated in her maiden speech to Parliament on 10 September 1996: 'I will be called racist but, if I can invite whom I want into my home, then I should have the right to have a say in who comes into my country'.⁸ On 28 October 2001, less than two weeks before the election and in reference to recent changes made to Australian border protection laws following the Tampa affair, then Australian Prime Minister John Howard expressed similar, now equally famous, sentiments:

National security is therefore about a proper response to terrorism. It's also about having a far sighted, strong, well thought out defence policy. It is also about having an uncompromising view about the fundamental right of this country to protect its borders. It's about



Former Australian Prime Minister John Howard speaking on the removal of 438 refugees from the MV Tampa freight ship. Melbourne, 3 September 2001 (Julian Smith/AAP Image)

this nation saying to the world we are a generous open-hearted people taking more refugees on a per capita basis than any nation except Canada, we have a proud record of welcoming people from 140 different nations. But we will decide who comes to this country and the circumstances in which they come.⁹

Howard would have been well aware that the One Nation Party had the potential to split the conservative vote, and in particular that support for One Nation could damage the support of the Coalition partner, the National Party. One Nation might not have been in government, but its populist agenda was highly capable of shaping the response of the major parties on potentially divisive issues, such as asylum seeker boat arrivals and border protection, that stirred feelings of protectionist nationalism in elements of the Australian electorate.¹⁰

Returning to August 2001, this approach of the Australian government to border security was demonstrated when a boat carrying 438 asylum seekers became stranded in international waters approximately 140 kilometres north of Christmas Island.¹¹ The asylum seekers were rescued by MV Tampa, a Norwegian freighter. Following the rescue, the captain of the Tampa set course for Christmas Island to safely offload the asylum seekers. The Australian government refused the Tampa permission to enter Australian territorial waters, claiming that the Australian government had no responsibility to the asylum seekers as the rescue had occurred outside of Australia's designated search and rescue region.¹² Ultimately the asylum seekers were offloaded onto an Australian naval vessel and transferred to Nauru, where most of them were held in detention camps as part of what would become known as Australia's 'Pacific Solution'.¹³

ii Entry prevention and deterrence: the Pacific solution

Australia's Pacific Solution was targeted at unauthorised boat arrivals and included three key elements: one, the excision of territory for immigration purposes; two, the interdiction of asylum seekers arriving by boat; and three, the establishment of processing facilities in countries in the Pacific region.¹⁴ The *Migration Amendment (Excision from Migra-*

tion Zone) Act 2001 (Cth) allowed for the excision of certain offshore territories (including Christmas Island) from Australia for migration purposes, meaning that persons entering Australia in such territories were considered not to have entered Australia for the purpose of applying for a visa, thus leaving them outside of Australia's refugee protection system and without access to Australian tribunals.¹⁵ Under the Pacific Solution, those asylum seekers intercepted by Australian naval operations were transferred to processing facilities on Manus Island (Papua New Guinea) and Nauru, where they were detained while they awaited processing and repatriation or resettlement.

The Pacific Solution has continued in various forms for the majority of the years since its inception and has been the subject of sustained critique from the United Nations, human rights organisations, scholars and other experts, all of whom point to its failure to comply with international human rights law.¹⁶ Of particular concern is the use of mandatory detention, which has been repeatedly found by the United Nations Human Rights Committee to be in breach of art 9(1) of the *ICCPR*,¹⁷ as well as the increased risk of refoulement¹⁸ that this policy entails. International pressure has not dissuaded Australia from its course of action, nor has domestic pressure by a range of non-governmental organisations, experts, and even from some within the government's own ranks. The policy enjoys the support of both major political parties, and even the one short-lived attempt to relax the policy, by a Labor government in 2008, 'did not abandon the policy completely, however, maintaining the legislative provisions underpinning the strategy'.¹⁹ Domestically, boat arrivals remain a politically divisive issue, and notions of human rights appear to have little currency. Paradoxically, Australia continues to pride itself on its strong commitment to human rights and was in 2017 elected uncontested to the United Nations Human Rights Council, an indication, according to then Australian Foreign Minister Julie Bishop, that Australia is seen as a 'principle and pragmatic voice when it comes to human rights'.²⁰

iii Transfer of language and of policy: from Australia to Europe

It seems odd that a country can detain highly vulnerable people, including children, on

remote Pacific islands in conditions that have been condemned by the United Nations,²¹ whilst simultaneously receiving the blessing of the international community to take up a key role in an inter-governmental body that is 'responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them'.²² In the European context, rather than being chastised for its refusal to honour its international obligations, Australia's approach is being lauded through imitation, that most sincere form of flattery. Language focused on 'stopping the boats' and 'breaking the people smuggler's business model' that is very familiar to Australian ears began to emerge in Europe following the large influx of asylum seekers to that continent in 2015.²³ At the regional level, Frontex, the EU agency responsible for the EU's external borders, describes its tasks in the following terms: 'Frontex, the European Border and Coast Guard Agency, promotes, coordinates and develops European border management in line with the EU fundamental rights charter and the concept of Integrated Border Management'.²⁴ The agency's executive director, Fabrice Leggeri, stresses that '[f]undamental rights are integrated into Frontex operations from their inception, ensuring that all those fleeing war and persecution are able to apply for international protection'.²⁵ This language remains milder than that of the Australian government, which describes its own response to unwanted migration by boat, Operation Sovereign Borders, as a 'a military led border security operation' aimed at 'protecting Australia's borders, combating people smuggling in our region, and preventing people from risking their lives at sea'.²⁶ Nevertheless, Australian inspired language and rhetoric has gradually begun to emerge at the European Union's upper levels. In May 2015, just a few months into the so-called 'European Migrant Crisis', the European Commission, the EU's executive, phrased its response in terms of the perceived need 'to try to halt the human misery created by those who exploit migrants',²⁷ choosing to frame the issue both in terms of the need to combat the actions of people smugglers as well as 'the duty to protect those in need'.²⁸ More recently, statements that set a clear border control agenda that is less grounded in ideas

of rights have become more commonplace. In June 2018, the European Council, made up of the leaders of the EU member states, declared the following:

In order to definitively break the business model of the smugglers, thus preventing tragic loss of life, it is necessary to eliminate the incentive to embark on perilous journeys. This requires a new approach based on shared or complementary actions among the Member States to the disembarkation of those who are saved in Search And Rescue operations. In that context, the European Council calls on the Council and the Commission to swiftly explore the concept of regional disembarkation platforms, in close cooperation with relevant third countries as well as UNHCR and IOM. Such platforms should operate distinguishing individual situations, in full respect of international law and without creating a pull factor.²⁹

Here the language of rights is relegated to a secondary position, not even explicitly identified but (presumably) included under the broader notion of 'international law'. Rather than a focus on protection, there is a preference to remove incentives for movement, encapsulated in the idea of 'regional disembarkation platforms' in third countries that draw a clear parallel to Australia's Pacific Solution.³⁰ Whilst overall Europe appears still to be clinging to notions of human rights and dignity in its response to asylum seekers, it is showing clear intent of replicating Australian policies that have inflicted high levels of harm to asylum seekers through their preference for punishment and deterrence over protection and dignity.

iv Conclusion: the failure and future of human rights

The core human rights message, as enshrined in the *UDHR*, claims that 'the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.³¹ This message, as a starting point, seems no less relevant now than it was in 1948. The message is clear, digestible, and seemingly requires little by way of elaboration or explanation. In spite of this apparent simplicity, since 1948 a language of human rights has developed that has become the domain of experts. Select

committees, expert bodies, working groups and roundtables have spawned a proliferation of treaties, declarations, recommendations and other documents. At a time when the language of human rights is being challenged and overshadowed by that of border control, human rights language finds itself in a struggle to remain relevant. The language of law has permeated the language of rights to the point that for many this language has become difficult to penetrate. Koskenniemi refers to a 'process of endless narration'³² that brings with it a risk that 'the domination of the Western academy will see to it that the stories everyone hears will perpetuate precisely the kinds of hierarchy that rights-languages on its best days was expected to dismantle'.³³ Nevertheless, even such a critical assessment of the language of human rights allows scope for the possibility that the message is sound, and that the failure can be found in the delivery. According to Falk, 'the power of rights needs to motivate its varied constituencies by both the urgencies of its cause and the genuine, although not assured, possibilities of

producing improvements in the human condition'.³⁴ A human rights regime that creates or enables division fails to achieve its fundamental purpose, and an exhaustive re-evaluation of the human rights project's present state is needed before its future can be reimagined. Lessons learnt from the Australian context can help to rebuild an approach to human rights that is relevant in the prevailing security-driven climate, and can empower those in various parts of the world to work towards safer and more sustainable paths to protection for asylum seekers than those that currently exist, or are being contemplated. ■

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Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) provides that '[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' The prohibition of *refoulement* is also grounded in a range of international human rights treaties, such as the *ICCPR* (n 17) arts 6–7, and the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 3.

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Increasing support
to refugees and
asylum seekers



General Practitioner Katherine Lazaroo treats an asylum seeker's child at the Asylum Seeker Resource Centre in Footscray, Melbourne, 17 May 2002 (Julian Smith/AAP Image)

An asylum seeker's access to Medicare and associated health services while awaiting determination of a Protection Visa application in Australia

Danielle Munro and
Niamh Joyce

I Introduction

The right to access Medicare while waiting for a decision to be made on an application for a Permanent Protection Visa (subclass 866) ('Protection Visa') is governed by legislation and is dependent on the conditions of the Bridging Visa the applicant holds.

The requirements for access to Medicare differ for asylum seekers who have applied for a Temporary Protection Visa (subclass 785) or Safe Haven Enterprise Visa (subclass 790), which are the Protection Visa classes available for unauthorised maritime arrivals. This paper discusses the situation for asylum seekers who passed through immigration clearance when arriving in Australia and have applied for the Permanent Protection Visa.

The criteria for a Protection Visa is that a person meets the definition of a refugee or satisfies the complementary protections.¹ This visa is only available for people currently in Australia who have arrived and entered Australia lawfully (ie arrived in Australia with a valid visa, such as a Tourist (subclass 600) or Student Visa (subclass 500)). This Protection Visa is different to the visas available to people who have arrived irregularly.²

If a person is subsequently granted a Protection Visa, they have the status of an Australian permanent resident and have access to Medicare and other services.

After lodging an application for a Protection Visa, the applicant will be issued a Bridging Visa which is a temporary visa and allows the applicant to remain lawfully in Australia while awaiting a decision on the application.

It is during the lengthy wait for the Protection Visa application to be processed (and, if necessary, the appeal process) that applicants are in need of medical care. Yet, many are prevented from accessing Medicare due to conditions placed on their Bridging Visas.

The Department of Home Affairs ('DHA') has reported that during 2017–18, there were 27,931 valid Protection Visa applications lodged,³ yet only 1,425 Protection Visas were granted during that period.⁴

The DHA has chosen not to publish processing times, however, based on the author's experiences, Protection Visa applicants can be waiting for two to five years for a decision, and even longer if the applicant needs to lodge an application for merits review and possibly also for judicial review. There are long lasting

psychological effects on visa applicants waiting this length of time without having access to Medicare and the authors argue that all people that have applied for a Protection Visa should be given access to Medicare from the time the application is submitted.

ii Legal requirements to access Medicare

The *Health Insurance Act 1973* (Cth) defines who is eligible for Medicare.⁵ There are only limited classes of people who are able to access Medicare without being a permanent resident or an Australian Citizen.⁶ This includes a person in Australia who has applied for a permanent visa and currently holds a Bridging Visa with the 'right to work'.⁷

iii Conditions attached to Bridging Visas

Whether the visa applicant has the right to work while on their Bridging Visa depends on the class of Bridging Visa (A through to F) held and the conditions attached to the Bridging Visa.⁸

The class of Bridging Visa granted to a Protection Visa applicant is determined by the applicant's visa status at the time of lodging the application.⁹ That is, whether or not a Protection Visa applicant is able to access Medicare while awaiting a decision depends on their immigration status before they applied. It is not, for instance, based on need, strength of their visa application, or any health-related claims for protection.

If a person makes a valid application for a Protection Visa while on a substantive visa (a visa other than a Bridging Visa), then they will be granted a Bridging Visa A with permission to work and will therefore be eligible for Medicare.¹⁰

Case Study 1: Mohammed arrived in Australia to study from Indonesia. While studying he came out to his family as gay and became fearful of returning to Indonesia. Just before his Student Visa expired, he applied for a Protection Visa. He was subsequently granted a Bridging Visa A, allowing him to work and access Medicare while he awaited a decision from the DHA.

If a person makes a valid application for a Protection Visa while not holding a valid visa (that is, they are 'unlawful') and are not in immigration detention, they will be granted a Bridging Visa C with no right to work.¹¹ However, they will be able to apply for the right to work if they can show that they have a

compelling need to work (ie they are demonstrably in financial hardship).¹²

Case Study 2: Duc arrived in Australia on a Tourist Visa and remained for many years after it had expired. While he was 'unlawful' (ie holding no visa), he applied for a Protection Visa, and was subsequently granted a Bridging Visa C, with no right to work. He needed to apply for permission to work by demonstrating financial hardship. This required him to provide copies of bank statements in Australia and his home country as well as receipts and evidence of his expenses. He also needed to include details of why his friends and family could not financially support him.

If a person makes a valid application for a Protection Visa while on a Bridging Visa E, they will be granted a Bridging Visa E with no right to work.¹³ They can apply for the right to work, but they must show that they have both a compelling need to work (ie they are demonstrably in financial hardship), and that they have an acceptable reason for the delay in applying for the Protection Visa.¹⁴

Case Study 3: Parvesh and Diya are a couple who were on a Bridging Visa E while pursuing a complicated skilled visa matter, which was unsuccessful. They then lodged an application for a Protection Visa. As they were already on a Bridging Visa E, they were granted another Bridging Visa E in association with the Protection Visa application.

The couple then fell pregnant in Australia, and had to pay for private health insurance (out of their savings) for the pregnancy and birth-related healthcare costs. Even after they ran out of money, they continued to be ineligible for work rights or access to Medicare, because they do not meet the 'delay' criteria.

If a person makes a valid application for a Protection Visa (subclass 866) while in immigration detention, they may be granted a Bridging Visa E to permit them to live in the community while their application for protection is processed. It is mandatory under Department policy that in these circumstances the condition 'no right to work' be attached to the Bridging Visa E.¹⁵ They can apply for the right to work (and therefore access to Medicare) by demonstrating both a compelling need to work and an acceptable reason for delay in application.¹⁶

Case Study 4: Chelsea was unlawful and homeless in Australia for a number of years, before being detained by immigration deten-

Protection Visa flowchart

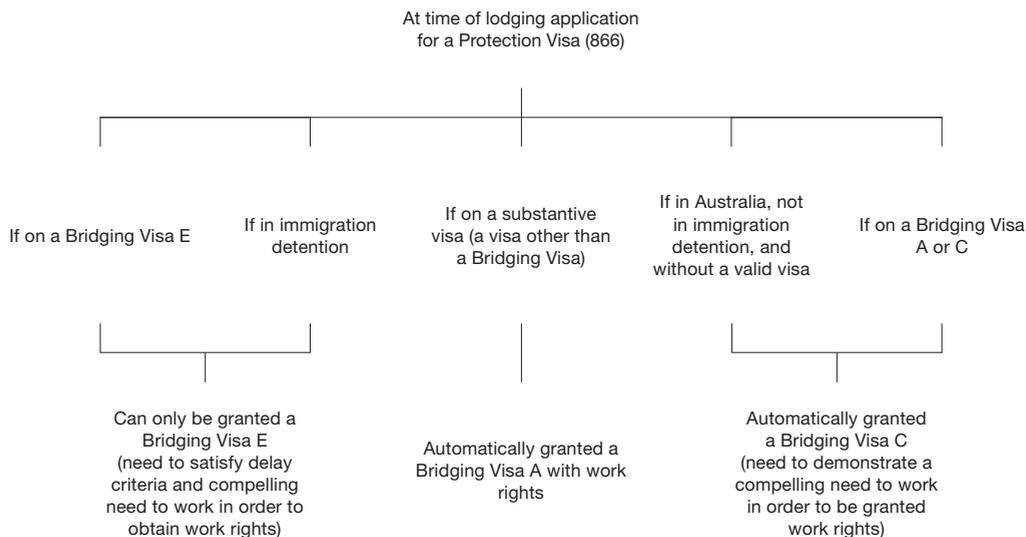


Figure 1: Flowchart of the class of Bridging Visa which will be granted to a Protection Visa applicant

tion. After lodging an application for a Protection Visa, she was released into the community on a Bridging Visa E. As a person who had been homeless for so long, she did not have a bank account or identity documents. She also had a number of serious health conditions which had been untreated. Yet she remained ineligible for Medicare or work rights.

A pressing need for healthcare is not a factor considered by the DHA in the application to grant work rights or access to Medicare.

Reasons for delay for Bridging Visa E holders

When considering whether or not a Bridging Visa E should be granted with the right to work, addressing the additional criteria relating to 'reasons for delay' often present a serious obstacle for asylum seekers needing to work (and access Medicare).

Department Policy states that it is very unlikely that a person who has remained in the community unlawfully for a long time, or only applied for a Protection Visa when they became located by the Department will have an acceptable reason for delay.¹⁷ It is only if circumstances change in the applicant's home country, which is then made the basis for their protection claims that will then be considered an acceptable reason for delay.¹⁸

A closer look at Case Study 4: Chelsea had a well-founded fear of harm at the hands of police, medical staff and others in her country of origin, and she had no reason to believe that her experience would be different in Australia. She had suffered trauma regarding this, and on this basis did not engage with authorities in Australia. Yet, none of these were considered an acceptable or 'reasonable' explanation for her delay in applying for the Protection Visa.

The reason the Department imposes no work rights on Protection Visa applicants, and the considerations to be weighed in making the decision above, relate to the policy goal of encouraging people to genuinely and continuously engage with the Department and regularise their status.¹⁹

A closer look into Case Study 3: Parvesh and Diya pursued a Skilled Visa application and requested the Minister to intervene. While awaiting the outcome, the couple were granted a Bridging Visa E. Over four years passed between the date they originally lodged their application and the final refusal. They had never been unlawful, and had always complied with all visa requirements. As they did not apply for protection immediately upon arrival to Australia, they were deemed to have 'unreasonably' delayed in their Protection Visa application, and therefore did not meet the 'delay' criteria.

A lack of understanding of the immigration processes, limited English, and a trauma-based response, including inaction, are common and not unexpected experiences of asylum seekers.

A closer look at Case Study 2: Duc it was only while on a Bridging Visa C, and after applying successfully for work rights, that he became eligible for Medicare. Due to the fact that he was unlawful in Australia for an extended period of time and living in insecure housing, he had no valid identity documents. Due to the nature of his visa application, his Migration Agent advised him not to contact his embassy to apply for a new passport. Without the appropriate identity documents, he was still unable to obtain a Medicare card.

This situation is made more complex because the DHA no longer provide 'Immi-Cards' (a form of identity document) to Protection Visa applicants.

iv State and territory laws and policies on asylum seekers accessing medical treatment without expense

States and territories in Australia have begun to fill the gaps made by federal legislative requirements for Medicare and have enacted legislations to guarantee healthcare to asylum seekers regardless of the individual's Medicare status. Tasmania enacted legislation,²⁰ and the Australia Capital Territory enacted subordinate legislation,²¹ to ensure that asylum seekers without Medicare can receive free medical treatment.

