

Seeking Asylum in Australia: 1995–2005 Experiences and Policies



Proceedings

Compiled by Susan Aykut and Jessie Taylor

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Introduction

The publication of these twelve papers from the Monash University Conference *Seeking Asylum in Australia 1995-2005: Experiences and Policies* could not be more timely.

The conference itself was held over the last weekend in November 2005 – a fleeting moment of peace and quiet in the recent history of Australia's refugee policy, during which the harshest aspects of the law had been relaxed. Following the scandals of Cornelia Rau and Vivian Alvarez Solon, and Petro Georgiou's Private Members Bill in 2005, the Howard Government had softened its line. It had quietly admitted that it was not morally sustainable to detain children, and it had rolled back the 'Pacific Solution' to the point of mothballing the offshore detention facilities.

These papers are locked in time at the moment of the conference. In late November 2005, the greatest obstacles to be conquered by refugee advocates, activists, lobbyists and interested members of the legal fraternity were the harsh conditions of Bridging Visa E, and the ongoing sagas of the two young Iraqi men left on Nauru, and the remaining ninety-something asylum seekers being detained at Australia's behest on the Indonesian island of Lombok since 2001. These were the dregs, the rough edges, the hangover of a policy left in tatters by criticism, ridicule and loss of face.

However, as these papers come to publication in August 2006, the Howard Government has tabled the *Migration Amendment (Designated Unauthorised Arrivals) Bill*, taking a violently retrograde step, thrusting Australia's refugee policy back by years, into the darkest recesses of the post-*Tampa*, post-September 11 era, from the 'change of culture' and 'softer approach to asylum seekers' to the attitude of 'sending a strong message to people smugglers' and other extremely harsh ideas that resulted in the 2001 Howard election victory.

We stand on the edge of a precipice. Based on the decisions made at Parliament House in the next few weeks, Australia may be about to enter a phase of its history that will cause immeasurable additional hardship to asylum seekers, and a great deal of shame to the present generation.

This collection of papers is a retrospective of the past decade as a phase in Australia's immigration history. We can only hope that the reflections, observations and lessons found herein will inform the future direction of Australia's immigration policy, tending towards alignment with international obligations, and a domestic policy characterised by strength, compassion and integrity.

Jessie Taylor

Matthew Albert

Australian Refugee Policy from an African Perspective

Matthew Albert

In 1999, when aged 20, Matthew Albert co-founded the Sudanese Australian Integrated Learning (SAIL) Program which now engages almost 300 volunteers weekly at three campuses across Melbourne. The SAIL Program supports the fastest growing ethnic community in Victoria, the Sudanese refugee community, by providing free services including tutoring, home help, camps and excursions to about 450 people every week. Matthew remains the overseeing coordinator of the Program. Matthew is also the Founding Director of the Sudanese Online Research Association; an online advocacy centre for the global Sudanese Diaspora. He is regularly published on issues concerning refugees, migration policy and African affairs including in the Melbourne Age and Eureka Street. In 2004, Matthew worked for the United Nations' High Commissioner for Refugees in Nairobi, Kenya and at the Kakuma Refugee camp. Matthew is a solicitor in the Victorian Government Solicitors' Office and is a research assistant to the Solicitor General for Victoria in her role as legal adviser to the Victorian Human Rights Consultative Committee. Matthew has been appointed Australia's representative to the Commonwealth Secretariat until 2007. In this capacity, Matthew sits on an Advisory Board that determines development aid funding for youth in the Pacific Region. Matthew has been asked to lead the charge towards a Regional Child Rights document.

Abstract

Matthew's presentation looks at the Australian refugee scene from a bifocal East African perspective. Firstly, he reviews an international perspective of the Australian policy as it influences the lives of refugees in Kenya. Secondly, Matthew will reflect on the domestic impact of the policy as it has effected Australia's fastest growing ethnic community, the Sudanese refugees.

Matthew Albert

Australian Refugee Policy from an African Perspective*

I would like to start by thanking you for the invitation to join you at this important conference - an important conference partially because of the subject matter, but also because of the time. The ten years that are being marked by this conference have been a particularly pertinent period for the community that I work with – the Sudanese Refugee community. Incidentally, that is the fastest growing ethnic community both within Victoria and Australia. I wanted to start by looking at the idea of what ‘refuge’ and ‘asylum’ actually mean, and how it is that they are portrayed, particularly in the popular press.

The story – which is quite brief – starts with events that have been happening quite recently around the world. I got to work a couple of weeks ago and logged on to The Age Online to check out the headlines. There was what I thought was a truly magnificent headline – ‘Poor, destitute refugees seek shelter’. It’s a fantastic headline for a number of reasons but not the least of which is that it is extremely evocative, and it’s also very bold. Poor. Destitute. Both emotive terms... Refugee. A term that we are all too familiar with. Seeking shelter... The idea of a refugee seeking shelter is somewhat of a tautology, but that aside, the poor and the destitute elements were very appropriate. Given that that was the headline and it was on The Age’s website, I was fascinated to see what the story was actually about, knowing as I do that the refugee communities around the world are sizeable, and being poor and destitute and seeking shelter is generally part of the deal. So I clicked through. The article was about the people of New Orleans, USA. It was an article about those people who were fleeing the aftermath of Hurricane Katrina. I had a very serious concern with those words being used in that context. The concern was – they were not, in fact, poor. They lived in what is the world’s richest country. They were not destitute, and I say that because the article came with an image of three seriously oversized (one may even say obese) American people, with a trolley full of their belongings. Destitute? I think not. Refugees? Well, the fact that they are in their own country means that by definition they are not. And seeking shelter is the last part of the headline. Well the problem I had with that part was that in the same image of the rather oversized Americans, there is a picture of a number of sheltered areas, one of them being a car park. While none of us would particularly like to stay in a car park for any length of time, one could only look at the photo and note that the seeking of shelter could only have lasted about 30 seconds longer, because there it was – right in front of them.

* Please note – this paper is a direct transcript of a presentation given in the absence of a written submission. The turn of phrase is thus less formal than would usually be expected from an academic paper.

Well, my anger, expressed today, was far stronger on that particular day. After clicking through the headline and reading the article, I then decided that the most appropriate thing was to call the Editor of The Age, which I promptly did. I managed to get through to The Age Online editor – to the man himself – and unfortunately for that gentleman gave him an earful of criticism, deconstructing the title as I’ve just done, and stating that pretty much every part of it was either inaccurate or offensive, or both. In the end, the title changed between 11.19am on September 2, 2005 and 11.54am on the same day, from ‘Poor, destitute refugees seek shelter’ to ‘Poor and destitute seek shelter’. An improvement, but not exactly what I was hoping for.

Now why is it that I care, and why is it that I think my anger and fury (perhaps not my abuse!) were justified? The reason is because of what the value of this term ‘refugee’ means to me, and to many of the people that I have the privilege of working with.

So how does this all fit together? Well, my story starts about five years ago, with the birth of an organization that has come to be known as the SAIL Program (Sudanese Australian Integrated Learning Program). SAIL caters specifically to the Sudanese Refugee Community, and I find it interesting in talking about this community to look at the timeline that we’re talking about during the course of this conference – the 1995–2005 timeline. Not that the correlation was necessarily made in the planning, but that timeline is – crudely speaking – the timeline in which the Sudanese community has sprung out of nowhere to become – now – a population of around 16,000. In 1995 there were around 200 people in Australia, and now we have this fairly sizeable figure. It should be noted that during this period there have been very few who have been detained as part of Australia’s mandatory immigration detention policy. This is due to the fortunate fact that the Sudanese refugee community (for the most part) get offshore humanitarian visas, which means that on arrival in Australia they have the full entitlements of other full Humanitarian entrants.

The story of the SAIL Program starts, as I said, about 5 years ago, when we (myself and a friend of mine from high school named Anna-Grace Hopkins) went out to a small rundown hall in Footscray. There was a single family there, 5 children of school age, and 2 little ones, who we kind of hung out with on a weekly basis, assisting them with their homework and trying to give them a foothold on the English language. From there, a second family came a couple of weeks later, and a few weeks after that, that family invited friends, and we had 3 families, and a good deal of panic on our hands, trying to work out what it was exactly that we should do next. From there the SAIL program has grown along a similar pattern, with us bringing in our friends, and then – not long after – people from the wider community to the program to assist with the most recent arrivals. Today we have around 300 volunteers; we have around 450 members of the Sudanese Refugee Community using our services each week, at 3 campuses across Melbourne – Dandenong, Footscray and Altona. There are plans for us to open more campuses due to demand, and a good possibility of opening campuses interstate, particularly in Adelaide, and Sydney.

What does the SAIL Program actually do? This is best answered by listing a series of activities. Predominately we offer free tutoring services on a Saturday morning. In addition to that we have excursions, camps, short courses and information sessions, all of which are offered for free at the 3 centres that I mentioned. The Sudanese community is in such early days in its formation as a migrant community in Australia that there are a number of issues that are not unique to them as a community, but certainly unique to most recent arrival communities. In particular I thought it would be relevant to raise three things which I think are the key issues, some of which the SAIL Program addresses, and some of which we do not. The three things are relating to finances and remittances, to domestic violence, and to identity. Because of the situation back in Sudan, the home of the world's longest running Civil war, the Sudanese community in Australia is faced with a particularly heavy obligation to support those who are back home in Sudan, or in refugee camps in countries surrounding Sudan, most especially in Kenya at Kakuma, in Uganda near Adjumani, and Cairo in Egypt. For the community here there is a general pattern that any additional finance is sent back by way of remittance to friends and family in those places. That is not seen really as a choice, but as an obligation, and the flow-on effect of that is quite dire in the situation here, in some cases. In particular, we have had a number of times where families have remitted back funds where there are in fact no funds to keep the family going here. The level of obligation is so high that immediate needs seem to be sidelined.

An additional issue related to the resettlement experience is that of Domestic Violence. Domestic Violence is an issue that has been present for quite some time, but is very often misconstrued as being one of the social ills of the community, rather than the result of people coming into a completely foreign environment. Domestic Violence, obviously most often actioned by men, is at least in my view the result of the settlement experience of losing networks and prestige. I'll come back to this later on, but for a large number of men in the Sudanese community, they have come from positions of privilege, authority and respect. To arrive in Australia where they are not able to speak the language, where finding a job (at least in the initial post-resettlement period) is very difficult, and where holding the family together is also a great challenge, the result is a degree of frustration that often cannot be borne. Needless to say, Domestic Violence is a very grave concern and is one that we and other service providers are keen to address.

The last of the issues that I wanted to raise just briefly is that of identity. This is where I think the SAIL program plays a particularly important role of the children. We use the metaphor of the front door, and relate that to the way that the kids in particular look at themselves. Because, for the Sudanese community – as with all migrant communities – in the younger generation there is always this question as to whether they are Sudanese, or whether they are Australian. The front door we use because in our experience, when the children leave home to go to school in the morning, they walk out that door and they are expected to speak like Australian kids, to act like Australian kids, to espouse Australian 'values', and to fit in to the Australian 'way of life'. When they walk back in the door at the end of the

day, everything flips. They are expected to act Sudanese, speak their Sudanese language, to espouse Sudanese 'values', and to live out the Sudanese 'way of life'. That is an extremely difficult task, and one that far too often leads to a degree of family breakdown. What the SAIL Program provides is a halfway point, a place where the kids can be both Sudanese and Australian at the same time, and be comfortably both.