The Queensland Government has a policy which states that Medicare ineligible asylum seekers are not charged in Queensland public health services.²²

Whereas, here in New South Wales, there is no legislation, subordinate legislation or policy ensuring access to health services without Medicare. Thus, an asylum seeker without Medicare is required to pay for their medical treatment unless they are covered by the Asylum Seeker Assistance Scheme or if the applicant is in immigration detention.²³

Without access to Medicare, an asylum seeker is reliant on individual doctors' discretion in not charging for their services, or on the assistance of charities. For asylum seekers with a chronic illness requiring daily medication, not having access to the Pharmaceutical Benefits Scheme is costly and a barrier to efficient treatment. Without funds or the right to work, applicants in these situa-

tions, depend on doctors arranging for pharmaceutical companies to provide compassionate access to medication. This is not guaranteed and there is always the risk that it will end.

v The health of asylum seekers and the long-term effects of not having medical care

The effect of not having access to Medicare during the long process of applying for protection can be long lasting. A person's medical condition can be part of their claims for protection, yet they are required to survive without Medicare while their application is considered. An applicant's medical condition is not even considered in an application in order to be eligible for Medicare.

Extensive medical and community service literature finds that people from refugee backgrounds experience significantly higher rates of poor health, including mental health.²⁴ The reasons for this include both poor access to health services before coming to Australia, violence and other harms, and lack of access to services once in Australia.

The Australian Medical Association also highlights that asylum seekers are at high risk of mental health issues, including psychological disorders such as 'post-traumatic stress disorder, anxiety, [and] depression'.²⁵

Health concerns for Case Study 4: Chelsea developed significant mental health and drug and alcohol use issues, as well as being diagnosed with HIV. Her extended periods of disengagement with health and other support services, as well as trauma responses has made her remain hesitant to seek health care and support.

Having to wait several years for the grant of a Protection Visa, all the while being denied Medicare, the right to work or ability to access medical services without large expense means that an individual is at a high risk of being in a worse health condition than when they had first made the visa application.

For Australia to assess an individual as a refugee, but in the process deny them access to work rights and Medicare, means that newly granted Permanent Protection Visa holders, when they finally do have access to Medicare, are likely in significantly worse health, and may require more health services than what they may have needed at the onset of their visa application.

vi Conclusion

To a Protection Visa applicant, the importance of having access to Medicare and healthcare cannot be understated. Protection Visa applicants are a particularly vulnerable group in need of care and assistance, and should not be excluded from involvement in society during the application process. The processing times for Protection Visas are at record lengths and during this time, the applicant waits with uncertainty and added stress. If an applicant is unable to engage with medical services during the application process then they will be in a worse physical and psychological condition than when they first made the application and may also be less likely to engage with the services after the grant of the visa. 🏠

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Disclaimer: This article is not construed as legal advice. The law and regulations referenced in this article are current at the time of writing. A person seeking advice on Bridging Visas should contact a Registered Migration Agent for advice specific to their circumstances. The names used in this article are aliases.

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SSI's Community Kitchen
(Settlement Services International)

Community, belonging and the irregular migration

Violet Roumeliotis

The movement and migration of people is one of the most pressing issues of our time. It has gone to the top of the political agenda globally at the United Nations, regionally in places like the European Union and domestically in countries including Australia.

Political and public policy debates are concentrated mainly on the people who move irregularly across borders. ‘Migrant caravans’ attempting to enter the United States, those crossing the Mediterranean to Europe and the arrival of people by boat to Australia are all recent examples of irregular migration that have generated heated debates. Governments and their leaders have choices in how they respond to and develop public policy for irregular migration. Civil society organisations also have choices in how they respond to policy and how they deliver services to irregular migrants.

Since 2001, both major parties in Australia have introduced deterrence measures in response to several waves of irregular migration by people seeking asylum in Australia by boat.¹ A look at the international context shows more western countries resorting to a deterrence framework in response to the

growing number of people around the world being displaced from their countries of origin.²

The *Universal Declaration of Human Rights* recognises the right all people have to seek asylum from persecution.³ While grounded in this declaration, the *Refugee Convention*⁴ takes this concept further by stipulating that refugees should not be penalised for their irregular entry or stay provided they are ‘coming directly from a territory where their life or freedom was threatened’⁵ and ‘show good cause for their irregular entry or presence.’⁶

Australia is a signatory to the *Refugee Convention*, but makes a distinction between people who seek asylum by plane and those who do so by boat. Both major political parties in Australia are in general agreement on the key measures to discourage ‘unauthorised boat arrivals’, including mandatory detention, offshore processing and the introduction of temporary, rather than permanent visas — even for those people who have been found to be legally entitled to Australia’s protection.⁷ In her analysis, Phillips also highlights the sheer volume of recent changes to government policy concerning



Saman Khaladj started his own business, supported by the SSI Ignite Small Business Start-ups initiative (Settlement Services International)

people seeking asylum, which showcases the complexity and ever-changing nature of working in this space.⁸

Around 30,000 people came to Australia by boat between August 2012 and January 2014.⁹ As a result of government policy during this period, this cohort has faced a number of different rules and has no pathway to permanent protection in Australia.¹⁰

My organisation, Settlement Services International ('SSI'), is a community organisation that has, for almost seven years, provided support to the people who sought asylum under various Australian government programs in this area. As a values-driven organisation, we have a social compact with the community, not just our funders. This means we have had to find a way to put our values of social justice, compassion and respect into practice without conflicting with our contractual arrangements — and to do this in a way that actually complements and adds value to these services.

Unlike refugees who are settled in Australia as part of our humanitarian intake, people who arrive as irregular migrants by boat are rarely considered when we talk of 'integration'. While these irregular migrants do not have a pathway to permanent residency, the key markers of integration — employment, housing, education and health¹¹ — are just as important for these individuals and families while they are living on our shores. Building social connections is a critical step on the pathway to achieving these outcomes.

Up until December 2014, people who arrived by boat did not have the right to work in Australia.¹² Financial barriers also restricted their capacity to study, so SSI's challenge was to create an environment in which people could get out into the community and have the opportunity to build social bridges, bonds and links.¹³

In 2012, we launched Community Kitchen — a fortnightly event where all SSI clients were invited to join community groups and volunteers for a free lunch. Since then, we've served more than 19,000 meals. Community Kitchen is so much more than a lunch. It is a welcoming, safe space where people in vulnerable situations can connect with members of the wider community, along with individuals and families who are in similar circumstances to their own.

Over time, people who had originally come to the kitchen as guests began to look

for ways they could contribute. They offered skills like singing or haircutting. They began to rebuild their sense of worth and purpose. Through interactions with volunteers and community groups, we also saw people improving their 'language and cultural knowledge' — another important building block towards fully participating in economic, social and cultural life.¹⁴

We also began to hear stories of women and children who had few reasons or opportunities to get out into the community and connect with other people, which was having a detrimental impact on their physical and emotional wellbeing.

Therefore, in 2014, we launched Playtime — a weekly playgroup where mothers seeking asylum could connect with other families. The playgroup offered parents new ways to connect with their children and feel a part of a community, which was particularly beneficial for families with limited family or social support. Health and social services outreach to Playtime so over time, we saw the wellbeing of women and their young children improve as their social bonds grew.

But there was only so much we could do by reinvesting in these value-adding initiatives. There were broader issues that required a response from outside our sector, and we identified the need for greater systems of advocacy.

At that time, people seeking asylum were not entitled to transport concessions.¹⁵ This meant that in order to travel to appointments or new areas of the community, they had to allocate a portion of their limited income towards a full travel fare.

Mobility is instrumental for people to participate more fully in society. In 2015, then-NSW Premier Mike Baird recognised this need and championed a travel concession initiative for people seeking asylum. In unveiling the initiative, he said: '[b]eing unable to travel creates social isolation which leads to deteriorating mental and physical health.'¹⁶

The travel concessions allowed people seeking asylum to use more of their limited financial support to cover basic living expenses. It was a critical step that enabled people to participate more fully in the community, which in turn helped them feel more at home in Australia.

In 2017, the NSW government once again stepped up with an important initiative to support the ability of people seeking asylum

to participate in education. They extended fee-free TAFE places to this cohort.¹⁷ Prior to this, people seeking asylum were considered international students, which meant they were effectively barred from studying due to high costs.

This cohort of people seeking asylum still live in a precarious position with no certainty of remaining in Australia in the long-term. Through activities like those outlined above, my hope is that we have helped these newcomers participate more meaningfully in the economic, social and cultural aspects of our communities.

As a country, we have control over how we welcome and include people. We can help

people new to our country establish a sense of belonging, which is essential for their wellbeing. Regardless of their visa status, newcomers deserve to feel connected to their community, to feel included and to feel like they belong for however long they call Australia home. 🇺🇸

Violet Roumeliotis is a social entrepreneur with an extensive not-for-profit career characterised by collaboration, growth, adaption and innovation. In her time as Settlement Services International CEO, she has identified service gaps for people from migrant and refugee backgrounds and invested in tailored initiatives that capitalise on their unique strengths.

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Scrutinising government practices



Qantas Airbus A330-303 (VH-QPF)
at Perth International Airport
(mailer_diablo/Wikimedia Commons)

Data quality and the law of refugee protection in Australia

Regina Jefferies

Australia's policies towards asylum seekers who arrive in the country by air and seek protection at or before 'immigration clearance'¹ at airports have been largely overshadowed by debates over offshore detention, processing, and interdiction policies. Immigration clearance is a physical zone, in these cases, at an airport, that every passenger must pass through before being allowed to enter Australia. Yet, even when asylum seekers who arrive by plane do receive Parliamentary or media attention, it relates generally to the backlog of individuals who have successfully passed through immigration clearance and subsequently lodged an asylum application.² A glance at data provided by the Department of Home Affairs ('DHA') in Senate Estimates³ and other contexts⁴ seems to suggest that the lack of focus on travellers seeking protection at or before immigration clearance at airports finds at least some support in the smaller number of individuals applying for protection at Australian airports, relative to maritime arrivals.⁵ In October 2017, in response to a question by Senator Kim Carr, the Department of Immigration and Border Protection ('DIBP')

reported that only 10 people had arrived at an international airport and claimed asylum in the first three months of the financial year in 2017 through 2018.⁶

However, a recent decision by the DHA under the *Freedom of Information Act 1982* (Cth) ('FOI Act') indicates that statistics previously provided to Parliament by the DIBP, now part of the DHA, are likely deficient. On 6 February 2019, the DHA issued a decision under the FOI refusing access to the 'number of individuals who have made protection claims before, or at, immigration clearance at airports since 2008',⁷ because the agency asserted that it did 'not hold existing documents as falling in the scope of the request'.⁸ After conducting an internal review, the DHA confirmed that:

referrals for persons seeking to engage Australia's protection claims are in fact recorded in the relevant system under one of two separate codes. One of these codes is specific to Refugee Claims, the other is for Manual Referrals/Reason Unknown. A very low number of referrals have been recorded under the code for Refugee Claims and as there is no distinct

way of determining which of the Manual Referrals may have related to protection claims, the total number of persons raising protection claims at Australia's borders remains undetermined.⁹

In other words, although the DHA records referrals for persons seeking protection at Australian airports, poor data collection practices mean that the 'total number of persons raising protection claims at Australia's borders remains undetermined'.¹⁰

This article explores the legal compliance consequences of poor data quality through an information systems lens. Data quality can be defined as 'fitness for use'¹¹ and encompasses a variety of characteristics,¹² including accuracy, completeness, and currency.¹³ Data lacking any of these dimensions can have a significant impact on data quality. This article explores the impact of the data quality dimension of completeness in the context of the DHA's operations targeting asylum seekers who arrive at Australian airports from abroad. The piece begins by situating asylum seekers within the border continuum and Protection Visa legal and policy framework. The work then describes aspects of the DHA's current data collection process and examines how the current process fails to attain the data quality characteristic of completeness.¹⁴ The article concludes with an examination of the legal consequences of poor data quality, as well as a call for increased transparency and accountability so that Parliament and the Australian public may accurately judge the DHA's compliance with international and domestic legal obligations.

I Entry screening and the Department of Home Affairs data collection practices

Australia has undertaken a number of international legal obligations in relation to refugees and asylum seekers by becoming party to the *1951 Refugee Convention* and *1967 Protocol*.¹⁵ Foremost among those obligations is the fundamental obligation of non-refoulement, or the requirement not to return an individual to a place where they might be persecuted or subjected to other serious harm.¹⁶ The domestic framework intended to give effect to these obligations can be found primarily within the *Migration Act of 1958*

and, though Australia has formally removed the obligation of non-refoulement from consideration in the context of the removal of 'unlawful non-citizens',¹⁷ Australian policy still recognises and seeks to implement the obligation for non-citizens seeking protection at the airport.¹⁸ The framework includes, but is not limited to, the creation of Protection Visas and complementary protection for individuals to whom Australia owes protection obligations.¹⁹ The Australian approach to border control constrains and significantly impacts the protection framework, manifesting in a complex, multi-agency effort of deterring asylum seekers while insisting that those in need of protection pursue a process of refugee resettlement. The Australian Border Force ('ABF'), formed in 2015 by combining the DIBP and the Australian Customs and Border Protection Service ('ACBPS'), sits at the centre of the deterrence framework as the operational enforcement arm of the DHA. The ABF approaches the border as a 'strategic national asset, a complex continuum that encompasses the physical border, [] offshore operations, and [] activities in Australian maritime and air domains'.²⁰

A substantial legal and informational framework sustains the border continuum, beginning with the requirement to obtain a visa for travel to Australia.²¹ When an international traveller arrives at an Australian airport with a valid visa, they must pass through 'immigration clearance' before being allowed to enter Australia.²² If the traveller seeks protection at, or before passing through, immigration clearance, they are referred to a secondary immigration area for a review of whether the purpose of their visa 'aligns with [their] intention for entry to Australia'.²³ Where the ABF official finds that the individual has come to Australia to seek asylum, rather than for the purpose of their visa (eg work, study), their visa may be cancelled and the immigration clearance is refused.²⁴ If the traveller has been refused immigration clearance, the ABF official conducts a second interview to determine whether the individual should be 'screened-in' and allowed to lodge a Temporary Protection Visa application.²⁵ There is no mechanism for judicial review of the screening decision, which means that an individual 'screened-out' faces rapid removal from Australia, without regard to the non-refoulement obligation.²⁶

ii Data quality

This section examines the DHA data collection processes, having regard to the data quality dimension of completeness.²⁷ Data completeness, or the 'extent to which data are of sufficient breadth, depth, and scope for the task at hand', depends upon the contextual dimensions of the task.²⁸ In examining whether the DHA can be said to comply with domestic and international legal obligations towards asylum seekers, the context includes legal obligations which must inform data collection. Where the data do not reflect that context, data deficiencies may result.²⁹ According to the DHA:

The purpose of entry screening is to determine whether a non-citizen should remain in Australia, pending an assessment against Australia's protection obligations, on account of the reasons the non-citizen has presented for why they cannot return to their home country or country of usual residence.³⁰

Data may also be incomplete where values are missing because the values were not included, though they should have been specified.³¹ In the entry screening process, ABF officials record data at several key intervals — two of which are examined here. First, officials record an 'inward movement and referral'³² for every traveller who claims protection at an airport. Second, officials record whether a visa has been cancelled in immigration clearance.³³ Information obtained through FOI and provided by the DHA in Senate Estimates reveals critical problems with both points of collection regarding contextual dimensions of the data and missing values.

First, in the Decision on Internal Review, the DHA confirms that 'referrals for [individuals] seeking to engage Australia's protection claims are in fact recorded in the relevant system under one of two separate codes. One of these codes is specific to Refugee Claims, the other is for Manual Referrals/Reason Unknown.'³⁴ Yet, protection claims may be recorded as a referral under either code and 'there is no distinct way of determining which of the Manual Referrals may have related to protection claims...'³⁵ As the data are likely missing values and cannot be said to be complete, 'the total number of [individuals] raising protection claims at Australia's borders remains undetermined.'³⁶

Second, ABF officials must evaluate whether an individual's reason for visiting Australia aligns with the purpose of their visa to determine whether the individual should be 'immigration cleared.'³⁷ Where an individual seeks to enter Australia to apply for asylum, their visa may be cancelled. Thus, the reason for visa cancellation is highly relevant to a determination as to whether the individual was properly evaluated by the DHA for potential protection claims, as well as whether the individual was given the opportunity to lodge an application for such protection. However, according to the DHA, '[d]epartmental systems are unable to aggregate data by reason for cancellation decision'.³⁸ As a result, the DHA cannot accurately track whether it is complying with the obligation to provide an individual whose visa has been cancelled at the airport with the opportunity to lodge a protection application. In other words, the data collected does not appropriately reflect the context of the task of compliance with the DHA's legal obligations.

iii Transparency and accountability

Quality data are critical to administrative policy formation, implementation, and legal compliance. Poor data quality not only 'compromises decision-making',³⁹ it 'may be the single biggest hindrance to developing sound strategy'.⁴⁰ Since at least 2005, the DHA, ABF, and predecessor agencies have consistently failed to implement sound record keeping and data quality practices.⁴¹ The department has repeatedly acknowledged these failures, stating in 2016 that:

These issues aren't new and have been highlighted in various reviews over the last decade resulting in:

- Poor decision making and advice to key stakeholders or for individuals;
- Failure to comply with legislative requirements due to poor information and records managements policies, systems and practices; [and]
- Failure to deliver on strategic objectives and priorities (risk and crisis management).⁴²

These endemic problems have significant consequences, not only for questions related to legal compliance,⁴³ but for assessing whether the DHA has actually provided accurate and complete information to Parlia-

ment and to the Australian public as part of the democratic process. Without a complete understanding of the number of individuals who have sought protection at Australian airports, or how many individuals have had their visas cancelled due to raising a protection claim – Australia cannot be said to comply with its international and domestic legal obligations. Failing this basic test not only imperils vulnerable individuals in need of international protection, it imperils the relationship between agency accountability and Parliamentary oversight. 🇺🇸

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42 Australian National Audit Office, *Integration of DIBP and ACBPS* (n 41).

43 The Australian National Audit Office notes that the agency has acknowledged these serious problems: The department is aware of the record keeping issues. A November 2016 submission to the Executive Committee entitled Records and Information Action Plan 2016–20 stated: 'Since 2006 at least 17 reviews of various aspects of records and information management (IM) have been completed, all of which identify significant scope for improvement. An assessment of the collective review recommendations confirms a consistent theme throughout each; a lack of sustained follow through, which in turn has left the Department's IM in a critically poor state.' Australian National Audit Office, *Integration of DIBP and ACBPS* (n 41) 29, citing Department of Immigration and Border Protection, Submission to Executive Committee, *Records and Information Action Plan 2016–20* (November 2016) (emphasis added).



Still image from Simon Kurian's documentary, 'Stop the Boats'. Manus Island (Simon Kurian)

The amended secrecy provisions of the Australian Border Force Act

An improvement in protection for refugee whistle-blowers or just another policy blunder?

Sophie Whittaker

In recent times, the Australian government's refugee policy has been the subject of harsh public and academic scrutiny.¹ Offshore processing, mandatory detention and the separation of refugee families, has led to harrowing consequences for those seeking refuge on Australian shores. Australia's refugees have found themselves trapped in a web of abhorrent and punitive measures, but the lived experience of these refugees has been largely hidden from public view.² This is somewhat due to refugee whistle-blowers being subject to the secrecy provisions of the *Australian Border Force Act 2015* (Cth) ('ABFA') since 2015,³ imposing stringent conditions on the recording and disclosure of specified information. In 2017, this legislation was amended in an attempt to improve the accountability and transparency of our government,⁴ and re-evaluate the ruthless provisions applicable to whistle-blowers. This essay will consider whether the amended legislation has, in form and in substance, improved protection for refugee whistle-blowers, by critically examining both laws within a framework of constitutional validity. Whilst this analysis demonstrates

the necessary improvements brought about by the 2017 amendments, the current legislation leaves much to be desired. Therefore, concerns remain in relation to those wishing to speak out about the abject failure that is Australia's callous refugee policies.

I The evolution of the Australian Border Force Act

Part 6 of the *ABFA* commenced on 1 July 2015,⁵ and outlines the relevant secrecy and disclosure provisions. Section 42 of the original Act made it an offence, punishable by 2 years' imprisonment, for an 'entrusted person'⁶ to '[make] a record of, or [disclose], [protected] information', where 'protected information' was any information obtained by a person in their capacity as an entrusted person.⁷ This provision was highly controversial,⁸ and scholars and the community alike expressed concerns relating to its breadth and chilling effect on public interest disclosures. Subject to limited exceptions,⁹ the law criminalised the unauthorised disclosure of any information obtained by an officer or contractor of the Department of Immigration

and Border Protection ('DIBP') in their course of duty. The law regulated the disclosure of information with the potential to harm essential public interests such as national security, defence and public safety, *as well as* information unlikely to have an adverse effect on such interests – which may have instead been in the public interest to disclose. For example, information about the abhorrent treatment of refugees by Australian government agencies and the living conditions experienced in Australia's mandatory detention centres. Such concerns culminated in the filing of a constitutional challenge to section 42 of the *ABFA* by Doctors for Refugees in 2016, on the basis that the law unduly restricted the implied freedom of political communication.¹⁰ In response to this challenge, the Secretary of the DIBP made a determination,¹¹ to exclude health practitioners from the application of the secrecy provisions.¹² Doctors for Refugees remained concerned that the blanket provisions applied too broadly to non-health professionals, including teachers, charity personnel and social workers,¹³ and sought to continue their proceedings. On 9 August 2017, the Australian Government introduced a Bill,¹⁴ which sought to amend the secrecy provisions, particularly by introducing a new category of information called 'Immigration and Border Protection Information' ('*IBP Information*'),¹⁵ defined as information the disclosure of which would or could reasonably be expected to:¹⁶

- prejudice the security, defence or international relations of Australia;
- prejudice the prevention, detection or investigation of, or the conduct of proceedings relating to, an offence or a contravention of a civil penalty provision;
- prejudice the protection of public health, or endanger the life or safety of an individual or group of individuals;
- found an action by a person (other than the Commonwealth) for breach of a duty of confidence;
- cause competitive detriment to a person; or
- information of a kind prescribed in an instrument under subsection (7).

The amending legislation, incorporating this definition and other changes, formally came

into force on 31 October 2017.¹⁷ However, the changes relevant to this essay were enacted retrospectively and thus said to commence on 1 July 2015.

ii Framework for constitutional validity

In various decisions the High Court has acknowledged that a freedom of political communication can be implied from the *Constitution*.¹⁸ This freedom is not absolute, but rather acts to fetter the legislative power of the Commonwealth.¹⁹ The *Constitution* necessarily protects the freedom of communication between people concerning government or political matters, to the extent necessary to uphold the accountability and transparency of Australia's representative democracy. Where a law is not compatible with the implied freedom, it will generally be invalid. The test to determine whether a provision impermissibly burdens the freedom has been set out by the High Court in a number of cases,²⁰ and was most recently amended in the case of *Brown v Tasmania*.²¹ A law will be incompatible with the implied freedom of political communication and hence be invalid where it effectively burdens the freedom in its terms, operation or effect; and where its purpose is illegitimate, in the sense that it is incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government; and/or where the law is not reasonably appropriate and adapted to advance that object in a manner that is compatible with the maintenance of the prescribed system of government.²² This third limb involves a test of proportionality to determine whether the restriction which the provision imposes on the freedom is justified.²³ This involves an inquiry into whether the law is suitable, necessary and adequate in its balance.²⁴ Both the original s 42 offence and the amended provision, as detailed above, will now be critically examined within this framework.

iii A critical examination of the original section 42

In assessing the original s 42 offence against the constitutional validity framework, it is evident that the legislation unjustifiably encroached upon the implied freedom of political communication. By making it an offence,

punishable by 2 years' imprisonment, for an 'entrusted person' to disclose 'protected information', the legislation conceivably burdened the implied freedom of political communication and satisfied the first limb of the test.²⁵ Exposing the practical effects of government policies, that are arguably morally repugnant or in breach of international obligations, is a form of political expression.²⁶ Restricting such conduct, as s 42 did, effectively burdened the freedom, where:

Representative government requires there to be a free flow of information to enable the community to be informed about the performance of their representatives and to communicate ... about governmental matters so as to make an informed choice at elections.²⁷

The second limb would also likely have been satisfied. In the absence of an objects provision, it appears that the 'legitimate end' served by the secrecy provisions, was either the protection of national security, or the maintenance of the efficient operation of Australia's border protection activities.²⁸ These purposes are not directed, nor do they operate, to adversely impinge upon representative government, and thus are compatible with the implied freedom.²⁹

Turning to proportionality, it is this third limb of the test that would have inevitably threatened the validity of the original s 42 offence. The use of secrecy provisions in the sensitive context of border force operations is and was warranted at the time; however, the disputable *proportionality* of these provisions raised red flags.³⁰ The broad scope of the definition of 'protected information' coupled with the expansive class of persons falling within the definition of an 'entrusted person', elucidates the operational overreach of the legislation. In *Bennett v President, Human Rights Equal Opportunity Commission*,³¹ a blanket secrecy provision similar to the original s 42 offence,³² was held to be constitutionally invalid by the Federal Court. Finn J was of the opinion that a catch-all provision, that did not differentiate between the types of information protected or the consequences of disclosure, was disproportionate to the purpose it aimed to achieve.³³ This line of reasoning, alongside the reasoning of the High Court in recent times,³⁴ suggests that an unqualified prohibition will not be compatible with the freedom.

The government defended the validity of its secrecy offence, referring to the various exceptions in the Act.³⁵ However, as Bevitt posits, these exceptions create an unclear, ineffective and patchwork protective framework for potential whistle-blowers.³⁶ They fail to ensure that information caught by the secrecy offence that is *not* reasonably likely to harm an essential public interest, can be disclosed without fear of reprisal. For example, s 42(2)(c) of the *ABFA* permits disclosure where it is required or authorised by law. This exception indirectly incorporates and relies on the application of the *Public Interest Disclosure Act* ('*PIDA*'),³⁷ otherwise known as Australia's whistle-blower legislation.³⁸ However, this exception also establishes a lacuna in the law, whereby some forms of conduct will be considered offensive under s 42 of the *ABFA* yet fall outside the scope of protection under the *PIDA*,³⁹ rendering it ineffective to overcome the *ABFA* provisions.⁴⁰ Section 48 further permits disclosure where it is necessary to prevent or lessen a serious threat to the life or health of an individual. On its face, this exclusion appears applicable to potential refugee whistle-blowers speaking out about the problematic conditions in Australia's offshore detention centres; however, this exception imposes a high threshold test and places the onus on whistle-blowers to prove that the requisite degree of seriousness has been met.⁴¹

Using proportionality as a tool of analysis,⁴² it is evident that the original s 42 offence was disproportionate, and unjustifiably infringed on the implied freedom of political communication. The scope of the offence was far too broad, and the exceptions too narrow to mitigate the onerous restrictions placed upon DIBP workers.

iv A critical examination of the amended section 42

In assessing the amended offence provision within the constitutional validity framework, it is evident that the legislation still encroaches upon the implied freedom of political communication, however, it does so to a far lesser extent than the original offence. The legislation strikes a more desirable balance between the gravitas of the purpose served by the legislation and the extent of its imposition on the implied freedom of political



Still image from Simon Kurian's
documentary, 'Stop the Boats'.
Manus Island (Simon Kurian)

communication.⁴³ Adopting the same analysis as above for the amended secrecy offence, it is similarly likely to satisfy the first and second limbs of the test for compatibility. Again, it is the proportionality limb that sparks the greatest debate.

The amended s 42 is *suitable*, as it is rationally connected to its purpose.⁴⁴ The Second Reading Speech sets out the purpose of the amended provisions as being to prevent the unauthorised disclosure of information that could harm the national or public interest.⁴⁵ The amended text of the legislation is directly in pursuit of this purpose, as the definition of 'IBP Information' confines offending conduct to that which could potentially harm the public interest.

A burdening measure will only be *necessary* if there is no other reasonably practicable means of achieving the same objective while having a less restrictive effect on the freedom.⁴⁶ In the instance of the amended legislation (and its predecessor), it is arguable that s 70 of the *Crimes Act 1914* (Cth) renders the s 42 offence unnecessary as it prohibits:

[A] Commonwealth officer, [to] [publish] or [communicate] ... any fact or document which comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose.⁴⁷

Section 70 has been held to be constitutionally valid,⁴⁸ and its jurisdiction overlaps with that of s 42. Whether it does in fact achieve the same object is however debatable, as it is less targeted in its operation than the *ABFA* provisions.⁴⁹

Whether the law is also *adequate in its balance*, requires an in-depth critique of the amended provisions.⁵⁰ There is no doubt that the definition of 'IBP Information' narrows the scope of the offence, tailoring it to the recording and/or disclosure of information which could harm the public interest. However, difficulties with the amended provisions remain.

Firstly, the new definition of 'IBP Information' is framed in a manner inconsistent with other Commonwealth secrecy provisions. In its report, *Secrecy Laws and Open Government in Australia*,⁵¹ the ALRC recognised that secrecy laws exposing government employees to criminal liability, like those contained in the amended Act, sit uneasily

with the principles of government openness and accountability.⁵² Thus, the ALRC recommended that such laws and penalties only be implemented in instances where disclosure could harm an essential public interest,⁵³ for example where the disclosure of information does, or is reasonably likely to:

- a. Damage the security, defence or international relations of the Commonwealth;
- b. Prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences;
- c. Endanger the life or physical safety of any person; or
- d. Prejudice the protection of public safety.⁵⁴

Paragraphs (a)–(c) in the definition of 'IBP Information' broadly correlate to these interests. Paragraph (a) whilst similar, is arguably harsher than necessary in its operation. In the highly controversial and volatile context of offshore processing, one can envisage certain disclosures in the public interest which could well prejudice the international relations of Australia within the international community — particularly those with countries critical of our refugee policies.⁵⁵ Absent a definition, damage to international relations, also contemplates intangible or speculative damage, such as the loss of trust or confidence in the Australian government or damage to Australia's reputation. The lower threshold of '*could reasonably be expected to*' in this context also goes against the recommendations of the ALRC,⁵⁶ as it potentially criminalises the unauthorised disclosure of information where there is only a reasonable possibility, not a reasonable likelihood of prejudice or damage.⁵⁷ Paragraphs (d) and (e) manifestly exceed the ALRC's robust framework. The broad application of paragraphs (d) and (e) lack sufficient justification to impose criminal sanctions. For example, it is unclear how the effect of disclosure on the competitive position of a private entity relates to essential public interest concerns. While it is legitimate to protect against competitive detriment flowing from the disclosure of confidential information, this is typically achieved via the application of civil law and contractual obligations relating to confidentiality.⁵⁸ For border protection workers to be held to a more onerous standard than that which applies to other government workers, suggests disproportionality of the law.

Of further relevance are the deeming provisions in s 42(1A) of the *ABFA*, which make it an offence to disclose certain information if the person was reckless as to whether (among other things) the information had a security classification. The law fails to provide an avenue to challenge the appropriateness of a security classification and consider the content of the information, and is unclear as to what steps a person would need to take to satisfy themselves that the information was not subject to such a classification.⁵⁹ Section 4(7) of the *ABFA*, also confers the Minister with discretion to prescribe new categories of information as falling within the scope of the offence. This could effectively be used to prevent the lawful disclosure of information, particularly in the highly controversial context of refugee policy. The concerns raised above in relation to the exceptions to the original s 42, also remain relevant.

There is no doubt that the amended legislation is more likely to satisfy the proportionality test, and thus be found to be constitutionally valid. Where potential refugee whistle-blowers were once 'gagged' by the operation of the s 42 offence,⁶⁰ the amended legislation has ameliorated many of the concerns held by the individuals and groups at the coalface of Australia's refugee policies. Despite no one actually having been charged with an offence under either iteration of the s 42 offence, the breadth and ambiguity of the legislation, still creates uncertainty, and the aforementioned loose ends of the legislation validates residual concerns as to its constitutional validity.

v Concluding remarks

This essay evinces how the recent amendment to the secrecy provisions of the *ABFA*, has resulted in an improvement to the protection offered to refugee whistle-blowers. The law, whilst refined in its scope, operation and practical effect, is an example of legislative drafting that leaves much to be desired. Where the original s 42 offence was likely invalid on the grounds that it curtailed the implied freedom of political communications, the amended offence too, remains uncertain and in some respects overly broad failing to rule out the possibility of a constitutional challenge. The amended legislation has ameliorated *some* of the concerns its predecessor invoked in relation to information of public interest reaching the public sphere but remains a deterrent for those wishing to speak out about the abject failure that is Australia's draconian refugee policies. 🇺🇸

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References

1 See, eg, 'Australia: Appalling Abuse, Neglect of Refugees on Nauru', *Amnesty International* (Web Page, 20 August 2016) <<https://www.amnesty.org/en/latest/news/2016/08/australia-abuse-neglect-of-refugees-on-nauru/>>; Waleed Aly, 'Australia's Poisonous Refugee Policy', *The New York Times* (online, 26 October 2016) <<https://www.nytimes.com/2016/10/27/opinion/australias-poisonous-refugee-policy.html>>.

2 Thomas Albrecht, 'Australia's Refugee Policy is a Failure. This is Not the Time to Shirk Responsibility', *The Guardian* (online, 2 October 2017) <<https://www.theguardian.com/commentisfree/2017/oct/02/our-refugee-policy-is-a-failure-this-is-not-the-time-to-shirk-responsibility>>.

3 *Australian Border Force Act 2015* (Cth) ('*ABFA*') pt 6.

4 *Australian Border Force Amendment (Protected Information) Act 2017* (Cth) ('*ABFA 2017 Amendment*').

5 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Australian Border Force Amendment (Protected Information) Bill 2017* (12 September 2017) 1 [1.4].

6 An 'entrusted person' was (and still is) defined in section 4(1) of the *ABFA* (n 3) to include various officials in the Australian Border Force, as well as people who are 'Immigration and Border Protection workers'. That class is broadly defined to include inter alia, people who are engaged as consultants or contractors to perform services for the Department

of Immigration and Border Protection, and who are designated in writing by the Secretary of the Department or the Australian Border Force Commissioner: at s 4(1) (definition of 'entrusted person').

7 *ABFA* (n 3) ss 4(1) (definition of 'protected information'), 42(1), as repealed by *Australian Border Force Amendment (Protected Information) Act 2017* (Cth) sch 1 pt 1 ('*First ABFA Compilation*').

8 See, eg, Nicole Bevitt, 'The Australian Border Force Act 2015 (Cth) Secrecy Provisions: Borderline Unconstitutional' (2017) 39(2) *Sydney Law Review* 257; Khanh Hoang, 'Border Force Act Entrenches Secrecy around Australia's Asylum Seeker Regime' *The Conversation* (online, 2 July 2015) <<https://theconversation.com>>.

com/border-force-act-entrenches-secrecy-around-australias-asylum-seeker-regime-44136>; Ellen Moore, Musood Darwish and Alison Pert, *Submission No 109 to Australian Law Reform Commission, Freedoms Inquiry* (September 2015).

9 First *ABFA Compilation* (n 7) ss 42–9. Subsection 42(2) provides that the offence does not apply if: “(a) the making of the record or disclosure is authorised by ss 43, 44, 45, 47, 48 or 49; or (b) the making of the record or disclosure is in the course of the person’s employment or service as an entrusted person; or (c) the making of the record or disclosure is required or authorised by or under a law of the Commonwealth, a State or a Territory; or (d) the making of the record or disclosure is required by an order or direction of a court or tribunal.” A defendant bears an evidential burden in relation to a matter listed above, in accordance with s 13.3(3) of the Schedule to the *Criminal Code Act 1995* (Cth). Sections 43, 44, 45, 47, 48 and 49 set out circumstances in which use and disclosure of protected information is permitted, in particular where: the recording or disclosure is for the purposes of the *Australian Border Force Act 2015* (Cth) or the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (s 43); the person has written authorisation from the Secretary of the Department to disclose information, or a class of information, to certain bodies and persons in Australia, including government agencies and police, for certain purposes (s 44); the person has written authorisation from the Secretary of the Department to disclose information, or a class of information, to a foreign country, agency or authority of a foreign country, or public international organisation, that has entered into an agreement with the Commonwealth or one of its agencies, for certain purposes (s 45); the disclosure is in accordance with consent given by the person or body to whom the information relates (s 47); an entrusted person reasonably believes it is necessary to prevent or lessen a serious threat to the life or health of an individual (s 48); or the information has already been lawfully made available to the public (s 49).

10 Claudia Fatone, ‘Doctors for Refugees’, *Fitzroy Legal Centre* (Web Page, 27 July 2016) <https://www.fitzroy-legal.org.au/doctors_for_refugees>; Sarah Whyte and Uma Patel, ‘Doctors to Launch High Court Challenge against Detention Secrecy Laws’, *ABC News* (online, 27 July 2016) <<https://www.abc.net.au/news/2016-07-27/doctors-to-launch-high-court-challenge-against-detention-secrecy/7662836>>.

11 *ABFA* (n 3) s 4(f)(iii).

12 *Determination of Immigration and Border Protection Workers*

2015 (Cth) para D, as amended by *Determination of Immigration and Border Protection Workers – Amendment No. 1 2016* (Cth).

13 Bianca Hall, ‘A Huge Win for Doctors: Turnbull Government Backs Down on Gag Laws for Doctors on Nauru and Manus’, *The Sydney Morning Herald* (online, 20 October 2016) <<https://www.smh.com.au/politics/federal/a-huge-win-for-doctors-turnbull-government-backs-down-on-gag-laws-for-doctors-on-nauru-and-manus-20161020-gs6ecs.html>>.

14 *Australian Border Force Amendment (Protected Information) Bill 2017* (Cth).

15 The new category of ‘Immigration and Border Protection information’ was to replace the repealed definition of ‘protected information’ in the original *ABFA* (n 3).

16 *Australian Border Force Amendment (Protected Information) Bill 2017* (Cth) sch 1 cl 1.

17 *ABFA 2017 Amendment* (n 4).

18 *Australian Constitution* ss 7, 24. See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

19 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (*‘Lange v ABC’*).

20 *Ibid* 567; *Coleman v Power* (2004) 220 CLR 1, 51 (*‘Coleman v Power’*); *McCloy v New South Wales* (2015) 257 CLR 178, 193–5 [2] (*‘McCloy v NSW’*).

21 (2017) 261 CLR 328, 363–4 [104], 375–6 [156], 416 [277], 478 [481] (Keifel CJ, Bell and Keane JJ) (*‘Brown v Tasmania’*).

22 *Ibid* 363–4 [104] (Kiefel CJ, Bell J and Keane J), 375–6 [156] (Gageler J), 416 [277] (Nettle J).