That I think is one of the great things that we provide, although it takes no resources and no effort, it is something that I think is very important in instilling in them a sense of pride in their own personal histories, and in their community history. And that leads me to the big philosophy the SAIL Program embodies, and that is a famous four-word phrase coming from the United Nations: Think Global, Act Local. To me the SAIL Program does exactly that, because the Sudanese Refugees here are the human by-product of things that are happening far away.

So, who are refugees, and asylum seekers, to Australia? Well the Sudanese Civil War has been reaping a fair bit of public attention over the last couple of years. What most people unfortunately don't know is that the most recent chapter occurring in Darfur is in fact just the latest instalment in a very large book of conflict dating back to 1983. The Civil War between the North and the South of Sudan bursts a number of superlatives. It is taking place in the largest country in Africa. It has resulted in the largest internally displaced population on the planet, with 4.4 million people homeless within Sudan and seeking the protection of the Sudanese government. In addition to that there have been some 2 million who have been fortunate enough to be able to escape Sudan itself and to seek refuge predominately in the three places that I listed earlier. Those statistics are enormous. They are so enormous that they are quite hard to get your head around. Perhaps the most marked statistic is that of the number of people killed in the North / South war – putting aside the conflict going on at present in Darfur. The North / South war, in 22 years, has resulted in the deaths of 2 million people. It's a meaningless number, one that is almost impossible to comprehend. But if you break it down, flesh it out and compare it to things that we are more familiar with, you get something like this:

- 2 million people in 22 years is the equivalent of a September 11 attack ever 12 days.
- It's the equivalent of hurricane Katrina – which as we know caused poor, destitute refugees to seek shelter – every 1.5 days.
- It's the equivalent of a London bombing every 5.5 hours for 22 years.

The 2 million people who have been made refugees from the Sudanese conflict in the South form a relatively small percentage of those people who are 'persons of concern' to the United Nations High Commissioner for Refugees. As we meet, there are approx 19 million people who are regarded as refugees in the world. That generally is about the number of people in Australia. So who are the refugees in Australia? That's answered by the number of people who are resettled of those 19 million each year.

Combining all of the refugee resettlement nations including Australia, New Zealand, America, and some of the Scandinavian countries, all of those combined give a total of 100,000 resettlement places each year. So you've gone from the population of Australia down to the MCG on a very good day. It's not hard to see from those numbers that the people who end up in our neighbourhoods are people who have got into a position that is very highly sought after, and perhaps more appropriately described as highly competitive. This is not something that gets a lot of attention in resettlement countries, but it is something that I think needs to be given some more emphasis, because it paints a very clear picture of how we and how refugee resettlement programs fit into the grander scheme of things, that being situations of war and peace around the world. What concerns me is that we focus our attention and indeed our resources on this very small number, and at the same time effectively ignore the majority. It seems to me that in Australia we are spending our time and money focussing on the icing, and not necessarily on the cake. Asylum seekers are not issues, beings and creations of themselves. They are, as I said earlier, the human by-product of conflict and war. It upsets me – and I've written publicly about this before – that Australia has had a minimal role at best in Sudan itself, and yet is very active (and appropriately so) in welcoming Sudanese refugees to Australia. To me, the act of ignoring the war but taking in the select few of the survivors is not dissimilar to inviting people back after a funeral, when you could have prevented the death in the first place. The issues are global issues that one deals with when one actually gets into the creation, if you will, of refugee and asylum seeker situations. In Africa, where the Sudanese are largely processed before they come there are a number of refugee centres in which people are being housed on their way, ultimately (they hope – but it only happens to very few) to countries like Australia. The situations in these camps where people have been living for up to 13 years (as in Kakuma where I worked in 2004) have been known previously as a 'protracted refugee situation'. The term 'protracted refugee situation' is a very clinical and antiseptic term, which doesn't evoke very much of interest. In about May of 2004, a term replaced it. This term came out of the United States, and was particularly championed by Senator Ted Kennedy. The phrase is this idea of 'refugee warehousing'. Refugee warehousing is a far more appropriate term, and it's one that I think fits more comfortably with the surroundings of the camps, at least the one that I experienced. Refugee warehousing also give a very clear idea as to where – in my view and in the view of many – the attention of the world should be. And that is in resolving the underlying cause of refugee and asylum seeker situations by resolving conflict itself.

So we come to this question of why, ultimately, should we be caring at all about those seeking asylum in Australia over the last ten years, and of course, over the next ten years and beyond. When I was working in Kenya in 2004 I was stationed for a couple of months in the Kakuma refugee camp. This camp is home to over 90,000 refugees, 60,000 of whom are from Sudan. They are refugees by definition under the Convention. And while the idea of a refugee is ultimately purely a legal term, there is a very real and pragmatic basis to it. Because behind the legalese, the people at the camp (all 90,000 of them) had, I realised after some time, made a choice from three options:

- The choice of seeking asylum, as the fortunate few do
- Dying at the hand of another person
- Or dying by their own hand

When you live in a situation such as a refugee camp and with the extreme privilege that I enjoy, it's very hard not to ponder the thought of what exactly I would do in the same situation, when faced with those three choices. That question came home to me on the same trip overseas, when I found a letter that I'd not read before, that explained the decision of one person. That letter, in essence, was (as was described to me when I obtained it) that person's 'last letter'. It was written by a person who when faced with those three choices decided, in the interests of honour and prestige, perhaps, to take his own life. The letter was signed by a gentleman called Leo Lippmann. What most of you will not know is my full name, which is Matthew Lawrence Lippmann Albert. Leo Lippmann wrote this letter having been told in 1943 that he was about to be taken to Terezin, a concentration camp used as a front by the Nazis to woo people into a sense of security about the concentration camp process. Well, just a few weeks ago I was in the Czech Republic for the first time and went to Terezin myself, a place that no one in my family – including Leo Lippmann – had ever been. Well, on reflection, I think he probably made the right choice. Ultimately, behind what we see on the news, and behind this magical title of 'refugee' or 'asylum seeker', are the people. And behind them is the politics. For the people in the refugee camp, and for most refugees and asylum seekers, there comes a point when there are only seven letters in the English language that stand between them and death itself, and those seven letters spell the word REFUGEE. It is a word the sanctity of which cannot be reduced, and it is a word that we should all see the importance of, not only in a local setting like this, but also in a global setting, in a setting of conflict and war. And more especially, in the pursuit of peace.

Well it seems appropriate when reflecting on the last ten years to end by talking about the next ten years. The asylum seeker policy is due for a reshape. It is a policy that has served a huge number of communities very well, not the least of which is the Sudanese community – the beneficiaries of the same policy over the last ten years, I think. But there's a phrase that I would like to end with, which comes out of the United Nations, that I think is a magnificent phrase, and would provide a very useful direction in terms of how the policy is reshaped over the last 10 years. The phrase comes from the United Nations doctrines relating to repatriation. To people returning to situations that were previously in conflict and war – to resettle, and rebuild, and re root, to make sure that their homeland comes back into being a healthy and stable nation. And the phrase talks about the situation in which people are encouraged to repatriate. It's a lovely phrase that would work as a very good guiding light for our asylum policy. It asks that decisions only be made for repatriation when people can do so... and here it is... in safety, and with dignity.

Let us hope that this is how the policy is reshaped in the next ten years. Thank you.

Julian Burnside

What the Government Will Do If They Can Get Away With It

Julian Burnside

QC and Refugee Reform Advocate

Julian Burnside has given countless hours of his professional expertise as a barrister to the cause of refugees and other asylum seekers. As an advocate for the voiceless, Julian has taught us to open our minds, hearts and our homeland to welcome others to share our good fortune. In advocating his own beliefs as a human being, he represents those who are powerless to represent themselves. His passion for justice also flows into his love of the arts. Julian believes that every work of art carries part of our shared culture; and he defines art broadly. He is state president of Musica Viva, council member of the Victorian College of the Arts and he chairs the music venue Fortyfive Downstairs and the Chunky Move Dance Company. He also sits on the board of The Justice Project. Julian is a well published author who cares about the English language and the power of words.

Julian Burnside

What the Government Will Do If They Can Get Away With It*

Thank you for that introduction, Jess. I just wanted to say something else about *From Nothing to Zero*¹ – the book of letters was really a very interesting project, and a worthwhile one. And it just happens that last year I commissioned Peter Sculthorpe to write a string quartet, because chamber music is one of my great passions. And whenever I commission music I never give the composer any guidelines or instructions or anything at all, except the form of the work, so a string quartet, or a piano duo... And to my astonishment and delight, completely independent of me, Peter stumbled across *From Nothing to Zero*, read it and got extremely upset by it, and wrote his quartet drawing on the main emotional themes that come out through the letters. So one movement is anger, one is trauma, one is hope of liberation, and so on. That was premiered by the Tokyo string quartet in Melbourne a couple of weeks ago, and has been played right around Australia, to great critical acclaim, and interestingly, in Canberra, to a standing ovation. It does seem significant that in Canberra of all places it got a standing ovation! And I mention this because I'm rather hoping that Lonely Planet might get together with the recording studio and put out a reissue of the book with the disc. It's a really good quartet and I'm delighted to have had a part in it. So watch out for Peter Sculthorpe's 16th String Quartet.

I had real trouble deciding what to talk about today, because here you all are, people who know a great deal about the refugee issue, people who have been involved in it, as I can see looking around the room, many for a long time. And the issue itself is now mature, almost to the point of having been solved, at least the first major phase of it. We still have to deal with the way in which refugees who have been accepted into the community are helped along until they feel sufficiently confident of themselves to make their own way in the community. And I think there's some important work to be done there. But I wanted to draw as my theme today – said he, sounding like a country parson... on a Sunday morning! – I wanted to take as my theme a warning: what our government is willing to do if they can get away with it. And I've chosen this particularly because of what is going on right at the moment, with the proposed anti-terror legislation, the industrial relations reform. Because frankly it seems to me that this Government is prepared to do just about anything... if they can get away with it. It is hard to think of an Australian government more driven by ideological zealotry than this lot, and they will do dis-

* Please note – this paper is a direct transcript of a presentation given in the absence of a written submission. The turn of phrase is thus less formal than would usually be expected from an academic paper.

1. Janet Austin, ed., *From Nothing to Zero: Letters from Refugees in Australia's Detention Centres*, intro. Julian Burnside QC (Melbourne, 2003).

graceful things if they can get away with it. And I want to illustrate that by reference to a few episodes, most of which will be familiar to you.

The first and most obvious is the Tampa. Now, the Tampa episode was obviously a matter of international disgrace for Australia, although being in Australia you would hardly have known it. The Government's position on Tampa was greeted with widespread applause by the uninformed public, and by not exactly applause, but at least approval by a wrong-footed opposition, who went against the basic grain of their philosophy to support what the Government was doing. And the great irony of it was that with hindsight, the Tampa gets tied up with Sept 11 and terrorism, so a lot of people say 'it's not surprising that with the threat of terrorism that they acted the way they did with Tampa', and I wonder how many people in this room have absorbed that view of it... But remember the chronology: the Tampa rescued the 438 people from the *Palapa* on 26 August 2001. It entered Australian waters on 29 August 2001. We went to court on 31 August 2001, to try and get a writ of *habeas corpus* and require the government to act according to the dictates of the *Migration Act*. Because you may remember that the *Migration Act* says that if a person is in the migration zone or seeking to enter the migration zone and if on entering it they would be an unlawful non-citizen, then it's the obligation of an officer of the Commonwealth to take them into immigration detention. That's a provision that most of us don't like, by and large, but it seemed to offer some prospects of hope for the people on the deck of the Tampa. Because one thing was clear – they wanted to enter the migration zone at Christmas Island. But Bill Farmer, who's just been bounced upstairs, solemnly gave evidence in that court that he didn't know *what* the people on the Tampa wanted. That he wasn't *sure* whether they wanted to enter the migration zone or not. Well... what crap. Unfortunately I wasn't allowed to say that in court!

The case, as you may remember, started on the Friday night and ran Saturday, Sunday, Monday, Tuesday, Wednesday, and then the judge adjourned it to consider his decision. And he handed down his decision at 2:15pm Melbourne time on 11 of September 2001. One of the most striking co-incidences. And of course, the next day the news precipitated responses; which responses changed the world as we know it. (September 11 didn't change the world, but our responses to it *did*.)

Because of September 11, largely, the government was able to pitch the whole asylum seeker issue as one of national security ('border protection' was the tag), and that was the way they ran it between 11 September and the election later that year. In the meantime, of course, they resolved the impasse that the Tampa represented by negotiating frantically during the first weekend with the Republic of Nauru – who were probably the 6th in line. They got knock-backs from everybody else, who thought it was a revolting idea to warehouse human beings whose only offence was to try and escape the Taliban. The irony of course was that we knew that the people on the Tampa were Afghans fleeing the Taliban, and no-one could have had a more obvious or stronger claim for asylum in 2001 than Afghans fleeing the Taliban, especially the women and children. But they ran to the election and created a climate

in which it became a matter of national security to keep asylum seekers out. They set up the Pacific Solution based in Nauru and Manus Island, and people like Ali Mullaie who spoke before were among the approximately 1,500 people who in total were held up on Nauru. Now Nauru is an interesting case in point about what the Government will do if they can get away with it. Now, let us be blunt about it: they were warehousing innocent human beings, locking them away in what was effectively a legal black hole. It was our equivalent of Guantanamo Bay, with one important exception. The people held in Guantanamo Bay were suspected of being Taliban or Al-Qaeda supporters. The people locked up in Nauru were *fleeing* the Taliban and Al-Qaeda. And of course there are some Iraqis, for whom the obvious take-home message was: if you flee we'll lock you up, and if you don't flee, we'll bomb you. I don't know how people are supposed to resolve that choice.

But Nauru has been successful, as Mr Howard is proudly announcing. Because Nauru was basically hidden from the public view. No-one was allowed to go there except by the permission of the Australian government. Until the latter part of 2003, the only Australian journalists to get to Nauru – actually, they weren't Australian journalists at all – my wife, Kate, got there and took with her a BBC journalist called Sarah McDonald, and they went there to make a film about what was going on in Nauru. And by an interesting expedient they managed to get in. I had already tried to go there and had been blocked. I'd sent a colleague of mine who actually got onto the tarmac (although that was later)... In my three attempts to get there, all of them had failed, because the people in Nauru have been warned not to let anyone in from Australia unless they had the Australian Government's approval. So what Sarah and Kate did was to go to New Zealand, and from Auckland they flew to Fiji, then to Kiribati, then the Marshall Islands, Nauru then with an onward flight 2 days later to Kiribati. It's an incredibly expensive and tedious way to get there, and it's not a great place to be in any event – I think Ali would agree with that! But they got there, and because there was an offset of 2 days between the arriving flight and the onward flight, they simply asked for an *ad hoc* visa on the spot, and they were given it. The result is a BBC production called 'Australia's Pacific Solution', which has been shown all over the world, but not in Australia, interestingly. Although Sarah was put in touch with Kate by the ABC, who thought they would use it for *Four Corners*, *Four Corners*, after months of delay, decided they would not put it to air. SBS have not put it to air. Not daunted by this, Kate, through the Spare Rooms for Refugees network, offered copies of the video for the cost of the copies – \$5 – and we've distributed thousands of copies through the whole refugee network that way, and it's been shown in church halls and private homes, and all sorts of places over the last few years. I suspect that more people have seen it than would have if it had gone to air on Four Corners! Plus there's the added frisson, that it's somehow naughty...! So it's good.

Michael Gordon later got into Nauru as things began to soften, because the Government found the thing pretty much unsupportable. The Government found that they were not able to find anywhere else to park these people, most of whom were ultimately assessed as genuine refugees, so Australia began to take them in dribs and drabs, in small enough numbers so as not to make a fuss, but a significant

number of them have ended up in Australia, and the only difference between letting them in direct and taking them through Nauru is that it has cost Australia tens of millions of dollars extra, and it has inflicted incalculable additional pain on a lot of innocent human beings. Michael Gordon got in there and I think the Pacific Solution is now substantially discredited because he and one or two others have exposed just what it's all about.

Now, the counterpart to Nauru is Manus Island, which is a part of Papua New Guinea. It's a small island north of the mainland of PNG, and it was used as a holding place in 2002, but as the numbers dwindled, as Operation Relex in one way or another helped stop the arrival of boats into Australian waters, the numbers dwindled and so they decided to flush out Manus Island, and send all the people there over to Nauru. But one person remained on Manus Island – a man by the name of Aladdin Sisalem, the last man on Manus Island. And the curiosity about his case was this: the elaborate set of statutory provisions which were put in place immediately post-Tampa to justify after the event what the government had done, introduced some provisions which created a new category of asylum seeker, namely those who had arrived at the recently excised offshore territories of Australia, and those people were called Offshore Arrivals, and those Offshore Arrivals could be taken by the navy to Manus Island or Nauru. Well Aladdin Sisalem had actually made his way to an *unexcised* bit of Australia, so he was NOT an Offshore entry person. He had been tracking around the world for ten years looking for a place where he would be allowed to live. He's a stateless Palestinian, and no country in the world is obliged to receive him. So he got his way to PNG after queuing up in Kuwait for several years, after queuing up in Jakarta for several years, living on the streets, not allowed to work, he fled across into PNG. He was arrested by the authorities and was roughed up for his troubles, and was jailed for having entered the country without permission. Once he left jail, he thought this is not a very welcoming place, and so he went and found a fisherman who was prepared to take him across to Saibai Island. Saibai Island is close to PNG, but is part of Australia, and had not yet been excised. It has since. When he got to Saibai Island, he introduced himself to the Federal Police, he said who he was, said he wanted to seek asylum and asked for Australia's protection. They said they'd take him to some other place. So they took him to Thursday Island, another dinky-di bit of Australia, not yet excised. There he was interviewed by the Department of Immigration, first by an official on the ground, then by an official on the telephone from Canberra; in both of those interviews he explained who he was, he gave his story, and he asked for protection. They said 'we'll process your claim somewhere else', and they put him on a plane and took him to Manus Island. And when he asked how his claim for asylum was going, he was told he didn't have one.

Now, his plight only came to our attention because Sarah Stephen of *Green Left Weekly* contacted me and said, 'there's this guy on Manus Island who's been emailing us, and he's stuck there by himself – with his cat!' Honey the cat had wandered into the camp and befriended Aladdin, and there they were, alone, effectively, for nearly seven months. Now Tom Cordiner and Sam Hay, barristers at the Victorian Bar both helped me put a case together; Tom did most of the leg work, he found out

what had been going on, he got a long statement from Aladdin, he put together an affidavit, and we then had to think – what's the claim? Well it turned out the claim was fairly straightforward! He had arrived in Australia, he had applied for asylum, and they hadn't processed his claim. And so there's a device called a writ of mandamus through which you can compel a public official to do their duty according to statute.

And so we sought *mandamus*. And the Government came into court with this heroic argument – that whilst it was true that he had arrived in Australia proper, whilst it was true that he had said he was a refugee, and had asked for protection, there is only one way to seek protection in Australia, and that is by filling out Form 866. And since he hadn't asked for Form 866, they didn't offer it to him, and since they hadn't offered it to him, he didn't fill it out, and because he hadn't filled it out, he didn't have a claim, and therefore there was no duty to fulfil. You see what I mean when I say that this is what the Government will get away with if they can. I thought that was, well, I was going to say laughable – actually it's disgusting that a government would take that position. But then in a curious way the press – who have not really been the friend of those who support refugees – came to our aid. Because the press discovered the fact that by keeping the camp open for the sole purpose of holding one man in isolation, it was costing the Australian taxpayer \$23,000 a day. And the *Telegraph* in Sydney and the *Herald Sun* in Melbourne both did front-page feature articles about the \$23,000 a day man. This was not an act of compassion – it was the politics of envy. They did stories about what sort of accommodation you can get in Australian hotels, in Melbourne or Sydney, for \$23,000 a day – and it's pretty good! Very quickly the government was made to look not only shabby but also ridiculous. And very quickly they came to me and negotiated a settlement on the quiet, and very quickly Aladdin was finally brought into Australia and given a 5-year humanitarian visa. He's now working happily as a mechanic, about to study aeronautical engineering, and he's gradually piecing his life together.

And then we have the 4 major events of October 2001. The government's chances in the election had improved with the public reaction to the Tampa episode. But in October 2001, there were 4 events that happened in quick succession, all of which had a bearing on what the government was prepared to do and condone and on what was going to happen to them at the election. The first, of course, was the Children Overboard episode – the *so-called* Children Overboard episode, a story which looked like rubbish right from the beginning, because why would asylum seekers who have risked everything to save themselves and their families suddenly decide to hurl their children into the sea? I mean, it just doesn't make sense. And then Peter Reith – whom one can assume is lying unless there's evidence to the contrary – embraced the story, and so you knew it was false. And then he started talking vaguely about the existence of photographic evidence, which wasn't produced. And then there was all sorts of to-ing and fro-ing before they managed to produce some rather obscure looking pictures that didn't necessarily tell you very much, and ultimately I don't think anyone in this room believed the story even at the time, and it was beginning to unravel. At the end of October and in early November, the story

was unravelling as the press were pushing for more details about this, because they knew they were being had.

And so the next event that happened worked very conveniently in the government's favour because of the way they exploited it. That was the *Sumber Lestari*, which had arrived in Australian waters on 7 November 2001. It was chased by a customs vessel, and so it accelerated, in order to get to Ashmore Reef. The strain on the engine caused a fire in the engine room, the ship quickly caught fire, and burnt to the waterline. There were 140 odd people on board, and they all ended up in the water. And this is what happened in Operation Relex – it was specifically designed to detect and repel boats bringing asylum seekers into Australian waters. Most people would reckon that if you're going to send out the navy and customs vessels to intercept boats of desperate people seeking help, it would be likely that there would be incidents that would lead to people ending up in the water. I mean, one way or another it's kind of obvious. But notwithstanding the obvious fact that it was possible that people would end up in the water with boats sinking or catching fire, or whatever else may be the case, the customs boat and the naval boat between them had just two rubber dinghies. And those two rubber dinghies had to go around in moderately rough seas and pick up 134 people. It took 2.5 hours, and by the time everyone had been dragged out of the water, 2 women had drowned. They were lucky it was only 2.