23 *McCloy v New South Wales* (n 20) 213 [68] (French CJ, Kiefel, Bell and Keane JJ), 232 [131] (Gageler J).

24 *Ibid* 194–5 (French CJ, Kiefel, Bell and Keane JJ). See also *Brown v Tasmania* (n 21) 416–9.

25 Moore, Darwish and Pert (n 8) 8.

26 *Levy v State of Victoria* (1997) 189 CLR 579, 595–6.

27 *Lange v ABC* (n 19) 545.

28 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 February 2015, 1204–5 (Peter Dutton, Minister for Immigration and Border Protection); Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2017, 7822–3 (Peter Dutton, Minister for Immigration and Border Protection).

29 See *R v Goreng-Goreng* (2008) 2 ACTLR 238, 247 (*‘Goreng-Goreng’*). In that case, the Supreme Court of the Australian Capital Territory

considered the validity of restrictions on disclosures by public servants. The relevant regulation prohibited the disclosure of information where it was reasonably foreseeable that the disclosure could be prejudicial to the effective working of government. The Court found that upholding the effective working of government was a legitimate end.

30 *Bevitt* (n 8) 258.

31 (2003) 134 FCR 334 (*‘Bennett v HREOC’*).

32 For example, the case discussed reg 7(13) of the *Public Service Regulation 1999* (Cth).

33 *Bennett v HREOC* (n 32) 359: ‘The dimensions of the control [the law] imposes impedes quite unreasonably the possible flow of information to the community — information which, without possibly prejudicing the interests of the Commonwealth, could only serve to enlarge the public’s knowledge and understanding of the operation, practices and policies of the executive government’.

34 *Coleman v Power* (n 20) 54 (McHugh J).

35 ‘Secrecy Provisions of the Australian Border Force Act’ (Media Release, Department of Immigration and Border Protection and Australian Border Force, 7 July 2015).

36 *Bevitt* (n 8) 264.

37 *Public Interest Disclosure Act 2013* (Cth) (*‘PIDA’*): the *PIDA* exempts, from civil or criminal sanction, those who make disclosures about disclosable conduct such as maladministration or corruption.

38 *Ibid* ss 10, 26, 29, 31, 69.

39 For example, the *PIDA* only covers disclosures made by ‘public officials’ — public servants and their contracted services providers, but does not include consultants and their employees: see *PIDA* (n 38) ss 30, 69. In contrast, the definition of ‘immigration and protection worker’ under the *ABFA* covers these categories of persons: see s 4. The *PIDA* also generally requires an initial disclosure to be made internally to a superior within a government agency: see *PIDA* (n 38) ss 26, 31. External disclosure can only be made after this, where the individual reasonably believes that the investigation or response was inadequate, and the disclosure is, on balance, not contrary to the public interest, or where there is a substantial or imminent danger to the health and safety of the individual. This is a high threshold for a person to overcome in making a public interest disclosure.

40 Khanh Hoang, ‘Of Secrecy and Enforcement: Australian Border Force Act’ (2015) 14 *Law Society of New South Wales Journal* 78, 79; Stephanie Szklinski, ‘Secrecy and Disclosure: The Australian Border

Force Act 2015 (Cth) Protecting Our Borders from Free Speech' (2016) 21(1) *Media and Arts Law Review* 64, 72; Councils for Civil Liberties, Submission No 142 to the Australian Law Reform Commission, Freedoms Inquiry (18 October 2015) 21.

41 Moore, Darwish and Pert (n 8) 5. The exception for recording or disclosing information related to the affairs of a person or body if that person has consented to disclosure (*ABFA* (n 3) s 47), may also be particularly relevant for refugee whistleblowers. Where this could provide an alternate avenue for disclosure, the information to be disclosed must be limited to that individual's personal information. Therefore, information about the widespread health issues and poor conditions in detention centres cannot be disclosed under these exceptions, despite being of significant public and political interest.

42 *Tajjour v New South Wales* (2014) 254 CLR 508, 550.

43 *McCloy v NSW* (n 20) 193–5 [2]; Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85, 90–1.

44 *Unions NSW v New South Wales* (2013) 252 CLR 530, 556–60 [44]–[60] ('*Unions NSW*').

45 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2017, 7821–3 (Peter Dutton, Minister for Immigration and Border Protection); Explanatory Memorandum, *Australian Border Force Amendment (Protected Information) Bill 2017* (Cth) 4. Both make clear that the Bill seeks to protect certain information from unauthorised disclosure that would harm the national or public interest, while meeting the expectations of the Australian community of transparency and accountability within the Australian government.

46 *Unions NSW* (n 45) 596, [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

47 *Crimes Act 1914* (Cth) s 70(1). This section prohibits a Commonwealth officer from publishing or communicating, except to some person to whom he or she is authorised to publish or communicate, any fact or document which comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose, commits an offence. The penalty for this offence is 2 years' imprisonment.

48 *Goreng-Goreng* (n 29) 247.

49 Note that the general guidance for the drafting of secrecy provisions as per the *ALRC's* recommendations, in their report *Secrecy Laws and Open Government in Australia*, explained below also presents an obvious and compelling alternative to the standard adopted in the amended *ABFA Act*.

50 *Brown v Tasmania* (n 21) 464–5 [430].

51 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (Report No 112, 2010).

52 *Ibid* 44 [2.12].

53 *Ibid* 13 rec 9–3. For example where the disclosure of information does, or is reasonably likely to: damage the security, defence or international relations of the Commonwealth; prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences; endanger the life or physical safety of any person; or prejudice the protection of public safety.

54 *Ibid* 9 rec 5–1.

55 Save the Children, Submission No 7 to the Senate Legal and Constitutional Affairs

Legislation Committee, Parliament of Australia, *Australian Border Force Amendment (Protected Information) Bill 2017* (Cth) (28 August 2017) 3. Damage to international relations, also contemplates intangible or speculative damage, such as the loss of trust or confidence in the Australia's government or damage to Australia's reputation.

56 *Australian Law Reform Commission* (n 52) 9 rec 5–1.

57 *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, 190.

58 UNSW Kaldor Centre for International Refugee Law, Submission No 12 to the Senate Legal and Constitutional Affairs Legislation Committee, *Australian Border Force Amendment (Protected Information) Bill 2017* (Cth) (1 September 2017) 3–4.

59 See *ABFA* s 4(5), 42(1A). The deeming of information with a security classification as requiring protection, without any consideration of the content of the information, whether it has been correctly classified or whether it is, in fact, information the disclosure of which would, or is reasonably likely to, harm essential public interests remains a 'blanket provision': see Australian Human Rights Commission, Submission No 13 to the Senate Legal and Constitutional Affairs Legislation Committee, *Australian Border Force Amendment (Protected Information) Bill 2017* (Cth) (1 September 2017) 24–6.

60 Paul Karp and Ben Doherty, 'Australia Should Urgently Improve Whistleblower Protection, UN Expert Says', *The Guardian* (online, 18 October 2016) <<https://www.theguardian.com/australia-news/2016/oct/18/australia-should-urgently-improve-whistleblower-protection-un-expert-says>>.

Deterring asylum seeking in Australia

Bribing Indonesian smugglers to return asylum seekers to Indonesia

Dr Antje Missbach and
Assoc Prof Wayne Palmer

I Overview

Since 2001, successive Australian governments have increasingly used unilateral and bilateral migration and border protection policies to prevent refugees and migrants from reaching Australia, where they have the legal right to apply for asylum.¹ Amongst many other measures, the Australian government uses mandatory detention and offshore processing in third countries, such as Nauru and Papua New Guinea, to deter asylum seekers from attempting to enter the country by sea without a valid visa. Turning back asylum seeker boats in the Indian Ocean is deemed to be another effective means to discourage future claimants. This and other border protection measures extend well beyond Australia's internationally recognised borders, reaching into neighbouring transit countries, such as Indonesia and Malaysia, and even further away, to countries of origin for asylum seekers, including Sri Lanka and Vietnam.

Australian government policies tend to frame the purpose of preventing asylum seekers from reaching Australia by sea as disrupting and deterring people smuggling

activities.² They view irregular border crossings narrowly as transnational organised crimes, neglecting the fact that such crossings enable foreigners' claims to a basic human right: asylum.³ Such perceptions have garnered substantial political support from the Australian electorate, on whose behalf the government bankrolls expensive anti-asylum measures to reduce the number of 'illegal maritime arrivals'.⁴ Measures to deter entry ignore legal status like 'refugee' or 'person at risk of harm in their country of citizenship', as they are solely concerned with whether a person holds a valid visa or not. Some critics argue that the expenses of offshore detention and other related border protection measures are not value for money.⁵ Furthermore, international non-government organisations, such as Amnesty International, and various United Nations bodies have continually criticised Australia for abusing the human rights of asylum seekers.⁶ On occasion, too, neighbouring countries have also spoken out against Australia's unilateralism as negatively impacting their region. As early as January 2014, Indonesia's Minister for Foreign Affairs, Marty Natale-



Sri Lankan asylum seekers on their way to New Zealand by boat were intercepted by Indonesian Marine Police. Waters off Tanjungpinang, Riau Islands province, Indonesia, 11 July 2011 (Syarifullah/AAP Image)

gawa, had again labelled Australia's policies 'not a solution' to the movement of asylum seekers through the region, in response to reports that the Australian government had turned back boats carrying asylum seekers within Indonesia's territorial waters.⁷

To complement the raft of scholarly and policy studies that assume the state is always an inhibitor of people smuggling, this article also examines the rarely discussed role of states as smugglers themselves. Generally, people-smuggling is defined as a crime against the state, because the primary victim is deemed to be the state whose immigration laws are violated. But this narrow understanding ignores the possibility that states can and do facilitate crimes against other states. Here, we discuss one such case in which the Australian government paid six Indonesian smugglers to return to Indonesia with 65 asylum seekers.⁸ In the discussion and analysis that follow, we also draw attention to how the turn-back may have violated international as well as domestic laws in Australia and in the neighbouring country of Indonesia. We conclude that Australia's turnback in this instance is not a deterrence model to be adopted by other sought-after destination countries for asylum seekers in the Global North.

II Return to sender

In September 2013, the Australian government established Operation Sovereign Borders to disrupt and deter people smuggling by intercept asylum seeker boats at sea.⁹ The joint agency taskforce is military-led, and has reportedly pushed or towed back at least 36 boats to Indonesia, Vietnam and Sri Lanka.¹⁰ In the forced returns to Indonesia, the Australian Navy claimed to have only escorted boats back to the edges of Indonesia's territorial waters — 12 nautical miles from the coast and from an area over which states exercise sovereignty, as recognised at international law.¹¹ Indonesian authorities often claim to have no prior knowledge of the returns, and that the Australian government only notifies them days after the forced returns — if at all.¹² Amongst other negative consequences, this lack of coordination risks the safety of the asylum seekers or crew, especially those who in need of urgent medical attention when the Australian authorities first intercept their boat.¹³ Despite strong protests from the Indo-

nesian government, Australia has continued to turn back boats regardless.¹⁴

On 5 May 2015, 20 months after the Australian government recommenced the 'turnback' of asylum seeker vessels, an asylum seeker boat named the *Andika* set sail from Indonesia's Pelabuhan Ratu on Java's coast.¹⁵ The 65 asylum seekers and six Indonesian transporters were destined for the distant New Zealand. Normally, the final destination was one of Australia's remote islands, such as Christmas Island. This time, however, the asylum seeker boat intended to risk the longer journey, as Christmas Island had been excised from Australia's migration zone and applications for asylum were thus no longer an option there.¹⁶

After almost two weeks at sea, on 17 May 2015, two Australian Border Force vessels intercepted the *Andika* in international waters near Timor-Leste.¹⁷ At first, the *Andika*'s boat crew objected to being stopped in international waters so far from Australia. They explained that the *Andika* was an Indonesia-flagged vessel, over which the Australian government had no authority. According to international law, the Indonesian government, as the flag state, should have had exclusive jurisdiction.¹⁸ Regardless, the Australian Border Force boarded the *Andika* to warn the crew and asylum seekers that they could not enter Australian territory without a valid visa or complete set of documents. For the next five days, the Australian Border Force shadowed the *Andika* as it continued on its planned sea journey to another desirable destination for the asylum seekers.¹⁹

On 22 May 2015, another Australian authority, the HMAS *Wollongong*, stopped the *Andika*.²⁰ Given that the Australian government has not released the coordinates, it remains unclear as to whether the boat was in Indonesian waters as the *Andika*'s crew claimed.²¹ The Indonesian captain was ordered to return to Indonesia, which he refused to do, but after long discussions, he agreed to reroute the *Andika* to Australia. The next day, the *Andika* anchored at Australia's Green Hill Island near Darwin, where Australian officials then boarded to interview and photograph the asylum seekers. The processing did not result in the much-expected assessment of asylum claims.²²

It was here on Greenhill Island that the Australian officials allegedly paid the crew so

that they would more readily return to Indonesia.²³ The asylum seekers claimed that the captain accepted a 'thick white envelope', and that the other crew were 'very happy' — so much so that they began 'joking with the Australian officers, whereas beforehand they had seemed frightened and nervous'.²⁴ According to the captain and his crew, the Australian authorities had initially promised to facilitate a return to the edges of Indonesian waters near Java, but the destination was changed to Rote Island in East Nusa Tenggara, the remote east of the Indonesian archipelago.²⁵ The boat crew were disappointed, but they were in a weak position to resist the change in plan, largely because the Australian Border Force had taken control of their vessel, and they had already accepted payment to return to Indonesia.²⁶

Early the next morning on 31 May, the Australian Border Force divided the boat crew and asylum seekers more or less equally between two new boats — the Jasmine and the Kanak.²⁷ Ten Australian vessels then escorted the boats to the edge of Indonesian waters, not far from Rote Island. The Australian Border Force left the boats there, but before reaching the destination the Jasmine ran out of fuel, so everyone overcrowded the Kanak for the final stretch. A few hours later, that boat struck a reef off the southeast coast of Rote Island, and asylum seekers who could swim abandoned the shipwreck by making their own way to the closest beach.²⁸ The others, including women and children, relied on locals, who had not been alerted by any government authorities, for rescue from the stricken vessel.

Once onshore, the crew, who feared being arrested for people smuggling fled, leaving behind the confused, frightened and angry asylum seekers, who gathered in the local village head's house. Four hours later, the police arrested the crew, and seven months later the Rote Ndao District Court convicted them for attempting to smuggle asylum seekers from Indonesia to New Zealand.²⁹

III Breaches of international and domestic law

At the trial of the captain and his crew, the judges ignored the supporting roles played by Australian agencies in the smuggling of asylum seekers from Australia to Indonesia.³⁰ Aus-

lian officials directed and otherwise arranged the crime by providing material assistance, including two boats, fuel, maps, and a GPS.³¹ They had directed the boat captain and crew to land at identified points in Rote Island, rather than an official entry spot where Indonesian authorities could have registered the arrivals, as required by Indonesian law.³² Effectively, the Australian government bankrolled the crime against Indonesia, even paying the captain and crew to commit it. Although Australia was certainly complicit, the Indonesian court ignored the inconvenient fact that another state could commit the transnational organised crime of people smuggling.³³

At international law, the Australian officials may have also breached the UN *Protocol against the Smuggling of Migrants by Land, Sea and Air* ('*Smuggling Protocol*'),³⁴ which requires ratifying states, such as Australia and Indonesia, to adequately punish smugglers for endangering the safety of their migrant and refugee passengers. In turning back Andika's asylum seekers, Australian authorities clearly put lives at risk, as the crew and passengers ended up abandoning one of the Australia-provided boats and overcrowded the other because of insufficient fuel. The turnback might have fallen through the cracks of national law in Indonesia, and it is unlikely that the Australian legal system will ever adjudicate the issue. Regardless, the UN *Smuggling Protocol* contains a safeguard clause which clearly stipulates that states ought to 'ensure the safety and humane treatment of the persons on board'.³⁵

Over four years later, it seems unlikely that either government will conduct further investigations with the view to punish the Australian officials. In Australia, there is a lack of political will to investigate the events fully, as the government continues to shield its anti-people smuggling activities from any public scrutiny. The Australian Senate published an Interim Report in 2016, but has since abandoned the inquiry with the following technical justification: '[a]t the dissolution of the Senate and the House of Representatives on 9 May 2016 for a general election on 2 July 2016, the parliamentary committees of the 44th Parliament ceased to exist'.³⁶ Therefore, inquiries that were not completed have lapsed and submissions cannot be received.³⁷

Even if future Australian governments decide to punish the crime, certain categories

of officials, such as officers of the Australian Secret Intelligence Service, who were reportedly involved, enjoy immunity from liability under Australian law.³⁸ Likewise, there seems to be little appetite in Indonesia to reopen the case, as the Indonesian government does not deem it a priority and its officials are busy with other policy problems.

iv State, illegality and a new generation of bordering practices

Putting aside the Andika case and taking a wider look at the advancement of global bordering practices by states, it becomes apparent that bordering practices to deter asylum seekers are becoming more diversified and are not always legal. There is a growing body of literature that focuses on different kinds of interceptions, concentrating in particular on uni-, bi- and multilateral initiatives to combat people smuggling and block access to asylum.³⁹ Interceptions are often used to prevent unauthorised arrivals of vessels and their passengers, but are only permissible in certain situations as outlined in international law.⁴⁰ When called to account, governments in destination countries, such as Australia, are known to 'quarantine domestic law and policy from [their] international legal obligations', for example, by attempting to prevent the use of international law when assessing the legality of their interception activities.⁴¹ They also selectively choose articles under international law to justify their interception activities while ignoring obligations in others.⁴²

Although the number of boats reaching Australia has substantially decreased since the start of Operation Sovereign Borders, the direct and indirect costs of interceptions and returns of asylum seeker boats remain high — not only in financial terms, but in human costs and even political terms.⁴³ Unilateral action might bring quick results in preventing people smuggling, but cannot guarantee long-term success. In addition to the unsustainability of these methods in the long-term, they might result in unwanted impacts. For example, the nature of the Australia-Indonesia relationship in seeking to combat and prevent people smuggling marks this risk very clearly, as unannounced and unapproved turnbacks could jeopardise Canberra's diplomatic relations with Jakarta. More drastically, other

countries in the Indo-Pacific region might follow suit and adopt the Australian practice to some extent, which would result in even weaker protections for maritime asylum seekers and refugees in the region. For example, during the Andaman Sea Crisis in May 2015, Malaysia, Thailand and Indonesia all carried out pushbacks against Rohingya asylum seekers fleeing Myanmar until international criticism became too strong.⁴⁴

In conclusion, the unilateral policies pursued by the Australian government under its Operation Sovereign Borders have threatened to undermine the fragile regional collaboration between states and the already weak protection spaces for asylum seekers. Pursuing its own interests at a neighbour's expense will not only weaken Australia's diplomatic relations, but also severely undermine international trust in Australia's adherence to the rule of law. In this regard, Australia can be deemed to be playing with fire by setting dangerous precedents that might then be copied by other states beyond the region. ❧

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Tension between the government and the courts



Surgical theatre of Lorengau
Hospital on Manus Island.
Manus Island, 29 October 2017
(Amnesty International/AAP Image)

Strategic litigation, offshore detention and the Medevac Bill

Anna Talbot and
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2018 saw a flood of litigation in the Federal Court of Australia, on behalf of children and adults living in offshore detention who required urgent medical care. Starting with a single case brought by the National Justice Project (NJP) in February 2017,¹ by the end of 2018 over 50 injunctions had been filed in the Federal Court by lawyers across Australia, all founded in tort law and the Minister for Home Affairs' duty of care.²

Lawyers sought and uniformly obtained urgent interlocutory mandatory injunctions to force the Minister to bring the applicants to places where they could get the urgent medical care that they needed. This litigation has led to the evacuation of hundreds of individuals from Nauru and Papua New Guinea (PNG) to Australia over the last 12 months for their own or their family members' urgent medical treatment.³ Ultimately, this strategic approach to developing the duty of care was the foundation of the successful Kids Off Nauru campaign and historical legislative change: the Medevac Bill. This article traces the experience of two lawyers from the NJP as the crisis unfolded and reflects on its ongoing legacy.