The following year an inquest was held in Fremantle by the Perth coroner – an inquest into those 2 deaths. It had been the subject of some agitation by some refugee groups, and so 2 members of the families of the deceased were brought to Australia to give evidence in the inquest. The husband of the 18 year old woman who drowned, and the son of the 53 year old woman who drowned. The son had been on Nauru, the husband had been held on Christmas Island in the intervening time. I was asked if I would appear for the families at the inquest, which I did. And inquests are pretty awful things because you are dealing in a very cold, detached and clinical way with tragic human events. These 2 men were held in the cells each day, and held in the dock during each hearing, not because they were suspected of having done anything wrong at all, but because they were in immigration detention. So they were treated like criminals whilst they were on Australian soil. And each of them gave evidence about the events which had led to the drowning of their mother and wife, respectively. And it was very sad evidence, not surprisingly, and very difficult for them to give that evidence.

The final day of the inquest was Friday 7 November, which happened by chance to be the one-year anniversary of the drownings. And the refugee support group who had agitated for the inquest had arranged a small commemoration to take place in the lawns immediately outside the Fremantle court complex. They had got permission from the Department, from the Court and from the Police, and these 2 men were to be brought up from the cells about 45 minutes before court was to begin, so that they could be present while a small group of good-hearted Australians noted the 12 month anniversary. Half an hour before that little ceremony took place, Mr Ruddock personally withdrew their permission to attend the ceremo-

ny. So it took place while they were 20 metres away in the cells under the Fremantle court complex. His stated reason for withdrawing their permission to attend that little ceremony was that the press might be present, these two men might be photographed, and that might put them in danger in Afghanistan.

Notwithstanding that he'd already refused them asylum, I must say it was probably the most despicable act of a public official in my direct experience, and it still makes me go cold with anger to think that he did it.

Strangely, at the end of the hearing that day, the coroner – as coroners do – asked the families if they wanted to say anything. Coroners do that because it gives family members a chance to unburden. So Moussa, the young man whose wife had drowned, whose only freedom on Christmas Island was a visit to his wife's grave every couple of days, made a statement through an interpreter. He said simply that he wanted to thank Australia for taking care of him, and he hoped that his evidence hadn't upset anyone. It was the most extraordinarily gracious response to an act of wilful cruelty that he had suffered just hours earlier.

And then of course on 19 October we had the SIEV-X. The SIEV-X also led to more disgraceful behaviour by this Government, as the Government resolutely refused to allow the orphaned children of a man in immigration detention in Woomera then to come into Australia where they could be reunited with their only living relative – a resolution which dissolved rapidly in the face of the embarrassing fact that on a photo opportunity Mr Howard had grappled these 2 little kids, grabbed them by the hands because it was a good photo opportunity, and it turned out to be the two little kids who were not allowed into Australia to see their father. That was very quickly fixed up – another really interesting example of the way that the Government's position changes as soon as they're found out.

But the next item that I want to mention which also happened in October 2001, is much less well known, still needs to be resolved, and if we can expose it, then maybe there will be a resolution. And that is the fate of the asylum seekers currently held on Lombok Island – part of Indonesia. Those people arrived at Ashmore Reef in October 2001. They had been seeking asylum in Australia. They are mostly Afghans, and mostly Hazara – Afghans who even *now* are being recognised by the Department as having good claims for asylum, even against the current situation in Afghanistan. They arrived at Ashmore Reef and were held by the navy. They were held for 7 days in the open sunshine, and the families were separated from the single men. At the end of the seven days, the navy forced all the single men to go below decks on the boat that they had arrived in. This was a space which – according to them – was room enough for 40 people, but 160 people we forced into this cramped area, and then the little craft set sail again, and after a time they were brought alongside a Navy vessel which apparently had the family groups on board. The family groups were then taken from the navy vessel and put onto the vessel on which they'd arrived. The naval people then smashed the engine and the generator, and took away the diesel fuel and told them that they were back in Indonesian waters, and that was where they would

remain. They were left there to be found by Indonesian fishermen. Felicia DeStefano has provided me with a copy of an email written by one of these men, and I can't improve on the way he tells the story:

Then asked all the singles to come down inside the boat. We requested them it is not possible for 160 persons to come together in a place, which is enough only for 40 persons. They said only for five minutes we want to tell some thing to you. So all the 160 passengers came down inside the boat, some sat on each other, some were standing. They kept us down by force for two days where the people cannot breathe, eat or sleep because there was not enough oxygen and a there was much smoke of engine. Many people fainted. Each who fainted was taken to upside of the boat like a dead body then navy people poured water on his face or injected him to become conscious and after he was conscious threw him down in the same tight and smelly place. After two days in early morning the officer shouted: 'you are returned back and now you are in Indonesian water'. This sentence was like thunder, which hit the passengers' mind. We shocked and asked them 'if you did not accept us why did you not submit us to UN and why have you deceived us and why... and why...!!??' But there was no ear to hear! The navy people instead of logical reason replied to us with electrical sticks, which they had with them. Then they take the families back to our small boat by force. Because no one was ready to come out of the navy ship the navy people were bringing the children in our boat and beating the men, and women so badly if they did not want to come out of navy ship. By observing this scene some of the navy people were weeping, one even hit his head to the wall of the boat. Then they broke the engine of the boat, took the oil and generator so we cannot go back to Australia and went by speed boat to the navy ship which had brought the families, and sailed away. We remained on the ocean with broken engine and no oil and generator to evacuate the water from our boat.

That is a story which is hardly known to anyone. And interestingly it resonates precisely with some of the details we learned in 2002 when Kate put together a document called *Soldiers, Sailors and Asylum Seekers*, drawn from the stories of people on Nauru. And what is interesting is that the stories of force and trickery, the stories of electrical sticks, are common to the people held on Nauru, the people held on Manus Island, and these people held on Lombok. It is impossible for them to have got their heads together and concocted the details which correspond. Mr Ruddock has publicly denied that Navy personnel have electrical truncheons, and the like. Of course, he is also sometimes a stranger to the truth, and his department is willing to acknowledge very fine distinctions when it comes to admitting – or not admitting – what they do. Interesting story (some of you will know this) – I was at a public forum once, in early 2002, and Philippa Godwin was on the same platform with me. Philippa Godwin was head of Onshore Compliance, and I had an opportunity to ask her in front of an audience of 100 or 150 people something about the not-yet-opened Baxter Detention Facility. It was due to open in that August. I had got hold of a ground plan, and the ground plan of Baxter shows that it's surrounded by a fence, which is described on the plan as a 'Courtesy Fence'! And I asked her why it was that an electric fence was referred to as a 'Courtesy Fence'. It seemed to me not just a small matter of semantics! And she publicly corrected me and said, 'It's not an electric fence', which took me aback... But she went on... 'It's an *energised* fence'. So I suppose they have *energised* truncheons, not electrical truncheons, and that would explain the difference.

They were duly rescued by Indonesian fisherman, and they were taken to Kupang Island, where they spent 40 days, and from Kupang they were taken to Lombok, where they have spent the last four and a half years. They have – most of them – been assessed by the UNHCR as genuine refugees, they are being held in a camp run by IOM, for whose services *we* are paying. They got to Australia, yet they were removed from Australia and dumped on Lombok, and there we continue to pay for their keep. Interestingly, they are receiving lessons in English on Lombok, which is pretty hard to explain, and there are just 92 of them left. The rest, I assume, have decided to return to Afghanistan and take their chances, rather than live an endless life in hopelessness with no prospect of a future. Those people are the forgotten leftovers of the brutality of Operation Relex and the Pacific Solution. And it's a small tragedy of our time that their fate has been largely ignored, because their circumstances are even worse than those of the people who were held in Nauru. Most people in Australia had vaguely heard of Nauru, most people thought it was part of Australia and thought it was just another detention camp. But at least people were aware that we were holding some asylum seekers somewhere. These are the forgotten people. The people held without most of the public knowing it, and no doubt at great expense to the Australian taxpayers. This is something that needs to be fixed and it needs to be fixed quickly. Holding people in isolation and detention, innocent of any offence, is just about enough. And we need to fix it up soon. It is the sort of wanton cruelty that this Government excels at until they are caught out. And we need to embarrass them back into a little bit of decency, and if we don't, well then, their souls are on our consciences.

I think the only other thing I want to add is – and it's right off the subject of asylum seekers – but I want to finish as I began. Right now the government is trying to introduce horrendous legislation which is supposed to make us more safe. It will in fact sell away basic democratic freedoms. In very brief compass, what it does is two main things:

First, it will allow the Federal Police to get a control order which can involve an order that a person remain in their own house without the use of the phone or the Internet, for up to a year. And that sort of order can be extended. Those orders can be made in the absence of the person affected. And when the person affected is given notice of the order, they will not get the evidence on which the order has been made, they'll get a summary of the evidence, which makes it very difficult to challenge the accuracy of the evidence, and therefore very difficult to challenge the making of the order. The other thing that it will enable them to do is to get an order in the absence of the person affected, an order that they be held in preventative detention for up to 2 weeks. This is jailing a person not because they *have* committed an offence, not because they are *thought* to have committed an offence, but in case they were *about* to commit an offence. This will be an Australian first – locking you up before you've committed the crime!

It doesn't need to be proved on the criminal standard that you were going to commit the offence – the balance of probabilities is enough. It can be done in your absence, and when you're notified of it, all you'll get is a summary of the evidence. And by the time you get to court to challenge it – if you can

– you will have already done the time. So we have the possibility of 2 weeks’ jail – just in case – without much chance of overturning it. And lurking in the background – the background against which this legislation will operate – is a law that was passed in October 2004, and amended in May 2005, and it’s the most terrifying piece of legislation, which almost no-one seems to be aware of. It’s the *National Security Information (Civil and Criminal Trials) Act*. What it does is provides that in any litigation, whether Criminal or Civil, if evidence is going to be given by a party, or if questions are going to be asked by a party, or a witness is being produced in Court by a party, and if the Attorney General of the Commonwealth thinks that that evidence or those questions or that witness might jeopardise Australia’s ‘national security interests’, then he can sign a certificate which conclusively certifies that that evidence or those questions or that witness would jeopardise Australia’s national security interests. On making that certificate, the certificate must be given to the court, the court must close the hearing, and in the closed session which can exclude the defendant and the defendant’s lawyers, the court has to decide whether or not to allow that evidence to be heard, to allow those questions to be asked, to allow the witness to be brought into the court. And in undertaking that inquiry, the statute directs the court to give principle weight to the conclusive certificate of the Attorney General.

Now, read literally, it makes it logically impossible for relevant evidence to be produced, for relevant questions to be asked or for relevant witnesses to be brought into the court. Well you might think that maybe this is ok, because it is protecting our ‘national security interests’. Well, what does that phrase mean? It’s defined in the legislation. It’s defined extremely broadly, and includes many things, including our interests in the proper functioning of international law enforcement agencies. So let us suppose that Mamdouh Habib is about to be subject to a control order – and I’m giving short odds on that one – and he says that when he was in jail in Egypt, he was interrogated for about 100 hours by CIA officers. He was fairly thoroughly softened up, and then he was interrogated by Australian Federal Police. If Mamdouh Habib were the subject of a control order on the basis of things he told the Federal Police, he would ordinarily be entitled to adduce evidence of the way he’d been treated by the CIA in the 100 hours of interrogation before he was questioned by the AFP. As you can understand, the way you are treated immediately before an interrogation will make quite a significant difference to the way that you answer the questions. But of course, giving evidence about how the CIA treated him might adversely impact on the way the CIA goes about its business. And it’s an international law enforcement agency, therefore it’s possible, and I would think probable, that the Attorney General would prohibit that evidence from being called. And for Mamdouh Habib, that would make the difference between being able to show that he should not be the subject of a control order, and being *unable* to show that. For him, it could mean the difference between ordinary freedom in a country where he has committed no offence, and house arrest under the strictest conditions for a year or possibly more. This is the most devastating incursion on basic democratic rights, and our Government *will* do it, if they can get away with it. We *know* that they will, because we’ve seen them do it before. So can I suggest that you should be alert, and very alarmed. Right now, our freedoms are at risk like never before. Thank you.

Michael Clyne

Words Excusing Exclusion

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Abstract

The 'war against terror' with its ill-defined enemy has unleashed a new kind of exclusionary discourse which allows people to imagine an enemy among the unknown and strange. This paper focuses on the discourse on asylum seekers employed by Australian politicians from main parties and sections of the media. It shows how the terms 'illegal', 'queue jumper' and 'border protection' and assessments of unrespectable behaviour are used to generate antagonism against asylum seekers and support for government treatment of them. This is contrasted with earlier examples of discourse excluding new arrivals, such as the early versions of Advance Australia Fair and with more recent instances of overt racist discourse. Some comparisons are made with European discourse.

Michael Clyne

Words Excusing Exclusion

Exclusionary discourse has made a comeback in mainstream Australia in recent years. The 'war against terror' has unleashed the latest episode in the historical tension in Australia between the forces of inclusion, openness and tolerance of diversity and those of exclusion and xenophobia. This time an ill-defined notion allows the hearer/reader to imagine an enemy among the unknown and the 'other'. This includes not only prejudice against all Muslims, especially easily identifiable Muslim women, but also against Asians and Africans. Note the overt and unashamedly racist discourse of Andrew Fraser against Australians of Sudanese and Chinese background in his letter (26 July 2005) to the *Parramatta Sun*. Two other recent instances of exclusionary discourse have been Pauline Hanson's overt racist discourse and the public debate on asylum seekers. This paper focuses on the latter, drawing on statements of politicians from the contemporary European discourse on refugees. I will focus on the choice of vocabulary in the representation of asylum seekers in some public discourse in 2001 and put the exclusionary discourse in historical context. cursory comparisons will be made with the public discourse in Europe.

Two incidents provide the occasion for the discourse – the Tampa affair (August 2001) and the 'Children Overboard' affair (October 2001). As both are well known, I do not have to provide details. Both incidents provided the Howard Government with an opportunity to demonstrate its strong 'leadership' in the face of what it projected as a national threat.

Initially the asylum seekers in the leaky boats were excluded through dehumanization – being described by the media as 'boatloads' and 'cargo'. When more attention was given to them, they began to be demonized. I would like to concentrate on the field of words around 'refugee' and the items 'queue-jumper' and 'border protection'.

A refugee is a person who flees (religious or political) persecution. In Australia this word tends to have positive connotations, especially once the people are settled in Australia. Refugees are basically nice people who are worthy of compassion and will usually make a positive contribution to the Australian nation. Most Australians can give examples from their own circle of friends or among well-known personalities. So if the government wanted people to approve of their treatment of asylum seekers, they would have to find another label, one that does not have positive connotations. The contrast is very blatant in the Prime Minister's statement on 8 October 2001 during the 'Children Overboard' affair:

‘Genuine refugees don’t do that.’¹

He was in effect passing judgment on the asylum seekers before their case had been heard by any refugee tribunal on grounds other than whether they were fleeing from persecution. But more importantly, he was ‘leading’ public opinion with the follow-up words:

‘I don’t want people like that in Australia.’

This exclusionary statement echoes ones from Pauline Hanson and David Etheridge of One Nation on ‘unassimilated’ Asian migrants:

‘We don’t want people like that in Australia.’

They professed to speak on behalf of ‘ordinary Australians’ whereas the Prime Minister gave leadership in the opinions of ordinary Australians.

The projection of these harmless people constituting a threat to the nation’s moral standards was continued by Foreign Minister Alexander Downer the same day:

‘Any civilized person wouldn’t dream of treating their own children that way.’²

There are parallels here with discourse on refugees in Europe – the differentiation between real and bogus refugees has been reported in parliamentary debates in Austria, Britain and the Netherlands.³ There is also a European precedent, in Austria, Britain and France, of conservative governments taking over the discourse on refugees of right-wing fringe groups.⁴

The *Herald-Sun* of 8 October, conducted a poll on the topic:

‘Should boat-people who threw their children overboard be accepted into Australia *as refugees*?’⁵

Unsurprisingly 95.67% of those responding voted no.

1.. *Herald-Sun*, 8 October, 2001.

2. *The Age*, 8 October, 2001.

3. Lena Jones, ‘Immigration and Parliamentary Discourse in Great Britain: An Analysis of the debates related to the 1996 Asylum and Immigration Act’, in Ruth Wodak and Teun van Dijk eds, *Racism at the Top: Parliamentary Discourses on Ethnic Issues in Six European States* (Klagenfurt, 2002), 79-106; Maria Sedlak, ‘You really do make an unrespectable foreigner policy: Discourse on ethnic issues in the Austrian Parliament’, in Wodak and Van Dijk, 107-168; Ineke Van der Valk, ‘Parliamentary discourse on illegal immigrants, sylum and integration: the case of Holland’, in Wodak and Van Dijk, 261-282.

4. Eva Vetter, ‘Rassismus – ein internationaler Vergleich’, *Wiener Linguistische Gazette* 51/52 (1994): 40-63.

5. My italics.

If these people were not refugees, what were they? Parliamentarians from both major parties taking part in the debate on 29 August had no difficulty finding the right vocabulary: ‘illegals’, ‘illegal refugees’, ‘illegal immigrants’, ‘illegal arrivals’, and even ‘occasional tourists’. I am not sure that a person can be illegal, but what these terms do is to declare the unauthorized arrivals as ‘non-people’ which enables them and their children to be treated accordingly – detained without trial, under sub-human conditions. (This has parallels with President Bush’s use of ‘illegal combatants’, referring to those imprisoned as terrorists at Guantanamo Bay.)

On 15 June 2004, a guideline from the Australian Press Council cautioned the media against ‘such unqualified terms’ as illegals.

We have mentioned that the behaviour of the asylum seekers was deemed to be contrary to the national family values. In fact they were sometimes depicted as bullies and criminals:

‘We will not let people force their way into this country by undesirable behaviour’.⁶

Because they were brought to Australia by people smugglers, they were linked to criminality. This came out in Opposition Leader Kim Beazley’s ambiguous statement, defending his party’s failure to adopt a different policy from that of the government:

‘It is *not unhumanitarian* to try to deter criminals’.⁷

The Prime Minister collocated ‘boat people, drug runners and other illegals’. This link also came up in the election campaign:

‘Our nation must be protected from the activities of people smugglers, drug traffickers and the introduction of diseases and dangerous goods’.⁸

So asylum seekers were the result of the activities of people smugglers in the same way as dangerous goods resulted from the activities of drug traffickers.

Another negative level for the asylum seekers was ‘queue jumpers’, or as government senator Kay El-lison put it in Parliament on 29 August 2001:

‘queue jumpers over the many *genuine refugees*’.⁹

6. Immigration Minister Philip Ruddock, ABC, 8 October, 2001.

7. *The Age*, 8 October 2001.

8. Prime Minister’s Action Plan for the Future, Election Campaign, November 2001.

9. *Hansard*, 29 August 2001.

This widely employed term directed public antagonism towards the asylum seekers in three ways:

1. It appealed to the Australian mythical national value of fairness.
2. It appealed to migrants and earlier refugees from non-English-speaking countries who have been trying to get their relatives to Australia under the family reunion scheme or their friends in from refugee camps under the humanitarian scheme.
3. It was based on the British dominance of the straight line as a basis of order in society as well as in academic discourse, sport, and the conduct of meetings.

It should be noted that the admission of refugees does not affect the numbers of migrants admitted and that people wishing to flee Afghanistan, Iraq, Iran or the Palestinian Territories do not have a queue in front of an Australian legation to stand in.

Also, according to an exit poll at the 2001 election, 73% of voters from non-English-speaking backgrounds agreed with the government's policies on asylum seekers. In this way the government was able to juggle a position against the asylum seekers which was not blatantly opposed to cultural diversity.

The term 'border protection', suggesting that asylum seekers are a threat to Australia's national sovereignty, needs to be seen in relation to the terrorist attack which had recently occurred in the U.S. The use of the term during the election campaign cannot be freed from association with terrorism even though most of the asylum seekers were claiming to be fleeing from regimes harbouring terrorists. The 2001 election saw strong competition between the major parties as to who can protect Australia's borders best. The first of the following examples actually implies a link encouraged between terrorism and asylum seekers:

'The tragic events of 11 September *and* the challenges to the integrity of our borders will require more resources – and stronger decisions'.¹⁰

'We will protect our borders and our nation's sovereignty'.¹¹

'Only Labor is committed to...provid[ing] the best protection of our national borders'.¹²

The Prime Minister is very attached to 'traditional Australian values' which he contrasts with 'political correctness'. Is the recent treatment of asylum seekers consistent with our 'traditional values'? Keeping

10. PM's letter to voters, November 2001.

11. Ros Clowes, Liberal candidate for Chisholm, November 2001.

12. Anna Burke, sitting Labor member for Chisholm, November 2001

some people out has been part of Australia's discourse for most of its history as a federated state. We only have to think of the White Australia Policy and the dictation test. Recurrent themes in the British colonial history of Australia were the threat of hordes of unwanted people invading Australia from the north, also known as the 'yellow peril'. (These were the days before Islamophobia.)

The recent past has been characterized by the use of inclusive language. This is symbolized in the national anthem *Advance Australia Fair*:

'For *those who've come* across the seas
We've boundless plains to share'.

However, the issues about the time of Federation were a boatload of Chinese from Hong Kong wanting to land on Australian shores, the annexation of New Guinea by Germany, the annexation of New Caledonia by France, and Russian ships seen in the region. The original 'politically incorrect' version of *Advance Australia Fair* ran:

'For *loyal sons* across the seas
We've boundless plains to share'.

'Loyal sons' are defined in another verse as those 'from England, Scotia, Erin's isle'.