I Legal background: onshore duty of care and Plaintiff M68/2015

The duty of care in onshore immigration detention is well established in Australian law. While the High Court has repeatedly found that indefinite immigration detention is permitted,⁴ the Commonwealth continues to be bound by its duty of care to detainees.⁵

In February 2016, however, in the case of *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, a majority of the High Court found that Nauru was detaining people offshore, not Australia.⁶ This finding raised questions as to whether Australia owed the same duty of care to those it had sent offshore. In light of this decision, a strategic approach was essential in taking the next step to ensuring accountability for offshore processing.

II Plaintiff S99/2016

This wave of tort-based litigation was based on the ground-breaking work done by the NJP in the case of *Plaintiff S99/2016 v Minister for Immigration and Border Protection* ('*Plaintiff S99/2016*').⁷ In that case, a young refugee on

Nauru (S99) had been raped while she was having what appeared to be an epileptic fit. It was not possible to diagnose the fits on Nauru, as they did not have the necessary equipment, but S99 had been suffering from them since her teenage years. As a result of that rape, she became pregnant and required a termination. Due to her complex health needs, doctors recommended that she be brought to Australia urgently to undergo the procedure.

Instead, the Minister took her to PNG. Having taken steps to facilitate the necessary medical treatment (the termination) for S99, Bromberg J found that the Minister had a duty to ensure that medical treatment was provided safely and legally. His Honour went on to find that she could not receive a safe or legal termination in PNG, where abortions remained illegal and a couple had recently been prosecuted for procuring one.⁸ He granted the requested injunction preventing the Minister from procuring the termination there. This was the first case that found a duty of care was owed to refugees or asylum seekers who had been taken to Nauru or PNG by the Australian government.

iii The first suite of 2018 cases

Because the legal strategy was novel, the NJP moved slowly to build on the precedent set in *Plaintiff S99/2016*. It commenced a number of cases, largely focusing on children suffering from severe psychiatric or other health problems. *FRX17* was the first, brought in December 2017.⁹

FRX17 was a case of a young girl, 'not yet a teenager',¹⁰ who attempted suicide on 9 December 2017 by taking an overdose of medication, and continued to experience suicidal ideation.¹¹ Eleven days later, the NJP filed in the Federal Court, seeking an interlocutory injunction which would force the Minister to provide her with urgent psychiatric care. Murphy J considered that the balance of convenience, in view of evidence showing a child of extreme suicide risk, strongly supported the granting of the injunction.¹² His Honour was not persuaded by the Minister's argument that the injunction would 'potentially impinge upon the conduct of foreign affairs', given it did not lead evidence to this end.¹³ Requests for an expedited trial were not granted,¹⁴ given the imminent suicide risk. *FRX17* was followed by *AYX18*

in March 2018,¹⁵ and then *DJA18 as litigation representative for DIZ18 v Minister for Home Affairs* ('*DJA18*') in June 2018.¹⁶

AYX18 was a 10-year-old boy at the time the application was filed. He had been separated from his father, who had been flown to Australia for medical treatment. The boy required an operation, which his mother would not consent to him undergoing in Nauru, due to the history of deaths following operations in the only hospital there. Doctors on Nauru recommended that the boy be brought to Australia for the operation.

Soon after that recommendation was rejected, the boy attempted suicide twice, by taking tablets and attempting to strangle himself with a curtain. He also had to have a knife forcibly taken from him. Perram J granted the injunction sought so the boy could get the care he so urgently needed.¹⁷

DJA18, brought by Maurice Blackburn Lawyers, was the case of a two-year-old child with suspected herpes encephalitis, 'a serious and life-threatening neurological condition'.¹⁸ Instead of following the medical recommendation that the child be flown from Nauru to Australia for treatment, the Minister chose to take her and her mother to PNG, where the Minister argued she could get adequate treatment. Her father was not permitted to travel with them, even though he was the only family member with English language skills. Instead, he was left in Nauru. Medical evidence was clear that any delay in treatment could lead to severe, life-long complications. Murphy J granted orders that required the transfer of the child, her mother and her father to Australia within 48 hours.¹⁹

iv Emerging mental health crisis

In June and July, children and adolescents on Nauru started exhibiting increasingly dangerous symptoms of mental illness. In July 2018, NJP alone filed four separate cases in the Federal Court seeking urgent medical care for severely ill children and teenagers. Two additional applications were made by other firms that month. A crisis was quickly unfolding.

We have no insight into why the cases escalated so rapidly. The judgments and research, however, give some indication.

In *BAF18 as litigation representative for BAG18 v Minister for Home Affairs*,²⁰ brought

by Russell Kennedy, Bromberg J found that the very environment on Nauru stifled children's development, as children are not 'able to undertake the anticipated tasks of adolescence associated with preparing for independence and adulthood', thereby stifling the applicant's development, despite him being 'identified as bright'.²¹ Further, he found that 'the applicant's continued residence on Nauru is a causative and contributing factor in his mental illness and substantial risk of self-harm'.²²

Médecins Sans Frontières ('MSF') provided independent mental health treatment on Nauru between November 2017 and October 2018. Its report — titled 'Indefinite Despair'²³ — details some key factors in the decline in mental health MSF doctors witnessed while they were on Nauru: the long and indefinite nature of the detention;²⁴ widespread experiences of violence and/or harassment in Nauru (including sexual violence), often exacerbating feelings of helplessness and historical trauma;²⁵ rejection letters for resettlement in the USA started being received in May;²⁶ and the tragic death of a well-respected young man in June 2018.²⁷

Resignation Syndrome (also known as Pervasive Refusal Syndrome or Traumatic Refusal Syndrome) started emerging at about this time, the condition underlying two of the four cases NJP filed in July 2018.²⁸ This Syndrome, previously only seen in foreign countries, saw children stop eating, drinking, talking and getting out of bed. As the Syndrome progresses, sufferers experience wasting and give up on showering and toileting themselves. All of these symptoms were seen in children on Nauru. It can quickly become life-threatening or cause permanent disability.²⁹

In *DWE18*, an adolescent was diagnosed with Resignation Syndrome.³⁰ Her food and fluid intake was so low she required hospitalisation for rehydration in Nauru.³¹ Expert medical evidence indicated that she needed urgent inpatient treatment for Major Depressive Disorder and Resignation Syndrome, and was at risk of developing kidney failure, permanent cardiac and/or neurological damage if she did not receive treatment.³² Nauru Hospital did not have the necessary facilities, such as EEG or child and adolescent psychiatric experts and facilities, to monitor and treat her.³³ Robertson J made orders that the girl be transferred to Australia for treatment.³⁴

Around this time, children and teenagers started attempting suicide and self-harm at alarming rates. Children started dousing themselves in petrol and trying to set themselves alight.³⁵ Others took whatever pills they could find, or cut themselves repeatedly.³⁶ Psychosis started to emerge in children and teenagers.³⁷ There were no facilities on Nauru that could manage these conditions, yet the Minister continued to resist transfers.³⁸ It appeared to be only a matter of time before this crisis level of mental illness in children would be lethal.

NJP quickly developed effective ways to work with people offshore and close relationships within the sector. Suddenly lawyers' phones were full of photos of critically ill and injured children and their medical records, sent to us by their parents as evidence, gathered to prove that our clients needed urgent care. The Asylum Seeker Resource Centre triaged the cases and helped NJP gather evidence. The Human Rights Law Centre came on board to help train other lawyers in how to run these cases.

The situation continued to deteriorate. Five cases were filed in August when there were still over 100 children on Nauru.³⁹ Nine were filed in September,⁴⁰ then 17 in October.⁴¹ The strategy was working.

The court cases were just the tip of the iceberg: for every case filed, the NJP acted for triple that number to secure urgent medical transfer (although in many of these cases, we were only days, hours and sometimes minutes away from filing). All of these people, or a member of their family, had been at imminent risk of permanent harm or death if they did not get the treatment the doctors said they urgently needed. Many were hospitalised for weeks or months when they finally arrived in Australia.

At the same time that these injunctions were being fought and won, the sector was looking for a better way. The cases were attracting significant media attention, the Australian Medical Association and doctors were raising their voices and it was becoming clear that the Minister's resistance was not sustainable. The 'Kids Off Nauru' campaign gathered momentum under the leadership of the Asylum Seeker Resource Centre, Refugee Council of Australia and World Vision Australia. The final children left Nauru in February this year.⁴²



Medical area treatment at the
detention centre on Manus Island.
Manus Island, 21 March 2014
(Eoin Blackwell/AAP Image)

As the pressure built to take action, independent Dr Kerry Phelps was elected to Parliament. The fallout from the change in leadership also saw Julia Banks leave the Liberal Party to sit as an independent. Suddenly the Government was in minority and there was a critical mass of support for legislation that would streamline the medical transfer process.

The Kids Off Nauru campaign and the Medevac Bill negotiation saw doctors, lawyers, caseworkers and others in the sector collaborating in previously unseen ways. While the lawyers continued to fight the Minister in court, doctors and other organisations worked with MPs and the media to explain the nature of the health crisis, the urgency of the situation and to correct circulating misinformation. The Medevac Bill was passed into law in February 2019, against the wishes of the Government of the day.⁴³

This legislation brings access to essential medical care into a medical, rather than legal, framework. Under the amendment, if two treating doctors believe that the applicant should be transferred from an offshore processing country to Australia for medical or psychiatric assessment or treatment, the Minister must facilitate transfer except in specific circumstances.⁴⁴ The Minister can only refuse transfer if he believes that transfer is not necessary,⁴⁵ the individual could be prejudicial to security under the *Australian Secret Intelligence Organisation Act 1979* (Cth) ('ASIO Act'),⁴⁶ or the Minister knows that the person has a substantial criminal record as defined in the Act.⁴⁷ If the Minister rejects the application for the former reason, the application is assessed by an independent panel of doctors.⁴⁸ If the panel recommends a transfer, the Minister can refuse it if they believe that transfer could be prejudicial to security under the *ASIO Act*.⁴⁹

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3 The NJP alone was responsible for approximately 150 transfers from Nauru and Papua New Guinea to Australia. We ran approximately a quarter of the cases filed.

4 See, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992)

Within days of the Medevac Bill passing both Houses of Parliament, the Nauruan Government introduced regulations banning telemedicine.⁵⁰ This had the effect of making the Medevac process more difficult to use in Nauru; meaning that it is generally only possible for doctors to review medical records to prepare their reports, rather than interview patients via telephone or video conference. The issue was considered by the Court recently, in the case of *CCA19 v Secretary, Department of Home Affairs*,⁵¹ with the Secretary arguing that only assessments by telephone or video conference would be adequate to meet the requirements of the amended Act.⁵² Bromberg J disagreed, finding that a review on the papers was sufficient.⁵³

The health crisis continues. Despite all of the evidence of its need and the massive waste of resources forced by the Minister's intransigence prior to its passage,⁵⁴ the Minister continues to promise to repeal the Medevac Bill.⁵⁵ At the time of writing, the Minister had presented a Bill for this purpose to Parliament.⁵⁶ This would reintroduce politics into life-or-death decisions currently being made by doctors under Medevac. Regardless of the fate of this Bill, however, there is now an army of lawyers around Australia with the expertise to challenge the Minister when he withholds life-saving care. The Minister's intransigence has trained us all well. 🇺🇸

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Reforming judicial review since Tampa

Attitudes, policy and implications

Jack Zhou

In the flurry of legal and political activity surrounding the Tampa crisis, the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) was pushed through Parliament — one of a series of amendments to the *Migration Act 1958* (Cth) (*'Migration Act'*) passed in direct response to the crisis.¹ It formed a major attempt to reduce the scope of judicial review available for migrants, refugees and asylum seekers. This article will survey the attempts to eliminate and curtail judicial review in the wake of the Tampa crisis. It will also examine the rhetoric on border security and national sovereignty precipitating legislative attacks on judicial review, which was perceived as obstructing government policy, overburdening the courts, and at too great an expense for taxpayers. Its consequences and implications for offshore detention will also be discussed, particularly the introduction of offshore processing — outside domestic Australian jurisdiction — as a means to avoid judicial review.

I The importance of judicial review

The reach and scope of judicial review in relation to migration decisions has faced dramatic

reductions as a result of various legislative amendments. Judicial review is only a way of vetting administrative errors, and is not a process for reconsidering a migration decision. It is an important mechanism in the context of migration, primarily in addressing decisions made by ministers or officers which fall short of constitutional or legislative boundaries.²

Judicial review also plays a role in Australia's detention policy for refugees arriving by boat. Its restriction, according to Brian Opeskin, has prevented detained refugees from seeking recourse, breaching art 9(4) of the *ICCPR*,³ which guarantees detained persons 'an entitlement to bring proceedings before a court to allow it to decide on the lawfulness of the detention and to order release'.⁴ Despite attempts to curtail it, judicial review is still entrenched in s 75 of the *Constitution*.

II Attitudes and reform

Since 1998, parliamentary debates over how to deal with the perceived financial and administrative burden of migrant litigation led to the Migration Legislation Amendment (Judicial Review) Bill 1998,⁵ which remained



Australian Army patrols near the MV Tampa. Christmas Island, 3 September 2001 (Dita Alangkara/AAP Image)

dormant until the Tampa crisis. Interest in the Bill revitalised, and it received royal assent in September 2001.⁶ The intent, outlined by Minister for Immigration Philip Ruddock, was based on

giv[ing] legislative effect to the government's longstanding commitment to introduce legislation that in migration matters will restrict access to judicial review in all but exceptional circumstances. This commitment was made in light of the extensive merits review rights in the migration legislation and concerns about the growing cost and incidence of migration litigation and the associated delays in removal of non-citizens with no right to remain in Australia.⁷

The government claimed that this would not restrict access to courts, but only expand the conditions for the legality of a migration decision. The amendment introduced 'privative decision clauses' into the *Migration Act*.⁸ Almost all migration decisions under the Act were turned into a privative clause decision.⁹ A decision made under the auspices of the Act (either directly or through regulations) — with the narrow exceptions provided by ss 474(4)–(5) — would be 'final and conclusive' and cannot be subject to any sort of judicial review or challenge.¹⁰

One of the debates leading up to the November 2001 election was built upon concerns of border security,¹¹ fomenting tensions between the courts and the government. The attitude that courts were unjustifiably interfering with tribunal decisions formed a key justification for the attacks on judicial review.¹² However, the actual outcomes of those reviews did not bear that interpretation.¹³ The High Court had, in reality, cautioned against 'overzealous' judicial scrutiny; of 32 applications in the 11 months before 31 May 2000, 26 were refused, three discontinued and only three resulted in orders.¹⁴

Concerns about 'abuses' of the Australian migration system featured in the rhetoric of the government discourse surrounding migrants. A prevailing view was that administrative and legal institutions were being abused by migrants seeking unmeritorious judicial review. Philip Ruddock stated

it is hard not to conclude that there is a substantial number who are using the legal process primarily in order to extend

their stay in Australia, especially given that one-third to one-half of all applicants withdraw from legal proceedings before hearing.¹⁵

The discussion over the abuse of courts reflected a fear of unauthorised migrants being able to stay in Australia. According to Alan Freckelton, it represented a fixation on border security as 'a necessary element of a government's sovereignty.'¹⁶ The result has been an anxiety over 'absolute control'¹⁷ over borders and migration:

Images which convey this run from the Statue of Liberty to crack SAS troops boarding the MV Tampa. In the law, the strong links between migration provisions and the notion of sovereignty have led to courts showing remarkable deference to executives in areas of immigration rule making ...¹⁸

Moreover, Sharon Pickering has highlighted the 'criminalisation' of refugees as a product of these discussions. Media representation of refugees throughout this period heightened many of the issues generally in terms of a 'problem'.¹⁹ Using coverage from the *Sydney Morning Herald* and other publications throughout the late-1990s, Pickering argues that portrayals of refugees during this period were underpinned by perceptions of 'deviancy'.²⁰ To that end, judicial review was seen as 'aiding and abetting' the deviant behaviour of refugees, through undermining government policy and creating a threat to national sovereignty.²¹ Courts were unfavourably characterised as obstructionist, with the costs and resources associated with judicial and administrative review perceived as a burdensome expense to tax payers.²²

III Aftermath

In 2003, the new privative clause provisions were considered by the High Court in *Plaintiff S157/2002*.²³ The plaintiff was refused a Protection Visa by the Refugee Review Tribunal. He argued that the tribunal's decision was a breach of natural justice and that the restriction under s 474 of the *Migration Act* was inconsistent with s 75(v) of the *Constitution*, where the High Court retains original jurisdiction over matters where review 'is sought against an officer of the Commonwealth'.²⁴ Instead, the Court found a 'jurisdictional error' in the decision, meaning that it

was not a decision ‘made under [the *Migration Act*].’²⁵ Privative clauses did not apply to decisions made ‘purporting to be under the Act’, that is, a decision involving a jurisdictional error.²⁶ This reading would make judicial review possible only if the decision was erroneous and outside the decision-maker’s jurisdiction, where it could not be defined as a privative clause decision. Parliament could not completely extricate itself from judicial review. While the High Court did not find s 474 inconsistent with the *Constitution*, they nevertheless retained judicial review, reserving it for cases of ‘jurisdictional error’.²⁷

Further reforms to judicial review appeared in the following years. With the *Migration Litigation Reform Act 2005* (Cth), the Federal Circuit Court (then the Federal Magistrates Court) was given the power to exercise judicial review on the bulk of migration cases.²⁸ The Federal Circuit Court’s jurisdiction over these matters is the same as the jurisdiction conferred upon the High Court under s 75(v) of the *Constitution*, but with exceptions laid out in s 476A of the *Migration Act*.²⁹ Throughout these reforms, Parliament attempted to reframe s 486A of the *Migration Act* to include absolute time limits for judicial review applications.³⁰ This was later found constitutionally invalid by the High Court in *Bodruddaza*.³¹ In response, the *Migration Legislation Amendment Act [No. 1] 2009* (Cth) enacted a 35-day time limit with discretion to seek an order from the High Court to extend the time limit.³²

More recently, the *Migration Amendment (Clarification of Jurisdiction) Bill 2018* (Cth) has attempted to clarify the grounds for judicial review, after claims that the terms under pt 8 were unduly ambiguous.³³ The Bill provides that purported non-privative clause decisions (ie decisions affected by jurisdictional error) are ‘reviewable by the Federal Circuit Court’.³⁴ It has been said this will ‘ensure that applicants seeking judicial review of migration decisions would have substantially the same rights as applicants seeking judicial review of most other Commonwealth administrative decisions’.³⁵ However, as of April 2019, the Bill has lapsed in the Parliament.

iv Implications for offshore detention

Far from eliminating judicial review, the addition of privative clauses and the results of subsequent cases have instead raised ques-

tions of what exactly constitutes a ‘jurisdictional error’. Denis O’Brien argues that ‘the privative clause... has not achieved its intended effect’ but ‘merely had the effect of returning judicial review in the area to the complexity associated with the prerogative writs and the language of jurisdictional error’.³⁶ Numerous cases have considered this issue, attempting to define what is and is not a ‘jurisdictional error’.³⁷

However, there remains a significant concern that judicial review may be unavailable for refugees placed in offshore detention. Although privative clauses and other restrictions to judicial review have been resisted, the High Court’s original jurisdiction to hear these matters is confined to a function by ‘an officer of the Commonwealth’.³⁸ Throughout the Tampa crisis, the government ensured that the asylum seekers’ vessel could not have contact with a migration official, but instead dispatched SAS troops to intercept them. The troops had no ‘relevant statutory or common law duties under the *Migration Act* ... [t]he supervisory jurisdiction of the High Court under s 75(v) of the *Constitution* was not relevant in their instance’.³⁹ This method of depriving judicial review would form a major rationale for the Pacific Solution and subsequent offshore processing policies – according to Duncan Kerr, ‘the Howard government’s strategy of avoiding judicial review by keeping officers of the Commonwealth away from possible legal engagement with refugee claimants was fundamental to the offshore process regime’.⁴⁰ To that effect, Nauru and Manus Island were established as offshore detention facilities. Christmas Island was removed from the Australian migration zone through the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth),⁴¹ meaning that a refugee who arrives at Australia via Christmas Island – or another offshore territory – is treated as an ‘offshore entry person’.