Early paranoia about border protection is abundantly evident in a lesser known verse:

'Should foreign foe e'er sight our coast
Or dare a foot to land,
We'll rouse to arms like siers of yore
To guard our native strand;
Brittania then shall surely know,
Beyond wide oceans roll
Her sons in fair Australia's land
Still keep a British soul,
In joyful strains then let us sing
Advance Australia Fair'.

This all underlines the historical tension between open cosmopolitan and narrow isolationist strands in our history. It also demonstrates the manipulation of language and choice of vocabulary to emphasize and generate fear.

Asylum seekers are not the only people who are the object of the language of exclusion. To give just one other example, academics whose research has led them to disagree with the government are another target, as is seen in Industrial Relations Minister Kevin Andrew's retort on 17 November 2005:

‘A group of academics is no substitute for commonsense’.¹³

In these days of wedge politics, we need to be aware and make the community more aware of the abuse and power of language.

¹³Interview on *AM*, 17 November 2005.

David Corlett

Do We Have Obligations To Those We Sent Back?

David Corlett

Research Associate, Politics, La Trobe University

David Corlett is a research associate in Politics at La Trobe University. He has worked with refugees and asylum seekers in the community sector and as an academic. In mid-2004 he traveled to the Middle East and Asia to research the plight of failed asylum seekers returned from Australia. His book, *Following Them Home: The Fate of the Returned Asylum Seekers* (BlackInc) was published earlier the year.

Abstract

Australia has returned failed asylum seekers to places of insecurity and uncertainty. In some instances it has returned people to situations in which they have been treated brutally. The government claims that these people returned voluntarily after undergoing a thorough refugee determination process. David Corlett will speak on his fieldwork experiences following returned asylum seekers to Afghanistan, Pakistan and Iran and how he sees Australia's obligations to these people.

David Corlett

Do We Have Obligations To Those We Sent Back?

Australia has undertaken, by signing the 1951 Refugee Convention and its accompanying 1967 Protocol, not to return refugees to situations in which they will be persecuted.

There are a host of other conventions that Australia has also signed which commits it not to return people to situations in which they will have their fundamental human rights violated – including the Convention Against Torture and the International Covenant on Civil and Political Rights – although unlike the Refugee Convention, the status of these other international instruments have a precarious footing in Australia's protection determination process.

This paper is concerned with Australia's return practice and the obligations Australia ought to have to those it returns. It is based on my mid-2004 research with people whose applications for protection in Australia were rejected and who were returned to the Middle East and Asia. My book, *Following Them Home: The Fate of the Returned Asylum Seekers* (Black Inc, 2005) is predominantly the product of this fieldwork.

Following Them Home describes the plight of those Australia returned. In it, I argue that Australia returned people to situations in which they continued to face unacceptable risks. Australia returned people to situations where they lived in fear and insecurity. Some had been treated brutally. Many of the people I met continued to live with the mental scars from the wounds that they said were inflicted on them in Australia's duty of care.

There was, for example, 'Mohsen', an Iranian. He spent years in Australia's mandatory detention regime, during which time he was subjected to what we know now as the usual humiliations that occur within that system. He attempted suicide on more than one occasion and escaped twice.

When Australia began pressuring Iranians to return, Mohsen started to worry. He realised that his behaviour in detention put him in the front line of those people the Australian Government wanted to rid itself of. The government was planning to focus its pressure on those asylum seekers in detention who were most vulnerable and those who had caused trouble in the past.

With the threat of forced return and his psychological deterioration in detention, Mohsen decided to sign to 'voluntarily' return to Iran. He did not think that he would be safe. Rather, he told me that given that he was so psychologically damaged that he was prepared to take his own life, it would be better to risk being killed in the land of his parents.

On return, Mohsen told me that he was immediately detained and tortured for what he guesses was about forty days. Eventually, he escaped from a medical centre and fled to Turkey where he was jailed for being there illegally. He escaped the Turkish jail with the help of other Iranians who, when they heard his story, realised the seriousness of Mohsen's plight. He then fled to Greece and is now in another European country seeking asylum there.

Mohsen was returned to a situation in which he was persecuted. Australia's onshore protection determination system got it wrong. One of the reasons that Mohsen told me that he wanted to tell his story – and it was a story he told with great difficulty both because of the trauma involved in recalling it and because he was terrified that the Iranian authorities may still be able to track him down – was so that his RRT member who said that he did not have protection needs would understand that the decision was wrong. Mohsen told a friend that, because of his torture upon return, he had 'lost his soul'. Such a cost is a high price to pay for a wrong assessment.

Yet I suspect that the Australian Government may be tempted to mount a technical-legal defence against the suggestion that by returning Mohsen to a situation in which he was persecuted Australia breached its non-refoulement obligations. The line would be that Mohsen wanted to return. He signed a voluntary repatriation agreement and returned of his free will. He chose to return to Iran and in so doing put himself in the position that he was persecuted.

Such a position, however, would be barely defensible. Mohsen's return was not voluntary in any meaningful sense. He felt compelled to return. He feared that he would be forcibly repatriated unless he signed to return. This was a fear that the Australian government was keen to promote. Indeed, it deliberately set out to promote it. And while a return without physical force posed risks, a forcible return would have drawn even more attention to him.

Nor was it only fear that meant that Mohsen's decision to return was involuntary. His failing psychological state – a product of being detained for years in Australia's immigration detention regime – meant that the decision to return was not a decision made freely. Rather, and like so many I spoke with during the course of my fieldwork, Mohsen's decision to return was in large part an attempt to save his mind and a sense of his own humanity.



Mohsen's plight is, to be sure, at an extreme end of my research findings. Yet there were others I met who were also subjected to serious brutality after being sent from Australia or from Australia's camps in the Pacific.

I met with an Afghan man in the Pakistani city of Quetta, who, like some 400 other Afghans had returned from Australia's Pacific Solution. This man was convinced that to remain on Nauru would bring

only further psychological harm. The prospect of reuniting with his family was the final motivation to return to Afghanistan. But by the time he got back to Afghanistan, his family had fled. So he began an epic search across three countries to find them. He ended up in Iran where the police caught him. He was jailed for a month during which time he was beaten and tortured by being put into a drum and rolled. He was eventually released and fled Iran into Pakistan where he is living the life of an illegal immigrant.

Or there was a young man whom I call in my book Abdullah. He also returned from Nauru in order to be with his family. He travelled to his village to find that, while he was away, they had gone and a man from his village had taken over the family's land. This man, 'Uncle', threatened to kill Abdullah if he sought to reclaim his family's land so Abdullah fled Afghanistan a second time. He stopped in Pakistan for a while then went to Iran. From Iran, Abdullah thought he would try to get to Europe so he organised with a smuggler to cross into Turkey. The journey was harrowing and Turkish authorities eventually captured Abdullah. He was beaten by the Turks and then thrown back over the border where the Iranians also beat him. He was sent back to Afghanistan but this time fled straight back to Pakistan. When we met, Abdullah guessed that he was about 17 years old.

Since I returned from my fieldwork, Abdullah has become increasingly desperate. Terrorist violence in Pakistan against Shi'ites is ongoing. Most of the Afghans with whom I spoke and who sought protection in Australia were ethnically Hazara and most Hazaras are followers of the Shi'ite branch of Islam. The people with whom I spoke felt, therefore, very much the target of anti-Shi'ite terrorist violence. As well as this, Abdullah and the other Afghans I spoke with in Pakistan fear the Pakistani police which they say threaten them with jail or return to Afghanistan should they not pay substantial bribes.

As his desperation has grown, Abdullah has become increasingly keen to find a place where he can be safe and where he can begin to build something of a life for himself. He called me some time ago saying that he wouldn't be in contact for a couple of months. He was going to Islamabad with a smuggler in another attempt to get to Europe.

A couple of months later, I spoke to Abdullah again. He had gone to Islamabad but said that he had been caught by the police and sent back to Afghanistan. He travelled to Kabul and then thought that he would see if his parents had returned to his village. They had not. Instead, the 'uncle' detained Abdullah for several weeks before Abdullah was able to convince him that he hadn't intended to return to Afghanistan and that he did not want to reclaim the land.

Abdullah travelled to the border of Pakistan and was picked up by the Pakistani border guards. He said that he was detained for about a month before he was released again. He continues to live in fear of terrorists and the police. He also lives in desperate boredom, his thoughts oscillating between his next attempt at escaping to a place of security and utter despair.

What can these stories tell us about Australia's return policy and practice and its obligations?

There is considerable evidence to suggest that these men – and many other Afghans who returned from Australia and its Pacific Solution – ought to have been found to be refugees.

Some months ago, when considering the case of an Afghan Hazara Shi'ite whose application for ongoing protection had been rejected by the Immigration Department and the Refugee Review Tribunal, the Full Federal Court found that while the Taliban was no longer the central government in Afghanistan, this did not equate with the fact that the man, referred to as 'QAAH', was safe from persecution.¹

As I have already noted, most of the Afghans with whom I spoke in Afghanistan and in Pakistan were Hazara Shi'ites. They are people who face precisely the same risk of persecution from which QAAH was saved. Indeed, the people with whom I spoke had stories largely similar to those who remained on Nauru and have, in the end, been found to be refugees and are now in Australia. The main difference between those I met and those who are now in the Australian community as refugees is that those I met could tolerate detention no longer. In his book, *Freeing Ali*, Michael Gordon quotes a letter from the prominent migration agent Marion Le to the Minister for Immigration. Le is the only independent legal advisor to have been permitted to travel to Nauru to speak to the detainees there. She discovered that many of the people whose cases had been repeatedly rejected were indeed refugees and that the decision-makers had got it wrong. Le wrote in the letter: 'How many Afghans, who gave up their claims and returned to their region, only to flee again into Pakistan and Iran, were also poorly served by our decision-making process?'²

I doubt we will ever know the answer to this question and I suspect that there is little interest on the part of government to discover the answer. But I also suspect a significant number of the many hundreds of Afghans who returned from camps in Australia and the Pacific may have been wrongly assessed. If this is so, it represents a large-scale breach of Australia's obligations not to return refugees to situations in which they risk being persecuted.

Yet even if the Australian Government got it right and these people were not refugees, ought they have been returned? It seems to me no. Even if they were not individually targeted for persecution on Convention grounds, the return of people to a place that was clearly still in the throes of violent conflict and where there was no rule of law, is unjustifiable. And the Australian Government ought to have known that this was the case. There was, even before the UNHCR issued revised country information about Afghanistan in early 2004, a widespread understanding that Afghanistan was not safe. This highlights the need for a complementary protection regime in Australia which ensures that people who, while not refugees in the strict legal sense, are granted protection from other forms of human rights violations.³

1. QAAH v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 136 (27 July 2005) available online at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2005/136.html>.
2. Michael Gordon, *Freeing Ali: The Human Face of the Pacific Solution* (Sydney: University of New South Wales Press, 2005), 109.
3. See for example, The Refugee Council of Australia, The National Council of Churches in Australia, Amnesty International Australia, 'Complementary Protection: The Way Ahead', April 2004. Available online at <http://www.refugeecouncil.org.au/docs/current/comp-protection-model.pdf>.

The Australian Government might also suggest that it did not make Abdullah and others travel from Afghanistan and Pakistan. They were not beaten or tortured in Afghanistan. And Australia could not control their fates in countries to which they travelled illegally in any case. Australia purely facilitated their return to their homeland.

Again, I think that such an argument would be dubious. Australia created the environment in Nauru, from which these men felt compelled to escape. The conditions on Nauru – including the lack of resources – contributed to these men losing contact with their families. And this loss of their families set off a train of events which led to the abuse in Iran and Turkey. Given what Australian officials ought to have known as they were returning these and hundreds of other Afghans, Australia should be seen as considerably responsible for the fate of these people. Australia ought to have known that there was a reasonable likelihood that these men would need to flee Afghanistan (as reports indicated that many were doing) and that the countries into which they would flee would be unwelcoming to say the least.



Not everyone with whom I spoke was returned to situations of profound lack of safety. In *Following Them Home*, I suggested that several of the Iranians I met were not refugees at the time that they arrived in Australia. It is possible that some of the Afghans, those who can live in Pakistan without being harassed by Pakistani officials because they have access to Pakistani documents, similarly did not face persecution in Pakistan, although they did face a broader threat of terrorism on account of their ethnicity and religion. People without protection needs broadly understood should probably have been returned. The problem with Australia's return practice is that by the time people who ought to have been returned were returned, they had been damaged by their detention in Australia.

The story of the Kadems raises such concerns. They are a family, including four boys and two young girls, who were returned to Iraq. The family was returned in a state of unspeakable disrepair. The father and mother had both considered taking their own lives because of what they had endured in Australia; one son had become psychotic and a heroin addict and the other sons had self-harmed.

And there is the case of the Palestinian man, sent to Thailand because while he was not recognised as a refugee, Australian immigration officials seemed to accept that his fears of returning to Syria were indeed real. The United Nations High Commissioner for Refugees is currently paying for his psychiatric care in Bangkok – his ill-health, he says, is the consequence of his time in Australia.

These cases raise different obligations beyond those associated with the need for protection (although the case of the Kadems and of the Palestinian man also reiterate the failure of the Australian system to protect those who need it).

Many of the people Australia has returned continue to suffer the effects of their treatment in Australia. Returnees spoke of ongoing psychosomatic symptoms. They also spoke of something deeper. They said

that they had lost their humanity in Australia's detention camps – both here and in the Pacific Solution. They spoke of no longer being able to connect with people in the way that they once did. Some also spoke of being institutionalised in Australia's detention regime.

There seems to be an increasing recognition, across the Australian community, including in government, that the long-term detention of asylum seekers causes significant harm to those caught within it.⁴ That such harm is done to people while they are in Australia's duty of care means that Australia ought to be considered to have obligations towards them.

The damage inflicted on asylum seekers in Australia's refugee determination system also highlights the counter-productiveness of Australia's response to asylum seekers: it seems to me to make no sense to destroy the dignity of people, to undermine them to such an extent that they cannot make decisions, and then expect them to make the seemingly impossible choice to return to the place they once fled.



Return clearly poses a dilemma. Arriving in Australia does not entitle non-citizens to remain here. The protection determination process exists to sort out those who need protection in Australia from those who do not. People who do not have protection needs ought to be returned. If they are not, the onshore refugee determination process risks becoming a de-facto migration stream. Should this occur, the institution of asylum is diminished. Indeed, it is for this reason – to protect the institution of asylum both domestically and internationally – that advocates, academics and government ought to seriously engage in a discussion about return. Gibney and Hansen have argued that the failure on the part of liberal democratic states to return rejected asylum seekers has led to the development of mechanisms designed to exclude asylum seekers from accessing the scarce resource of protection in these states.⁵ If they are correct, the failure of such states to return has contributed to the diminution of protection more generally. People concerned with enhancing protection need, therefore, to engage in discussion about return.

Yet my research suggests that Australia has been all too willing to return people to precarious situations. Such people are now beyond Australia's sovereign jurisdiction. They are in the territory of other sovereign states. Nonetheless, Australia ought to be understood to have obligations towards these people. They sought protection here and instead were returned to places in which they were persecuted or in which their basic human rights were threatened. Others were returned after being psychologically damaged by Australian policies and practices. Australia should now seek to make amends for its political and policy failures. It should create a means by which those who were returned to situations of danger or who were returned as broken people could, if they desire to do so, return to Australia in an attempt to rebuild their lives.

4. See for example, Federal Court of Australia, *Sv Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2005] FCA 549 (5 May 2005). Available online http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/549.html.

5. Gibney and Hansen, 2003, 'Deportation and the liberal state: the forcible return of asylum seekers and unlawful migrants in Canada, Germany and the United Kingdom,' *New Issues in Refugee Research* (Working Paper No.77), available online at www.unhcr.ch.

Michael Gordon

The Media's Performance: An Insider's View

Michael Gordon

National Editor, The Age

Michael Gordon is the national editor of The Age. He has been a journalist for more than 30 years, has a commerce degree from the University of Melbourne and has written books on Paul Keating, reconciliation and Australia's treatment of asylum seekers.

Abstract

Michael responds to criticisms of the performance of the media since the Tampa episode of 2001, outlining the obstacles faced by journalists and some of the ways they were overcome.

Michael Gordon

The Media's Performance: An Insider's View

I would like to address three broad questions in my remarks this morning: did the performance of the Australian media fall short on the issue of asylum seekers; what was I attempting to achieve in writing my book, *Freeing Ali*, and, finally, whether the issue is now less important, given that the families with children are now out of detention and that much progress has been made on other fronts.

The first question was underscored in a review of David Corlett's book by Alan Kennedy in the *Walkley Magazine*. David's book, he wrote, was reason for the Australian media to hang its head in collective shame.

Here was a book that should not have to have been written, because if the Australian media had been doing its job the stories of our treatment of asylum seekers and the fate of many who were sent back would be etched into the Australian psyche.

The Kennedy thesis is that only the revelations about the treatment of an Australian resident, Cornelia Rau, led to questions being asked, failing to mention that this story would not have seen the light of day had my colleague, Andra Jackson, not alerted her family to her incarceration by writing a story. He paints a picture of a gullible, lazy and negligent media that ran the easy lines about 'five-star asylum seekers', that folded like a pack of cards in the face of departmental arrogance and that failed to detect what Mick Palmer found in his report.

I'm not here to defend the craft of journalism and I am not equipped to offer a definitive view on the case of Ali Bakhtiari, the case Kennedy dwells on in his review, but I would argue that the overall performance was a good deal better than he suggests. Indeed, I think the issue has prompted some terrific journalism that has influenced public opinion and, in turn, made the Government more inclined to listen to critics of the policy.

To the extent that there were failings, I think it is worth bearing in mind three factors.

The first is the extent our government went to make it difficult to give a human face to its policy. This began, of course, with the Children Overboard affair. As the Director-General of Defence Pub-

lic Affairs, Brian Humphreys, told the Senate committee investigating the children overboard affair: ‘We got some guidance ensuring there were no personalising or humanising images taken of SUNCs [suspected unlawful non-citizens]’. When Humphreys was pressed on this statement, he agreed with the proposition that ‘what we have is the Minister for Defence saying in the immediate post-Tampa environment, “Don’t humanise the refugees”’.

The inquiry concluded that, on the available evidence, the public affairs plan for Operation Relex, the government’s post-Tampa border protection regime, had two clear objectives.

The first was to ensure that the Minister [of Defence] retained absolute control over the facts which could and could not become public during the Operation. The second was to ensure that no imagery that could conceivably garner sympathy or cause misgivings about the aggressive new border protection regime would find its way into the public domain.

But the effort to make it hard for the media to tell this story continued well after the initial phase. One key element of the policy of offshore processing was the inability of the media – or human rights activists or lawyers – to access asylum seekers on Nauru and Manus Island. And, of course, there was the refusal to answer questions on specific cases, ostensibly in the interests of the privacy of the asylum seekers.

Some journalists like Bronwyn Adcock from the SBS *Dateline* program were able to infiltrate one of the Nauru camps and give a graphic indication of the conditions being endured by those in offshore detention. But without official sanction it was impossible to be able to talk at length with the asylum seekers and tell the whole story.

A second factor inhibiting media coverage was the attitude of the asylum seekers themselves. Such was their fear of the power of the department and the minister that they were extremely reluctant to take a public profile. Because of the temporary status of those released into the community after being found to be refugees, they suspected any criticism of the way they had been treated would result in their removal.

In this environment, it was difficult to locate those who had been involved in such episodes as the SIEV-X tragedy or the Children Overboard affair – and to convince them to tell their stories once they were located. In many cases these people had enough on their plates dealing with past traumas and the challenge of adapting to an uncertain life with limited government support. Seeking them out, I felt a bit like Edward Behr, who titled his account of his time in China and South East Asia during the 60s and 70s: *Anyone Here Been Raped and Speaks English?*

Even this year I witnessed the palpable fear that public exposure would be counter-productive when I visited an Iraqi woman who had been transferred from Nauru to Maribrynong Detention Centre

while she received medical treatment for an injury sustained during the Children Overboard rescue. I have no doubt that the publication of that story, including the advice from her doctor that she should be released into the community to maximise her prospects of recovery, had some influence in achieving this result. But each time I jotted a note during an interview with her husband in the detention centre the woman became visibly distressed.

A third constraint was the attitude of those members of Parliament who were working very hard within the government to soften the harsher edges of the policy. Tight discipline has been one of the hallmarks of the Howard Government and any suggestion that these MPs were inclined to go public with their campaign would set back their chances of achieving a positive result. Indeed, even when some concessions were made and given prominent treatment when they were leaked, they proved to be largely illusory. I suspect this is why, in the end, Petro Georgiou and his colleagues chose to go public with his private members' bills and force the Prime Minister into serious negotiations.

All of this is not to suggest that failings of the media can be totally excused. They cannot. Because the issue was out of sight and out of mind for many, indeed most, Australians, many media players saw little need to pursue it. It wasn't going to put up circulation or improve ratings.

Stories need both an angle and substance and, in the absence of obvious new developments, there have been times when it has been difficult to present what is happening on Nauru, or at Baxter, or on Lombok for that matter, in compelling ways – ways that enabled readers or viewers to relate to those who are suffering under our border protection policy.

Since the decision to turn back the Tampa in August of 2001, my role in writing about national issues involved devoting considerable energy to the issue of the Government's treatment of those who attempted to come to our shores without authority, mostly fleeing the Taliban in Afghanistan and Saddam Hussein's regime in Iraq. From early in 2002, I sought approval to visit the offshore processing centre on Nauru.

My short book, *Freeing Ali*, draws on my experience covering the issue over the last four years and it has three broad objectives: the expose of the inhumanity of the policy; to reveal the role of so-called ordinary Australians in changing it and assisting those either in detention or on temporary visas; and to put a human face on the policy by telling the stories of people like Ali Mullaie.

The MP who led the push to change the policy, Petro Georgiou, wrote a foreword for my book that puts this period in context and responds to the Government's principal justification for treating these people with less compassion than those who waited in refugee camps and came the so-called 'right' way.

As Georgiou expressed it: 'If the uninvited offend against our preference for an orderly migration process, these stories persuasively elucidate why escaping from persecution is not an orderly process.'