In 2008, Christmas Island became the primary area for processing an ‘offshore entry person’.⁴² Such a person cannot receive a Protection Visa nor make a valid application for one unless the Minister decides it is in the public interest to allow it.⁴³ Hypothetically, the process of refugee determination for an onshore claimant can be reviewed by the Administrative Appeals Tribunal (before 2015, the Refugee Review

Tribunal),⁴⁴ the Federal Court and eventually the High Court, but this would be unavailable to an offshore refugee. However, the case *Plaintiff M61/2010E; Plaintiff M69/2010* found that offshore entry persons whose claims were considered by the Australian government can still challenge and have their claims reviewed under s 75 of the Constitution.⁴⁵ The government's attempt to restrict judicial review was once again resisted.

Nevertheless, by 2013 all unauthorised refugee arrivals were sent offshore to Nauru or Papua New Guinea for processing without any prospect of settling in Australia, fulfilling its original purpose as a 'shield against the possible intervention of Australian courts'.⁴⁶ While the government has settled into the current offshore regime at the cost of much human suffering, the legality of that regime has been challenged. Over 2016–2017, two cases were heard before the High Court concerning the lawfulness of the detention of refugees: *Plaintiff M68/2015* involved a detainee in Nauru,⁴⁷ and *Plaintiff S195/2016*, which began as a class action by refugees on Manus Island but was ultimately heard on a single plaintiff.⁴⁸

While both decisions ruled against the applicants and upheld the legality of offshore processing, *Plaintiff M68/2015* highlighted the limitations of the Government's power to detain refugees in Nauru and Manus Island.⁴⁹ The majority emphasised that the government could not detain a person for purposes

outside of s 198AHA of the *Migration Act*. Justice Gordon's dissent also highlighted that the government should not escape accountability in regards to their offshore detention regime: 'the fact that the place of detention is outside Australia does not mean that legislative power is relevantly unconstrained'.⁵⁰

v Conclusion

Despite repeated attempts, judicial review relating to migrant decisions has resisted substantial erosion. The institution itself has been marked by a series of tensions between the courts and the government, becoming a target of legislative attack once the issue of refugees enters political debate. Throughout the Tampa crisis, judicial review found itself a feature of increasingly polarised political discourse, shored up by anxieties over national sovereignty, border security, and the purported abuse of courts by 'deviant' refugees. Amongst the Coalition's major amendments to the *Migration Act*, the introduction of privative clauses intended to effectively sidestep constitutional judicial review. When this strategy proved unsuccessful, offshore detention would eventually form a key mechanism for the continued deprivation of judicial review for refugees and migrants. 🇺🇦

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Rethinking the character power as it relates to refugees and asylum seekers in Australia

Dr Jason Donnelly

I Introduction

Under a web of provisions in the *Migration Act 1958* (Cth) (*Migration Act*),¹ both the Minister for Home Affairs and the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs have significant legal power to either cancel or refuse a visa to refugees and asylum seekers on character grounds. In making character decisions, although not bound by ministerial policy,² the relevant Minister often applies considerations reflected in the New Ministerial Direction No 79 (*Direction 79*).³

This paper argues that *Direction 79* requires significant changes to better advance the fundamental rights of both refugees and asylum seekers in Australia.⁴ Presently, relevant considerations reflected in *Direction 79* give far too much weight to the protection of the Australian community at the expense of safeguarding and promoting the human rights of non-citizens in Australia.⁵ This paper further argues that a number of considerations, as currently reflected in *Direction 79*, are likely to reflect policy principles that do not accord with the *Migration Act*. Therefore, such policy principles need to be ultimately removed from *Direction 79*.

II Relevant statutory regime

In accordance with s 501(1) of the *Migration Act*, the Minister or their delegate may refuse to grant a visa to a non-citizen if that person does not satisfy the decision-maker that he or she passes the character test. Similarly, pursuant to s 501(2) of the *Migration Act*, either the Minister or their delegate may cancel a visa that has been granted to a person if the decision-maker reasonably suspects that the non-citizen does not pass the character test and the person does not satisfy the Minister that the person passes the character test. Decisions made under ss 501(1)–(2) of the *Migration Act* require the rules of procedural fairness to be both observed and applied.

Under s 501(3) of the *Migration Act*, the Minister may either refuse to grant a visa to a person or cancel a visa that has been granted to a person if the decision-maker reasonably suspects that the non-citizen does not pass the character test and the decision-maker is otherwise satisfied that the refusal or cancellation is in the national interest. Critically, where decisions are made in accordance



Minister for Home Affairs, Peter Dutton
(Glenn Hunt/AAP Image)

with s 501(3) of the *Migration Act*, the rules of procedural fairness do not apply. Only the Minister, acting personally, can make a decision pursuant to s 501(3) of the *Migration Act*.

Pursuant to s 501(3A) of the *Migration Act*, the Minister must cancel a visa that has been granted to a person if the Minister is satisfied that the non-citizen has:

- been sentenced to death, been sentenced to imprisonment for life, been sentenced to a term of imprisonment of 12 months or more;⁶ or
- a court in Australia or a foreign country has either convicted the person of one or more sexually based offences involving a child or found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction,⁷ and
- the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory ('mandatory cancellation decision').⁸

A non-citizen can seek revocation of a mandatory cancellation decision made under s 501(3A) of the *Migration Act*.⁹ Where a delegate exercises statutory power by reference to ss 501(1)–(2) and 501CA(4) of the *Migration Act*, they are bound to apply relevant principles espoused in *Direction 79*.¹⁰

Section 501(6) of the *Migration Act* prescribes a detailed range of jurisdictional facts which mandates when a person is taken not to pass the character test. For example, pursuant to s 501(6)(a), a person does not pass the character test if that person has a 'substantial criminal record'. A person has a substantial criminal record if the person has been sentenced to death, sentenced to imprisonment for life, sentenced to a term of imprisonment of 12 months or more, the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity (and as a result the person has been detained in a facility or institution), or the person has been found by a court to not be fit to plead in relation to an offence and the court has nonetheless found that on the evidence available the person committed the offence and as a result, the person has been detained in a facility or institution.¹¹

A person may otherwise fail the character test for reasons associated with:

- committing offences in immigration detention or escape from immigration detention;¹²
- having an association with a criminal organisation;¹³
- offences related to trafficking in persons;¹⁴
- crimes related to genocide;¹⁵
- crimes against humanity;¹⁶
- offences concerning torture or slavery;¹⁷
- crimes that involve matters of serious international concern;¹⁸
- having regard to either the person's past and present criminal conduct or the person's past and present general conduct, the person is not of good character; and¹⁹
- sexually based offences involving a child.²⁰
- where there is a risk that a person would engage in various forms of adverse conduct in Australia,²¹
- the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security,²²
- it being reasonable to infer that a non-citizen presents a risk to the Australian community or a segment of that community by reason of being the subject of an Interpol notice that is in force.²³

Where delegates apply *Direction 79*, they are required to have regard to primary considerations related to the protection of the Australian community, expectations of the Australian community and the best interests of children affected by a character related decision.²⁴ Delegates must also have regard to other considerations such as international non-refoulement obligations (in certain cases), impact on family members in Australia, impact on victims and impact on Australian business interests.²⁵

Having detailed, in summary, the relevant statutory regime related to the character power in the *Migration Act*,²⁶ the balance of this paper explores various shortcomings with numerous policy principles reflected in *Direction 79*. As will be demonstrated, significant reform is required in relation to *Direction 79*.

iii **Difficulty one: taking the relevant considerations into account**

In accordance with cl 8(4) of *Direction 79*, primary considerations should generally be given greater weight than the other considerations. Critically, the effect of this policy principle is to mandate that non-refoulement obligations should generally be given less weight than the primary considerations. In other words, at a lower level of abstraction, this means that the primary consideration related to protection of the Australian community is generally given greater weight than considerations related to Australia's non-refoulement obligations.

It is contended that the consideration related to non-refoulement obligations should be treated as a primary consideration for the purposes of *Direction 79*. After all, non-refoulement obligations concern serious considerations related to a threat to a person's life or liberty, involving significant physical harassment, significant physical ill-treatment, significant ill-treatment, significant economic hardship (that threatens the person's capacity to subsist), denial of access to basic services (where the denial threatens the person's capacity to subsist) and denial of capacity to earn a livelihood of any kind (whether the denial threatens the person's capacity to subsist).²⁷

It seems unthinkable that in circumstances where a non-citizen has a well-founded fear of facing serious harm if they are returned to their home country, that such a consideration is generally given less weight than the primary considerations reflected in *Direction 79*. However, as Colvin J confirmed in *Suleiman*,²⁸ 'absent some factor that takes the case out of that which pertains "generally"', primary considerations are to be given greater weight.

iv **Difficulty two: deferral of decision-making**

Clauses 10.1(4), 12.1(4) and 14.1(4) of *Direction 79* mandate that it is unnecessary for delegates to determine whether non-refoulement obligations are owed to a non-citizen for the purposes of determining whether their visa should be cancelled, refused or a mandatory cancellation decision revoked in circumstances where:

1. The non-citizen makes claims which may give rise to international non-refoulement obligations; and

2. The non-citizen is able to make a valid application for a Protection Visa in the future.
3. There are three fundamental difficulties with this policy principle.

First, despite the fact that a non-citizen may advance claims that give rise to international non-refoulement obligations in the context of a character case, there is judicial authority that those claims need not be considered by the decision-maker.²⁹ As such, non-citizens could potentially lose a powerful discretionary consideration (as related to non-refoulement obligations) being taken into account in determining whether their visa should be cancelled, refused or a mandatory cancellation decision revoked on character grounds.³⁰

Secondly, the apparent lack of necessity to consider non-refoulement claims (advanced in the context of character cases) may directly or indirectly contribute to the non-citizen remaining in immigration detention for a substantial period of time.³¹ If consideration of a non-citizen's non-refoulement claims are deferred until he or she lodges an onshore Protection Visa application in the future (after their character case is decided unfavourably), the non-citizen will be required to remain in immigration detention for a substantial period of time until their Protection Visa claims are assessed.³²

Had a compelling non-refoulement claim been considered in the context of a character case decided under s 501 of the *Migration Act*, the non-citizen may have been granted a visa, not had their visa cancelled or been successful in having a mandatory cancellation decision revoked (thus avoiding the necessity for continued immigration detention as an unlawful non-citizen in Australia). As Bromberg and Mortimer JJ make plain in *BCR16*,³³ in determining a character case under s 501 of the *Migration Act*, the Minister is able to give greater weight to a small risk of persecution than is otherwise permitted where a decision-maker formally considers a Protection Visa application.³⁴

Thirdly, it is fairly arguable that cl 14.1(4) of *Direction 79* is inconsistent with the statutory regime mandated by s 501CA(4) of the *Migration Act*. Pursuant to s 501CA(4)(b)(ii), a decision-maker has a statutory power to revoke a mandatory cancellation decision if satisfied 'that there is another reason why the original decision should be revoked'.

In *Viane*,³⁵ the Full Court of the Federal Court of Australia interpreted s 501CA(4) of the *Migration Act* to mean that a decision-maker has an obligation to consider matters that carry significant weight or significance to satisfy the decision-maker to revoke a mandatory cancellation decision.³⁶

If a non-refoulement claim is 'seriously and substantively advanced'³⁷ by a non-citizen in the context of a case that concerns s 501CA(4) of the *Migration Act*, it is likely that such a representation would need to be considered by the decision-maker (regardless of an opposite conclusion being reflected in cl 14.1(4) of *Direction 79*); this is because the advancement of a clearly expressed non-refoulement claim is likely to be characterised as a 'significant matter'. To contend otherwise would be a failure to conform to the statute.³⁸ 'The statutory requirement for the Minister to invite representations must lead to the conclusion that if representations are made as to significant matters then the Minister must consider whether to revoke the original cancellation and do so by considering the representations as to those matters'.³⁹

v Difficulty three: status of indefinite immigration detention

Clauses 10.1(6), 12.1(6) and 14.1(6) of *Direction 79* outline that:

Given that Australia will not return a person to their country of origin if to do so would be inconsistent with its international non-refoulement obligations, the operation of sections 189 and 196 of the Act means that, if the person's Protection Visa were cancelled, they would face the prospect of indefinite immigration detention.

It appears that this policy principle is arguably not correct as a matter of law.⁴⁰ This policy principle appears to indicate that if a non-citizen's Protection Visa is cancelled, the non-citizen faces the prospect of indefinite immigration detention in Australia (on the assumption that Australia will not remove the non-citizen to his or her home country).

The preceding policy principle appears to squarely conflict with s 197C(1) of the *Migration Act*, which makes plain that it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.⁴¹ Further, under s 197C(2) of the *Migration Act*, an

officer's duty to remove (as soon as reasonably practicable) an unlawful non-citizen pursuant to s 198 arises 'irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen'.⁴²

Thus, 'if the Minister did not exercise one of his discretionary powers to grant the non-citizen a visa', the effect of s 198 (when read with section 197C of the *Migration Act*) 'appears to be that the non-citizen would be required to be removed from Australia regardless of Australia's international non-refoulement obligations'.⁴³ Indefinite detention is not a possibility.⁴⁴

vi Conclusion

Direction 79 formally commenced in Australia on 28 February 2019. Despite the relatively recent nature of this ministerial direction,⁴⁵ it is clear that relevant principles espoused in this significant policy document are arguably not correct as a matter of law. Critically, a matter of significant concern, various of the impugned policy principles identified in this paper have the potential to adversely impact the rights of refugees and asylum seekers in Australia.⁴⁶

Serious and urgent reform to *Direction 79* is required. Non-refoulement obligations, when raised in character cases, should always be treated as primary considerations by the relevant decision-maker. The nature of such a consideration, being non-refoulement obligations, inherently raises matters of international concern that are significant and important.

Where a non-citizen raises a non-refoulement claim in the context of their character case, there should be a mandatory obligation to consider such a claim (regardless of whether the non-citizen may make a future onshore Protection Visa application). Such a proposal could potentially reduce the time non-citizens spend in Australian immigration detention and otherwise expressly demonstrate that Australia takes its non-refoulement obligations seriously.

Finally, if a non-citizen's Protection Visa has been refused on character grounds, it is clear that they are required to be removed from Australia in accordance with s 198 of the *Migration Act*. In those circumstances, given the statutory effect of s 197C of the *Migration Act*, the non-citizen does not face the prospect of indefinite immigration detention in Australia (but faces likely refoulement). As such, this state of affairs should be correctly

reflected in ministerial policy (so that decision-makers, many of whom are not legally trained, fully understand the legal implications of cancelling, refusing or affirming a mandatory cancellation decision made to the detriment of a non-citizen).

Although refugees and asylum seekers may have committed serious criminal offences in Australia or overseas, the complexity of a person's criminality must be considered against the backdrop of a non-citizen's prospect of facing serious harm overseas and the historical basis upon which Protection Visa claims are advanced.⁴⁷ Presently, *Direction 79* is failing non-citizens who are either refugees or asylum seekers in Australia. 📄

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- 2 *Bochenski v Minister for Immigration and Border Protection* (2017) 250 FCR 209, 214 [30] ('*Bochenski*').
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- 4 See also Arjen Leerkes et al, 'Civic Stratification and Crime: A Comparison of Asylum Migrants with Different Legal Statuses' (2018) 69(1) *Crime, Law and Social Change* 41, where the authors argue that 'social exclusion actually contributes to certain crime issues, and that the chances of such issues occurring decrease when asylum migrants are more fully integrated, ie given similar rights as citizens, rather than being excluded': at 63.
- 5 Peter Billings, 'Getting Rid of Risky Foreigners: Promoting Community Protection at the Expense of Administrative Justice?' (2019) 47(2) *Federal Law Review* 231.
- 6 *Migration Act* (n 1) s 501(3A) (a)(i).
- 7 *Ibid* s 501(3A)(a)(ii).
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- 9 *Ibid* s 501CA(4).
- 10 *Ibid* s 499(2A); *Bochenski* (n 2) [62], [65], [78].
- 11 *Migration Act* (n 1) ss 501(6) (a), 501(7).
- 12 *Ibid* s 501(6)(aa).
- 13 *Ibid* s 501(6)(b).
- 14 *Ibid* s 501(6)(ba).
- 15 *Ibid*.
- 16 *Ibid*.
- 17 *Ibid*.
- 18 *Ibid*.
- 19 *Ibid* s 501(6)(c).
- 20 *Ibid* s 501(6)(e).
- 21 *Ibid* s 501(6)(d). Under this provision, adverse conduct includes harassing, molesting, intimidating or stalking another person in Australia, vilifying a segment of the Australian community, or inciting discord in the Australian community or in a segment of that community.
- 22 *Ibid* s 501(6)(g).
- 23 *Ibid* s 501(6)(h).
- 24 *Direction 79* (n 3) cl 9.
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- 26 See also Jason Donnelly, 'Tale of Two Characters: The Paradoxical Application of the Character Test between Visa Holders and Applicants for Australian Citizenship' (2018) 25 *Australian Journal of Administrative Law* 104.
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- 30 Cf *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96 [48]–[49] ('*BCR16*').
- 31 Oppressive delays have been a feature of administrative processes with 153 days as the average processing period for challenges to mandatory visa cancellation: *Martin v Minister for Immigration and Border Protection* [2017] FCA 1 [11] (Katzmann J); Commonwealth Ombudsman, *The Administration of Section 501 of the Migration Act 1958* (Report No 8, 21 December 2016), 3 [1.4].
- 32 *Migration Act* (n 1) s 189(1).
- 33 *BCR16* (n 30).
- 34 *Ibid* [49].
- 35 *Viane v Minister for Immigration and Border Protection* (2018) 162 ALD 13 ('*Viane*').
- 36 *Ibid* 27 [68], 28 [72], 28–29 [75]–[76].
- 37 *Omar v Minister for Home Affairs* [2019] FCA 279 [46].
- 38 *Viane* (n 35) [75].
- 39 *Ibid*.
- 40 *PRHR v Minister for Immigration and Border Protection (Migration)* [2017] AATA 2782 [109], [141]–[155].
- 41 *DMH16 v Minister for Immigration and Border Protection* (2017) 253 FCR 576 ('*DMH16*').
- 42 *AQM18 v Minister for Immigration and Border Protection* [2019] FCAFC 27 [17] ('*AQM18*').
- 43 *DMH16* (n 41); *KLQF v Minister for Home Affairs (Migration)* [2019] AATA 933 [261].
- 44 *AQM18* (n 42) [25].
- 45 *Direction 79 replaced Direction 65: Direction 79* (n 3) cl 2. There is considerable overlap of content between the new and old ministerial direction. Notably, relevant clauses of *Direction 79*, analysed in this paper, were also reflected in *Direction 65*.
- 46 *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 [1] (Mortimer J).
- 47 See Robyn Creyke and John McMillan, 'Administrative Justice: The Concept Emerges' in Robyn Creyke and John McMillan (eds), *Administrative Justice: The Core and the Fringe* (Australian Institute of Administrative Law, 1999) 1, 3–4, who refer to administrative justice as a philosophy that the rights and interests of individuals should be safeguarded properly in administrative decision-making.

The need for statutory reform



Farina, South Australian Outback
(Adrianbutera/Wikimedia Commons)

A 'legacy' of uncertainty

The need to abolish Temporary Protection Visas

Sanjay Alapakkam

I Introduction

People seeking asylum, and refugees who have arrived in Australia by unauthorised boats have faced a sustained campaign of dehumanisation consisting of divisive, often hateful rhetoric and harsher policies, which has shaped a considerable amount of 21st century Australia's response to 'boat people'. The introduction of Temporary Protection Visas has played a significant role in entrenching uncertainty, socio-economic stagnation and isolation in the lives of refugees. They are one of many mechanisms which, by design and in practice, alienate boat arrivals and seek to delegitimise their claims for protection.

The erratic legislative and regulatory changes in the form of offering permanent protection to refugees arriving by boat or withholding permanent protection and, in its place, offering temporary protection, were enacted by consecutive governments in their attempts to address the influx of people arriving in Australia by unauthorised maritime vessels for the purpose of seeking asylum. The situation escalated in 2012 when the recorded

number of people who undertook this journey exceeded 20,000. In 2008, the Rudd Government abolished the Temporary Protection Visa system that was implemented by the Howard Government, and allowed people seeking asylum by boat to apply for Permanent Protection Visas. However, the extension of permanent protection to this category of applicants was once again removed under the Abbott Government, which reintroduced Temporary Protection Visas as one of many elements of an overarching policy to deter people seeking asylum from embarking on a journey to reach Australia.

This article will explore the experiences of those who are subject to the newest iteration of the temporary protection policy which was designed specifically for the approximately 30,000 people¹ who reached Australia's migration zone unauthorised by sea.² The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) targeted people seeking asylum who arrived by an unauthorised maritime vessel between 13 August 2012 and 19 July 2013,³ who have subsequently been termed the Legacy Case-

load ('LC').⁴ The LC cohort was expanded to include asylum seekers who arrived until 1 January 2014; and now LC applicants fall within the definition of a fast track applicant under s 5 of the *Migration Act 1958* (Cth) ('*Migration Act*').⁵ In the first instance, fast track applicants are only eligible to apply for a Temporary Protection Visa (subclass 785) ('TPV'). The human cost of temporary protection warrants further examination of its operation and impact, as well as an exploration of a possible transition to permanent protection for fast track refugees.

Fast track applicants may include people arriving by air and claiming asylum at an airport prior to immigration clearance. However, in light of the hyper-politicisation of people arriving by boat, and the fact that this article is exploring factors driving governmental policies, boats and planes will be used as proxies to illustrate the stark contrast in their treatment and to critically examine the government's proposed *raison d'être* for the current Temporary Protection Visa regime.

II Papers, boats and planes

Available visas for boat arrivals

One's mode of arrival to Australia as a person seeking asylum is determinative of his or her fate. The options for fast track applicants are the three-year TPV and the five-year Safe Haven Enterprise Visa (subclass 790) ('SHEV').⁶ The concept of temporary protection was initially pushed by One Nation Party leader Pauline Hanson in 1998, who proposed that *all* refugees be given only temporary visas,⁷ and then implemented by the Howard Government in October 1999 to apply to those arriving in Australia unauthorised and by boat; which has partly been attributed to electoral anxiety stemming from the Queensland Coalition government facing major swings towards One Nation at a state level.⁸ The TPV was then abolished by the Rudd Government in 2008,⁹ but subsequently re-introduced alongside its 5-year variant by the Abbott Government in 2014.¹⁰

People seeking asylum who arrive in Australia with a valid visa, such as a student visa, and following immigration clearance, can apply for an onshore Permanent Protection Visa (subclass 866).¹¹ A common requirement for applicants, whether they apply for a

Permanent Protection Visa or a Temporary Protection Visa, is that they must satisfy s 5H of the *Migration Act* which defines a refugee as a person, if they have a nationality, who 'is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country'.¹²

The first limb of the definition of a well-founded fear of persecution requires a fear of persecution for at least one of five convention reasons: race, religion, nationality, political opinion or their membership of a particular social group.¹³ There must also be a real chance that, if the applicant were returned to the receiving country, that they would be persecuted, in all areas of the receiving country, for at least one of those reasons.¹⁴

Popular views: 'the right way' in

Political discourse and popular debates on the humanitarian intake have focused on boat arrivals taking the 'backdoor' route into Australia,¹⁵ which is also reflected in protection policies that differentiate between people seeking asylum based on their mode of reaching Australia. Those favouring plane arrivals often cite security considerations such as the fact that those arriving by plane must have a valid visa which they would have been granted only after fulfilling a series of tests including health and character checks,¹⁶ unlike people arriving by boat who are yet to be cleared. The self-selection method of boat arrivals amounting to a perceived infringement of Australia's sovereignty, as well as concerns about the riskier nature of the journey by boat also serve to juxtapose the two groups.¹⁷

On the other hand, discriminating between those seeking asylum on the basis of their method of arrival is contrary to art 31(1) of the 1951 *Convention Relating to the Status of Refugees* ('*Refugee Convention*'),¹⁸ and hence contrary to the views of the international community, at least nominally. The contrast between the categories of applicants is also firmly entrenched through the rhetoric espoused by politicians and political commentators, that is heavily characterised by negative terminology such as 'queue jumpers' and 'economic migrants'.¹⁹ The contrasting treatment of boat and plane arrivals, which creates a 'two-class system for refugees'²⁰ obscures the fact that both

Number of people attempting to reach Australia via boat

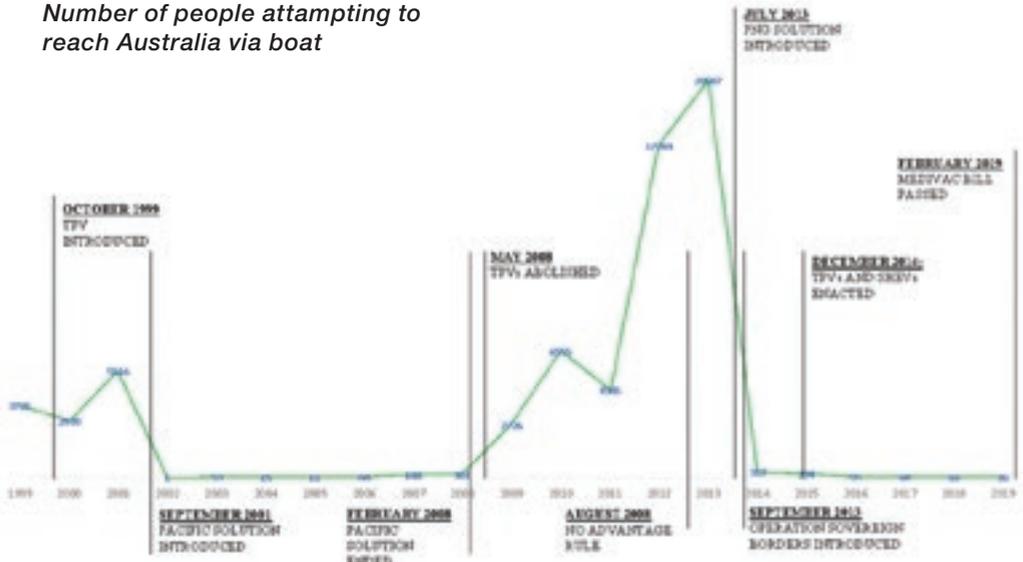


Figure 1: A timeline of the number of people who attempted to reach Australia via boat every year and major policies surrounding unauthorised maritime arrivals, in the years 1999–2019.²⁴

groups of people must meet the definition of a refugee.²¹ The added references, by political figures, to boat arrivals as ‘economic migrants’ implicitly misrepresents boat arrivals as raising unmeritorious asylum claims based on their mode of arrival, despite the fact that out of all finalised applications for ‘Illegal Maritime Arrivals’, almost 70% resulted in visa grants.²²

Rationale of deterrence

Deterring people from coming by boat to Australia has been and continues to be one of the main justifications provided by Australian governments for the implementation of harsher policies against boat arrivals.²³ This article is not exploring the validity of justifications to achieve deterrence but rather the causal link that appears to be drawn between the appropriateness of temporary protection for fast track refugees and the proposed purpose of achieving deterrence.

While decreases in the annual number of boat arrivals appear to correlate with the implementation of temporary protection, periods of change involving temporary protection policies have generally been accompanied by significant reform in migration laws and policies more broadly. The timing of the relevant reforms also indicates

that changes in TPVs was not the main causal factor in the number of people attempting to reach Australia by boat as seen through a general comparison of the two factors over the time period between 1999 to 2019. Specifically, the current version of temporary protection was enacted only after the sharp decline in the number of arrivals per year.

More importantly, the current iteration of temporary protection is only available for fast track refugees and hence, TPVs and SHEVs would not affect people arriving after 1 January 2014.²⁵ However, if misinformation is considered to be a main ‘pull factor’ for boat arrivals, then a change in any migration policy could theoretically be misrepresented by people smugglers to desperate people seeking asylum. Therefore, any causal link between temporary protection and deterrence²⁶ is tenuous at best. The Morrison government demonstrated a similar attitude towards the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2018* (Cth),²⁷ where panic was expressed out of concern that people smugglers would be able to sell a pathway to Australia through Medevac,²⁸ despite the fact that the legislation applies only to people seeking asylum who are already detained in the ‘regional processing’ centres in Nauru or Manus Island,²⁹ and

that people who arrive to Australia today would either be turned back or 'taken back'.³⁰ The legitimacy of the deterrence rationale is further eroded by the fact that the system is punitive in design against those arriving by boat which contradicts art 31(1) of the *Refugee Convention* which prohibits the use of penalties against refugees on the basis of their 'illegal entry or presence'.³¹

iii Need for change

Uncertainty as to future residency

In order to stay in Australia past the expiry of their visa, holders of TPVs must either apply and be granted a TPV again,³² or apply for and be granted a SHEV.³³ This would require an assessment of the applicant's protection claims which would involve them once again proving that they meet the definition of a refugee under s 5H,³⁴ in light of more recent information about their country of origin. Philip Ruddock, the architect of the first iteration of TPVs,³⁵ was initially opposed to Hanson's proposal for a blanket replacement of the humanitarian program with temporary visas for all refugees, stating that it was unconscionable, 'totally unacceptable' and would lead to uncertainty for refugees.³⁶

Reapplication for protection can place a refugee in limbo and act as an impediment to one's ability to start afresh and to attain a sense of stability as a result of the temporary protection system giving rise to an ever-present risk of being denied a subsequent visa.³⁷ Aside from existing psychological impairments stemming from experiences of persecution or of fleeing their homes, refugees granted temporary protection, when compared to those who have permanent protection status, have higher rates of PTSD and other mental health conditions.³⁸ The LC refugees' temporary status is a causal factor for greater rates and seriousness of their mental and functional impairment.³⁹

One may be able to transition from a SHEV to a non-Protection Visa such as a family or skilled visa,⁴⁰ provided that during the SHEV's five-year term, the holder worked or studied in a regional area for 3.5 years, meets relevant skill requirements and has not accessed social security payments for the entirety of their SHEV.⁴¹ There may also be English language standards, depending on the subsequent visa for which they apply.⁴²

In reality, this would be difficult for most refugees because of the onerous requirements, along with any mental or functional impairments, and the innate risk of isolation. The LC refugees' ability to subsist is adversely affected by the short-term nature of temporary protection, which limits opportunities to establish and grow their skills and/or businesses, fosters employers' potential negative biases due to the uncertain nature of their future residency status,⁴³ and limits their access to support services for labour market integration.⁴⁴ The shorter length of TPVs and SHEVs is also a barrier to one's ability to expand their social networks,⁴⁵ which is a key factor determining one's chances to pursue higher skilled and higher paying jobs.

The lack of certainty inhibits refugees' ability to 'plan for the future' and escalates socio-economic disadvantage and psychological issues which would actually add further pressure on the state and community groups.⁴⁶ Overall, temporary protection status, combined with the adverse mental health issues of refugees and asylum seekers can 'hinder their socio-economic integration',⁴⁷ and place them at risk of isolation and financial stagnation.

Family reunion

People classified as 'Illegal Maritime Arrivals' would need to hold a permanent visa in order to be able to sponsor one or more family members to arrive to Australia under Direction 80 cl 8(1)(g),⁴⁸ a Ministerial Direction signed by Minister for Immigration, Citizenship and Multicultural Affairs, David Coleman, which dealt with matters including but not limited to, the possibility of family reunification by way of visa holders being able to bring family members to Australia from another country. As a result, holders of TPVs and SHEVs are precluded from being eligible for family reunification. Given the state of perpetual limbo in which LC refugees are placed, they may face adverse social and psychological issues,⁴⁹ which could be exacerbated by limiting refugees' sense of belonging. Furthermore, s 91WB states that one cannot apply for a protection merely because they are a member of the same family as someone who has *already* been granted a Protection Visa.⁵⁰ This is also designed to be a part of the deterrence model; disincentivis-

ing family members 'travelling to Australia ... in the expectation of being granted a Protection Visa'.⁵¹

Subject to strict requirements, TPV and SHEV holders may travel to another country, except the one from which they seek protection, on compassionate or compelling circumstances, such as meeting their *close relatives*.⁵² However, given the lengthy assessment processes as well as the real likelihood that a refugee who is granted a visa here would have to obtain a *temporary* visa multiple times before having a chance to attain a permanent visa that could provide a pathway for family reunion, it could be many years before LC refugees are given the *chance* to live with their family again.

iv The way forward

TPVs were last abolished in 2008 under the Rudd Government which viewed them as causing suffering amongst refugees and ineffectual in stemming the influx of boats.⁵³ TPV holders were transitioned to a permanent counterpart.⁵⁴ The main method of alleviating some of the structural disadvantages and difficulties faced by LC refugees is to transition them to a form of permanent residency given that the difficulties they faced were magnified, when compared with the holders of the onshore Protection Visa (subclass 866) based on key indicators such as mental health and employment prospects.⁵⁵ Reform may involve expanding the eligible class of persons for the 866 visa to include LC applicants, in combination with exempting LC refugees and people seeking asylum from the caps set under s 39 of the Migration Act for the 866 visa in order to facilitate a transition from temporary to permanent protection. An alternative may involve the creation of a new visa for LC refugees upon further consultation with key stakeholders such as the Migration Institute of Australia and migration agents in general, relevant community legal centres, and support organisations. There also needs to be a reasonable process for permitting LC refugees to access family reunion,⁵⁶ as the current process, even for Permanent Protection Visa holders does not offer a realistic pathway for family reunion as it places applicants on an indefinite waiting list. Regardless of the ultimate approach taken, it is essential, as recommended by

the Kaldor Centre for International Refugee Law, that the solution enables 'families to rebuild their lives together, in a safe and stable environment'.⁵⁷ In Canada, people found to be eligible for protection can apply for permanent protection.⁵⁸ Once attaining permanent residence, one may, subject to limitations, sponsor family members who are overseas if they lodge an application within the one-year window that commences from the day that the resident refugee was granted protection.⁵⁹ Furthermore, an abolition of the Temporary Protection Visa, and the concurrent introduction of a realistic pathway to family reunification would be pivotal to the long term empowerment of refugees in their journey of 'realis[ing] their potential' and becoming 'contributing *members* of Australian society'.⁶⁰

v Conclusion

TPVs and SHEVs amount to a punitive measure against refugees by subjecting them to perpetual uncertainty, limiting upward social mobility, maintaining their long-term separation from their families, and cultivating a risk of ongoing isolation. These are factors which would have to be endured in conjunction with a given refugee's existing trauma and fear of being returned to the source of their persecution. Furthermore, the permanent and temporary protection dichotomy creates an artificial divide between plane arrivals and boat arrivals by requiring similar standards to be met for an assessment of eligibility, with punitive effects on the latter who simultaneously possess greater vulnerabilities and have relatively high rates of meritorious claims. It is imperative that the possible means of transitioning temporary protection recipients and applicants to permanent protection are explored, and that the implementation of such a change is expedited, lest we prolong the pain of those who sought our helping hand in an hour of need. 📌

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Asylum seeker Raj from Sri Lanka.
Manus Island, 28 November 2017
(AAP Image/Supplied by World Vision/
Nick Ralph)

Reimagining the protection response to irregular maritime arrivals

A principle-based regulation with a human security approach

Jeswynn Yogaratnam

I Introduction

*History does not repeat itself,
but it does rhyme.¹*

Mark Twain

In 2013 I visited a place called the Darwin Lodge or also known as an Alternative Place of Detention ('APOD'). This is a place of detention located onshore in Darwin, Australia. The reason I am referring to the APOD is because it sets the scene to the human security concerns, from onshore to offshore processing centres, of many asylum seekers who choose to arrive in Australia in an unregulated way.

According to a report by the Australian Human Rights Commission, the APOD was used to detain unaccompanied minors and families with children who were mostly irregular maritime arrivals attempting to seek asylum in Australia.² The term 'irregular maritime arrivals' in this paper refers to a non-citizen or an 'unlawful non-citizen' under s 46A(1) of the *Migration Act 1958* (Cth) ('*Migration Act*') who seeks asylum in Australia after 12 August 2012.³ In Australia this classification of people seeking asylum has been referred to as 'unau-

thorised maritime arrivals' and more recently 'illegal immigrants'.⁴ I find these terms inappropriate and will proceed to use the term 'irregular arrivals' throughout this paper.

When I visited the APOD, I recall that those who arrived by boat were identified by their boat registration number. I was granted access to visit a Rohingya family based on a social visitation policy at the time. When the family arrived at the reception hall of the APOD, they interacted with each other in Bahasa Malaysia. I noted that they must have been in transit in Malaysia for a few years. This is because when I visited Malaysia periodically, I met with Rohingya families similar to the ADOP family. These families alleged being persecuted in Myanmar. Some of the families who fled to Malaysia registered their refugee status determination ('RSD') application with the local United Nations High Commissioner for Refugees ('UNHCR') office. However, the significant waiting period and Malaysia being a non-*Refugee Convention*⁵ state meant that many of the Rohingya were in a state of indefinite transit. Over time, they became proficient in the local language. The uncertainty of the RSD outcome and

opportunities to resettle in a state that is a signatory to the *Refugee Convention* led some Rohingya to make arrangements with people smugglers. These arrangements were for the purposes of making their way to *Refugee Convention* signatory states like Australia and New Zealand.

During my visit to the APOD, I gained more out of the social visit than expected. This was partly because we conversed in Bahasa Malaysia and did not need an interpreter. I believe this direct form of communication put them at ease and lifted the inhibitions about the purpose of my social visit. My observation at the end of the meeting was that, for the family, speaking freely about their life in the Rakhine State of Myanmar prior to the alleged persecution and during the alleged fear from persecution, had therapeutic value, if not a temporary relief from an emotional burden they often suffer in silence with. Their grim nervous look at the beginning of our meeting turned to broad smiles at the end of our one-hour of social engagement. They talked about their human security while they were in detention and when fleeing from persecution in Myanmar. For the purposes of this paper, human security refers to factors that have an impact on the safety and vulnerability of irregular arrivals while in detention onshore in Australia and offshore in regional processing centres.⁶ To the Rohingya family, their human security while in detention was about their right to access healthcare, the right to education for their children, their personal security, the security of their community within a detention setting, their right to work and their right to culture (for example language, dietary preferences, dress code, and significant cultural calendar events). Their dream was to be granted refugee status and resettle in Australia.

The story signifies that even if history does not repeat itself in the way in which people may choose to seek asylum, it does rhyme with the consequences of seeking asylum in an 'unregulated' way: the consequence being that asylum seekers are forced to seek refuge from 'refuge'. The place of refuge, that is, a *Refugee Convention* state, becomes a reason to seek an alternative place of refuge because of their human security concerns. The prolonged, and in some cases indefinite lengths of time in detention in regional processing centres, transforms their deemed 'safe'⁷ place of refuge to a

mental health trap.⁸ As such, we need to call it out for what it is. It is human security at crisis perpetuated by rule-based regulations that are failing to protect the human security needs of irregular arrivals. Simply put, rule-based regulations are a prescriptive way of regulating whereas principle-based regulations are normative in nature. The former can be a set of rigid rules whereas the latter may be based on dynamic principles that have a flexible approach taking into account responsiveness and priorities.

The example below by Burgemeestre, Hulstijn and Tan illustrates the difference between rule-based regulations and principle-based regulations:

Rule-based regulation prescribes in detail how to behave: 'On Dutch highways the speed limit is 120 km/hour'. In principle-based regulation norms are formulated as guidelines; the exact implementation is left to the subject of the norm: 'Drive responsibly when it is snowing'.⁹

The human security concerns of the Rohingya family and the principle-based regulatory approach are central to the 'reimagining' of an alternative way forward. The first part of the article explains the 'reimagining' of the protection approach to irregular arrivals based on the concept of human security. The second part explains the reason for applying the human security concept when dealing with irregular arrivals. The third part qualifies the concept by reference to the scholarship of Taylor Owen.¹⁰ The final part is a summary to an interdisciplinary analysis that explains the operationalisation of the concept through John Braithwaite's theory of principle-based regulation.¹¹ It explains the need for a dynamic approach as opposed to a rigid rule-based prescription when responding to the human security needs of irregular arrivals. The article sets out a high-level interdisciplinary study on the intersection of political science on human security with immigration law and policy in Australia in relation to irregular arrivals in detention onshore and offshore.

II The untenable status quo compels a need to 'reimagine' protection approaches

Volker Türk noted that we have reached a scale of such global significance that it is

no longer viable to maintain the status quo on protection obligations for those affected by forced migration.¹² The note of caution by Volker Türk can equally be applied to the status quo of human security concerns faced by irregular arrivals who are kept in detention. It is also no longer viable. Triggs emphasised that it is critical to remember in this context that ‘these aren’t statistics and they’re not just legal principles or abstract ideas ... You’re actually dealing with human beings.’¹³ Triggs states that ‘it’s almost in our DNA in Australia to react negatively to those who arrive in the country in a way that the Government describes as illegal.’¹⁴ She noted that ‘the idea that our borders are insecure goes to the very heart of Australians’ sense of our own security and our own nationhood’.¹⁵

It is my opinion that the human security approach responds to the observation by Triggs when it comes to treating irregular arrivals like human beings. This is because the human security approach addresses the vulnerability of the individual and may facilitate a therapeutic and trauma-informed response when making policy for irregular arrivals.

In addition, the human security approach may also expose the common national security and border security crisis to be in fact a crisis of the ruling political community. This was noted by Bilgic in the European context, where irregular arrivals are synonymised with notions of national security or border security crisis.¹⁶ The lack of solidarity, the fear-mongering about irregular arrivals, the panic on the scourge of people smuggling and the call for more rule-based regulations draws political solidarity further away from practical responsibility-sharing solutions as part of domestic, regional and international cooperation. As a result, it enables the ruling political community, for example in Australia, to fall into a state of disconnect with the human security needs of irregular arrivals. The disconnect leads to commitments that implement ‘hard-headed’ measures similar to those found in Operation Sovereign Borders, exacerbating the need for asylum seekers to seek refuge from ‘refuge’.¹⁷ This observation does not displace the importance of state sovereignty and the security of the state, but instead highlights the need to embed a form of principle-based regulation that works in tandem with state sovereignty and national security concerns.

In the case of the Australian Government’s offshore regional processing arrangements, the evidence-base informs us that the regional processing centres have presented irregular arrivals with insurmountable psychological harm and other health security concerns.¹⁸ The recent *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth) (commonly referred to as the ‘Medevac’ law) highlights the consequences of placing irregular arrivals in places where health security is not at par with Australian standards.¹⁹ Indeed, the Medevac law is a way forward in attempting to expedite transfers of irregular arrivals to mainland Australia to respond to the health risks of those transferred to Nauru or Manus Island. But as a rule-based regulation it presents similar challenges to other immigration rules. It is weighed down by layers of discretionary administrative decision-making processes to the point that, at first instance, the Minister of Home Affairs can exercise ministerial powers to overturn the decision of the doctors. Although the Medevac law provides for a specialist panel to review the decision of the Minister that circumvents the court process, the whole administrative review process could delay the urgency of the request by up to ten days for a transfer to take place after the panel has reviewed the matter.²⁰ The delay can exacerbate the health condition of the patient who urgently requires medical treatment not available at the regional processing jurisdiction. This could lead to the Medevac legislation failing to achieve its intended purpose, that is, to expedite transfers based on medical opinions. The argument here is not about the merit of Medevac law but the regulatory regime in which it operates, that is, a rule-based regulatory approach. Having said that, anecdotal evidence from certain not-for-profit organisations involved in the referral of patients from the regional processing centres acknowledge that most decisions by doctors are not challenged and where it is called for review, the decision of the independent panel is usually adhered to.

The recent laudable decision by the Federal Court of Australia in *CCA19 v Secretary, Department of Home Affairs*²¹ (the ‘Medevac case’) demonstrates that the courts are willing to uphold the Medevac law by looking at the intent and purpose of the law, as well as allowing for assessment



Still image from Simon Kurian's documentary, 'Stop the Boats'. Manus Island (Simon Kurian)

by doctors, even remotely. But the process of undergoing such a legal challenge undermines the purpose of transfers under the law as the focus on legal-administrative technicalities simply adds to the delays. Furthermore, the decision has led to lobbying by the current Home Affairs Minister, Peter Dutton, to repeal the Medevac law.²² The act of the government repealing laws that have been upheld by the courts for the benefit of irregular arrivals is well precedented. One example is the High Court case commonly referred to as the Malaysian Solution Case,²³ where the majority upheld the need for the Minister to consider the 'relevant human rights standards' before the asylum seekers were transferred to another jurisdiction for offshore immigration processing. After the decision, the Government repealed the then s 198(A) (3)(a)(iv) of the *Migration Act*. That section set out the relevant human rights standards that a Minister needs to consider in the decision-making process when declaring the transfer of irregular arrivals to an offshore jurisdiction. The point being, we need an alternative approach that does not dwell on rule-based regulations but instead prioritises a principle-based regulatory response, especially when dealing with human security needs of asylum seekers.

iii Why the human security approach?

Ogata noted that 'the concept of human security presents a useful entry point to the central issue of security of the people because by focusing on the people who are the very victims of today's security threats, you come closer to identifying their protective needs'.²⁴ This form of assessment of security reveals the 'social, economic and political factors that promote or endanger their security'.²⁵ While Ogata's observations refer to people who are displaced due to internal conflicts within the state, the statement resonates to the lack of attention given to human security assessment of the socio-economic conditions that affect the lives of irregular arrivals, especially in offshore regional processing centres. This is because if such an assessment was carried out, it may be that the regional processing centres in Nauru and Manus Island be deemed unsuitable for the irregular arrivals.²⁶

In a summary, the human security approach is 'human-centred' in that its prin-

cipal focus is on people both as individuals and as communal groups. It is security-oriented in that 'the focus is on freedom from fear, danger and threat'.²⁷ Simply put, human security 'is a response to the urge to know what one should care about, what is in one's power to do, and what crises are looming'.²⁸ For the purposes of this article, it sets the premise on the relevance of human security to policymakers on matters relating to irregular arrivals. For example, in the case of the death of Hamid Khazaei that occurred while being detained at Manus Island in 2014, it was reported that the coroner found 'significant flaws' in the process of getting Mr Khazaei off Manus Island, including a 'lack of a documented approval process that resulted in a missed opportunity to transfer him on a commercial flight to Port Moresby on 25 August'.

In that case, an urgent transfer request from a doctor did not proceed as expected. Instead, an immigration official queried the decision and asked to clarify the reason medication could not be sent to the detention centre. The immigration officer then referred the request to a superior who did not read the referral until the next day. By then, Mr Khazaei's condition had 'deteriorated significantly' and doctors advised that his transfer was 'very urgent'.²⁹

In such a case, dealing with physical and mental health risks could have been avoided if the inclusion of principles regulating human security on healthcare policy was core to the policymaking when transferring asylum seekers offshore. It may shift the zero-sum game of the Operation Sovereign Borders policy that attempts to offset the detriment suffered by irregular arrivals transferred offshore with the benefit gained by the Australian Government from zero boats arriving in Australia. A principle-based regulation grounded by medical opinions should determine the next cause of action. Evidently, the rule-based regulation causes delays, not only because of the bulwark of bureaucracy involved but also due to the self-conflicted exercise of ministerial discretion. This self-conflict arises out of two primary reasons: one, to avoid disparaging remarks of the local healthcare system in the regional processing jurisdiction as part of state diplomacy; and two, to maintain the impression that the regional processing regime works.

iv The proposed human security approach

A snapshot to the human security approach by Owen

Owen explains human security to be the 'protection of the vital core of all human lives from critical and pervasive environmental, economic, food health and political threats.'³⁰ He explains that 'critical' attaches 'urgency' to the concept, that 'pervasive' attaches 'scale' and that 'vital core' attaches 'survival' to the definition.³¹ Therefore, any type of harm has the possibility of being a human security threat but it does not become an insecurity unless it has an objectively determined degree of urgency and is of a wide scale that threatens the life of the individual.

Owen's approach suggests that the severity 'bar' should be set as a political line, meaning that international organisations, national governments, experts and NGOs would determine what would be included as a human security threat at a given time in a particular region.³² Therefore, the boundaries are determined by political priority, capability and will. This means that the primary responsibility for ensuring human security falls on the national government. However, Owen cautions that 'if threats crossing the human security threshold are caused by the Government or if the Government are unable to protect against them, the international community should act.'³³

Owen analyses human security from the perspective of a threshold-based definition, based on severity. According to Owen, human security can be both analytically useful and relevant to policy if the threshold-based definition of human security is applied. The importance of this approach is that it looks at the consequence while paying attention to the cause.³⁴ The challenge with this approach is the assessment on the subjective nature of severity. I believe that this challenge can be addressed by a principle-based regulatory approach that sets guidelines on severity. The discussion on setting guidelines on severity is out of scope for purposes of this paper but suffice to say that the Hamid Khzaie case is worth examining as a case study when developing guidelines that deal with health and medical needs as a part of the human security policy for irregular arrivals at offshore regional processing centres.

v Enabling human security to be operationalised through principle-based regulation

Why principle-based regulation?

Braithwaite highlights that '[t]he big problems facing states would require creative regulatory solutions.'³⁵ There is no doubt that the offshore regional processing policy is a big problem for Australia. As such, we need to look for creative regulatory solutions because as Braithwaite observed when referring to rule-based regulations:

...traditions of excellence within the disciplines were narrowing their capacity to deliver creative solutions to these big problems. If these creative solutions were to have a chance of arriving, regulation could not continue to be thought as an inelastic thing of law. Rather it had to be seen as a multilevel dynamic process in which many actors play a part and have varying capacities and means of intervention.³⁶

Braithwaite's regulatory theory which is based on responsiveness places an 'emphasis on flexibility and the complementarity of regulatory instruments rather than following a preset sequence of responses.'³⁷ Based on the earlier discussion of the Medevac law, it appears that the Medevac law operates on a preset sequence of responses, from the opinion of the two medical doctors to the administrative processes involved. This may affect the efficiency of responsiveness when dealing with cases of urgency and severity.

How can the principle-based regulation be operationalised?

The short answer to this question is to attach principle-based regulations to the rules or create independent, principle-based regulations that have a responsive mechanism to the human security in question. The principle-based regulatory regime is operationalised or triggered once the responsible entity regulating the human security in question takes a responsive approach and applies the fast-track regulatory mechanism. For example, in the *Medevac* case, once the responsible entity from the Medical Evacuation Response Team decides to transfer the patient from the regional processing country to Australia, the decision authorises a fast-

track regulatory mechanism or a bypass from rule-based regulations requiring ministerial approval. Instead, the next cause of action is predicated by the responsible entity making a decision based on: one, the principle on the patient's best interests; and two, the severity to human security in question assessed. Both assessments are made based on guidelines or protocols that govern the professional body of the responsible entity. This means that the response to human security needs will no longer require authorisation from a government minister. Instead, the body that governs the security in question will have authority to make the responsive decision. Regarding the *Medevac* case, the Kaldor Centre for International Refugee Law succinctly describes the high level process and structure as follows:

An independent Medical Evacuation Response Team ['MER'] has been established to oversee the triage of people in offshore processing countries who are in need of medical treatment. The group is composed of a number of non-governmental organisations, who will work directly with medical professionals. It also includes caseworkers, counsellors and lawyers.³⁸

While the current position of the *Medevac* law would still require the MER to gain approval from the Minister, the principle-based regulatory approach would not. It does not require amending the *Medevac* law but instead drafting the operational policy framework from the provisions that currently authorises the powers

of the independent panel. The benefits of such an independent body will not only depoliticise the decision-making process but uphold the fundamental principles regulating the professional body responsible for conducting medical assessments and making the medical recommendations. Such decision-making enables principles from the ethical norms on the best interest of the patient within the codes, guidelines and policies by the Medical Board of Australia to be part of the broader regional processing risk management policy on health security of irregular arrivals.³⁹

VI Conclusion

This article sets out the essence of reimagining the protection approaches applying the human security approach through a principle-based regulation. It is important to note that this paper is part of a broader theme under the UN Global Compact on Refugees 2018 ('GCR'). Much of the reimagining of human security within the regional processing centres can be extended to the proposals for international cooperation outlined in the GCR. The parallels to the people-centred⁴⁰ as part of the human security concept and the GCR make the reimagining outlined in this paper a plausible way forward in the spirit of Trigg's reminder that we are dealing human beings.⁴¹ 🏠

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2 Irregular arrivals include those who have been either apprehended and detained by the Australian maritime authority when their vessel was interdicted at sea within the contiguous zone or apprehended at any of the migration excised zones under the s 5 of the *Migration Act 1958* (Cth).

3 *Migration Act 1958* (Cth) s 46A(1) ('*Migration Act*').

4 Australian Human Rights Commission, *2010 Immigration Detention in Darwin* (Report, 2010) <https://www.humanrights.gov.au/sites/default/files/content/human_rights/immigration/idc2010_darwin.pdf>.

5 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) read together with the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('*Refugee Convention*').

6 Jeswynn Yogarathnam, 'A People-Centred Refugee Approach: Revisiting UNDP's Human Security Concept' (2017) 11 *UNSW Law Society Court of Conscience* 58, 62.

7 On the issue of a 'safe' place, reference can be made to s 74 of the *Maritime Powers Act 2013* (Cth) and the High Court decision in *CPCF v Minister for Immigration and Border Protection & Anor* [2015] HCA 1, 51-53. This case dealt with issues relating to irregular arrivals being detained in a contiguous zone and the exercise of powers by the maritime officers to take them to a 'safe' place.

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on Asylum Seekers in August 2012 also known as the Houston Report — see Angus Houston, Paris Aristotle and Michael L'Estrange, Expert Panel on Asylum Seekers, Department of the Prime Minister and Cabinet (Cth), *Report of the Expert Panel on Asylum Seekers* (Report, August 2012); Peter Billings, 'Irregular Maritime Migration and the Pacific Solution Mark II: Back to the Future for Refugee Law and Policy in Australia?' (2013) 20 *International Journal on Minority and Group Rights* 279.

18 Ibid 8. See also the decision of the Supreme Court of Justice of Papua New Guinea in *Belden Norman Namah, MP Leader of the Opposition v Hon Rimbink Pato, Minister for Foreign Affairs and Immigrations* (SC1497, SCA No 84 of 2013) that led to the order to close down the Manus Island Detention Centre.

19 The Medevac legislation enables the non-citizen in the regional processing country to be transferred to Australia if the transfer is recommended by two treating doctors who share the opinion that the transfer is necessary because of the need for treatment or further assessment.

20 Note that the Minister reserves the right to veto the decision to transfer a patient to Australia on security grounds and this is not appealable. For example, if the Minister knows that the person has a substantial criminal record and the Minister reasonably believes the person would expose the Australian community to a serious risk of criminal conduct.

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26 An assessment process was part of the transfer assessment requirement in the past. In the *Malaysian Solution Case* the majority upheld the need for the Minister to consider the relevant human rights standards before the irregular arrivals are transferred to another jurisdiction for offshore immigration processing.

Subsequently, the Australian Government repealed, inter alia, the provisions of the *Migration Act* which the majority relied on, in particular s198(A)(3)(a), which dealt with the 'relevant human rights standards' that the Minister needs to consider in the decision-making process. See *Plaintiff M70/201* (n 23). See also Kate Ogg, 'A Sometimes Dangerous Convergence: Refugee Law, Human Rights Law and the Meaning of 'Effective Protection' (2013) 12 *Macquarie Law Journal* 109.

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28 Ibid 52.

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39 See also 'Codes, Guidelines and Policies', *Medical Board of Australia* (Web Page, 1 August 2019) <<https://www.medicalboard.gov.au/Codes-Guidelines-Policies.aspx>>. Note that in 2005 the Federal Government set up the Detainee Expert Health Advisory Group ('DEHAG'). DEHAG comprised of representatives of the Australian Psychological Society, Royal Australian College of General Practitioners, Royal Australian and New Zealand College of Psychiatrists, Australian Medical Association, Royal College of Nursing Australia, Federation of Associations of Survivors of Torture and Trauma, Public Health Association, Australian Dental Association, and a paediatrician from the Royal Australian

College of Physicians. DEHAG was tasked with advising the immigration department about health and mental health services of asylum seekers in detention. It was eventually disbanded in 2013 due to experts reporting publicly on poor health care of detainees and the poor access to health care services. Although DEHAG was an independent entity it was operating under an immigration rule-based regulatory model which caused the tension when the professional bodies were applying the principle that governed their professional bodies when making recommendations.

40 Yogaratnam (n 6).

41 Hutcheon (n 13).

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