But I think it is also worth stating that the demonisation of asylum seekers by the Howard Government was not a uniquely Australian phenomenon. As Erika Feller, Director of International Protection, at the UNHCR told a conference in Sydney last week:

Today asylum seekers are repeatedly mis-characterised as criminals, 'possible terrorists' or illegal migrants whose presence is to be managed as a matter of border and crime control, and whose protection needs are a secondary issue. With a taint of illegality, abusive behaviour or criminality hanging increasingly over asylum seekers, perceptions about which are genuine refugees, and what is the nature of the refugee problem, have also started to change. How a problem is characterized can be very significant to how it is managed. To put it simplistically, to see the refugee problem as an issue of human rights creates protection space. To see it as essentially an immigration issue works often to deny protection to those in need. The mischaracterization of the issue, particularly in the developed world, has contributed to a serious reduction here in the rights accessible by refugees and the responsibilities to them which States are prepared to acknowledge.¹

Thankfully, and credit must go to Georgiou and his colleagues and people like yourselves who maintained the pressure, the situation in Australia is now much improved, with children and the majority of long-term detainees now in the community and increasing numbers of those who were on temporary protection visas set to win permanency and the right to seek being re-united with immediate family members.

Indeed, the great pleasure for me this year has been in seeing the before and after situations of virtually all the last 54 on Nauru – the utter despair and hopelessness of their situations on Nauru and the enormous joy and optimism once they are in the Australian community.

But, sadly, the story is still a long way from being over.

On Nauru as we speak, there are still two asylum seekers, who were told their claims for refugee status were valid but that they were considered a security threat to Australia as a result of the assessments by ASIO. Both say they cannot understand why they received adverse findings, though both expressed frustration when I was in Nauru at the way their ASIO interviews had been conducted. One has very bad eye sight and is suffering greatly from being alone.

1. Erika Feller, 'The responsibility to protect – closing the gaps in the international protection regime and the new EX-COM Conclusion on Complementary Forms of Protection', presentation to the 'Moving On: Forced Migration and Human Rights' conference, Sydney, 22 November 2005: <http://www.unhcr.org/cgi-bin/texis/vtx/admin/opedoc.htm?tbl=ADMIN&id=43a692122>.

There is also the issue of permanency for those who have recently been found to be refugees. If someone is found to be a legitimate refugee after spending nearly four years in detention, how is it fair that they wait until their temporary protection visas expire in three or five years before being eligible to be re-united with the families here or even visit them in their country of birth?

Assadulah Qazahkil, from Afghanistan, and Mohammed al-Shammari, from Iraq, both have wives and six young children they have not seen for around five years. They have been found to be genuine refugees, yet they have no idea when they might see their families again. It isn't fair. The contrast, of course, is the approach New Zealand took in not only accepting so many who were intercepted on their way to Australia, including on the Tampa, but in locating their families and bringing them to New Zealand to start new lives.

And there are many other unresolved questions, too, including those that go to the support for those who are now trying to rebuild their lives in the community.

Then there is the issue of those who remain stranded in Indonesia, including those on Lombok. A number of these people have refugee status. At least one has immediate family members who are Australian citizens. A number who were intercepted, either by Indonesian or Australian authorities en route to Australia, have been found not to be refugees under the terms of the convention, but cannot be returned. A solution must be found for them and Australia has a responsibility to find that solution.

As the UNHCR stated in December 2004 on the concept of effective protection as it related to Indonesia:

Asylum seekers and refugees in Indonesia do not have lawful residence in the country, and are tolerated by the authorities, thus risking arbitrary detention by local law enforcement agencies, and even refoulement under the Immigration Law. Despite UNHCR's intervention, legal regularization of the status of asylum seekers and refugees with the authorities has so far been unsuccessful. There is no lawful access for these persons to the labour market and thus they are not able to work legally, which obviates any adequate and dignified means of existence. There is no possibility of exercising any civil, economic, social or cultural rights. Durable solutions are not guaranteed either, and there are considerable numbers of UNHCR recognized refugees who are rejected for resettlement, and who remain without any prospects of a durable solution. Furthermore, there are no options for family reunification, nor any systematic means, established by the State, of identifying specific protection needs of refugees, including those with special vulnerabilities, nor of addressing them.²

2. 'UNHCR's views on the concept of effective protection as it relates to Indonesia': <http://www.unhcr.org.au/UNHCR-protlegal-EPIndonesia.shtml>.

And there is more. At least three refugees who are in the community on temporary protection visas have wives and children who have been stranded in Jordan for more than three years after being forced to flee from their homes. Surely it is time for these people to be afforded permanent protection and assisted in being reunited with their families.

In short, I believe that while there is much to be thankful for as 2005 draws to a close, the job for those who support a more humane policy is not yet done – and the task of the media in covering the story is not yet complete.

Ida Kaplan

Pursuing Justice and Recovery for Asylum Seekers: A Psychological Perspective

Ida Kaplan

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Abstract

The experiences of refugees and asylum seekers are not incidental by-products of war and conflict but are the result of systematic and planned attempts to destroy them. The means of destruction include torture, planned displacement, ethnic cleansing and increasingly the targeting of children, because they are the future of any community. Distinctive issues for understanding the impact of violence, displacement and seeking refuge are presented. Cognitive, social and emotional effects are far-reaching affecting health and development. For the young especially, notions of good and bad, trust in others and the future can be irrevocably changed, influencing the development of fundamental values about self-worth and life itself. Promoting recovery and healing requires a broad conceptual framework including the restoration of meaning and justice.

Ida Kaplan

Pursuing Justice and Recovery for Asylum Seekers: A Psychological Perspective

In this paper I am going to present in some detail what the adverse psychological effects of being an asylum seeker are and how we can contribute to mitigating those effects. This is an enormous challenge given that the political environment is fundamentally hostile to asylum seekers, we still have a mandatory detention policy and we have a temporary protection system for those who arrive on our shores or airports without authorisation.

For those who arrive with some sort of valid visa, the conditions are better – they are allowed to live in the community but without access to any financial assistance or Medicare rights if they fail to be recognised as refugees after the first stage of determination by DIMIA, or if they fail to lodge a refugee application within 45 days after arrival. (There are some exceptions to these entitlements.) If their application fails at the second stage of determination by the Refugee Review Tribunal, and they proceed with a humanitarian application, they not only have no income entitlements, but they lose their work rights. (Again there are some exceptions to this general rule.)

Psychological Effects of the Asylum-Seeking Process

Essentially, the asylum-seeking process is inherently re-traumatising for people who have experienced violence and human rights violations prior to their arrival in Australia. The nature of their experiences does vary depending on the country of origin and the degree to which a person has experienced violence directly. For some countries such as Iraq or Afghanistan it is likely that everyone has been the victim of human rights violations.

Last year, in 2004, I attended an Australian-Iraqi forum. I listened to presentations by the President of the Iraqi Academy of Sciences and the President of the Organisation for Human Rights in Iraq.

They gave accounts of their own torture and the torture of their friends. They described in detail the methods of torture which were used. One presenter, although a survivor himself, quite spontaneously expressed his shock and horror over what human beings could do to one another, as he showed pictures

of amputations and burns and a picture of his friend who had been blinded as a result of cigarettes being put out on his eyes. Their accounts highlighted what has now become well known for the case of Iraq – men, women and children were tortured, not for information they held but as part of the reign of terror. And that is the main purpose of torture – to crush opposition and maintain power.

A film which transformed my understanding of torture from an incomprehensible evil to one of an all too human and systematic quest for power and control was Amnesty International's film 'Your Neighbour's Son'. In that film the recruitment of torturers was shown.

The Greek military recruited unemployed young men with *anti-communist leanings*. In their training they were *brutalised* but in their *graduation* ceremonies they were bestowed the highest honours and received the paraphernalia of power – beautiful uniforms with symbols of belonging to a special force. They had also been taught about their special duties to protect the *national interest* and to see their future victims as *vermin*. I will never forget the footage of a young man describing (these are his words) the intoxicating power of boarding a bus and everyone shrinking with fear. There were also the unforgettable words of one of the chief torturers they interviewed. He was a father himself and coolly stated that he would have tortured children.

As a psychologist I realised with horror how once ordinary human beings had been made into torturers by manipulating normal human needs for belonging and self-esteem and the human need to avoid humiliation and helplessness. This was *not evil* in the sense of a *mysterious inexplicable force*, nor was it *banal*.

Torture and other forms of systematised violence are designed not just to destroy individuals but their communities. At the Victorian Foundation for Survivors of Torture we have worked with survivors of human rights violations from over 40 countries. Some of those countries are: Cambodia, Vietnam, El Salvador, Chile, Argentina, Uruguay, Sri Lanka, East Timor, Iran, Iraq, Afghanistan, Somalia, Eritrea, Ethiopia, Sudan, Bosnia-Herzegovina, Kosovo. In all cases targeted individuals have been part of communities who represent a threat to a faction or government intent on holding power.

Human rights violations and state sanctioned violence derive their power to destroy in several ways. At VFST we use this analysis to understand the impact on individuals, families and their communities.¹

The destructive impact on individuals and communities can be far-reaching and transgenerational. There are four key ways in which persecutory regimes can destroy individuals, families and communities.

1. VFST, *Rebuilding Shattered Lives* (Victorian Foundation for Survivors of Torture, 1998).

1. Breakdown can be achieved or is attempted by creating a state of terror and chronic fear, and helplessness. Helplessness and fear are manipulated to the extreme in torture. Quoting from Kate Millett:

[T]orture is fear – it's the not knowing, the uncertainty of menace that drives you to panic. Not just what they do to you, but what they may do to you next, what they have the power to do to you, at any moment, at every moment – and if the world keeps silent afterward, torture is not only victorious but permanent, eternal and continuous.²

Paralleling the victim's necessary submission to his or her torture, a community's safety is made dependent upon submission to the oppressor.

2. The second destructive set of elements is the systematic disruption of basic and core attachments to families, friends, and communities. The disruption to relationships produces isolation, intense scrutiny of others and outright distrust. Many people are unaware of how intimate relationships are affected. Under torture the torturer's aim is to have total control over their victims and this is sometimes achieved by intermittently granting small favours or small comforts. This fosters dependence on the torturer. Once the victim is released, the survivor will avoid dependency, it being associated with captivity and the shame of having been dependent. The long term effect is isolation which resonates with the torturer's famous boast – 'no one will ever know, no one will ever hear you, no one will ever find out'.³

It is also not widely known that the torture survivor avoids contact with others for fear of infecting others with death or evil. Lifton calls this the 'death taint'.⁴

Even greater destructive power emanates from the deliberate disruption to attachments between children and parents. This is achieved by destroying families through rape of women. It also includes the deliberate targeting of children including the use of torture.

3. The third destructive element results from people being part of and witness to violations which occur on a mass scale. This can dramatically change at an existential level how a person sees themselves, other people and the world at large. The seeming capricious acts of violence taint the survivor with a sense of being disposable and discardible. The rule of law has failed, or serves oppressors, independent judicial processes do not operate. Protection can only be sought through flight. In some cases anger and injustice can be harnessed for retributive justice.

2. Kate Millett, *The Politics of Cruelty* (London: Penguin, 1994).

3. Millett, *The Politics of Cruelty*.

4. R. J. Lifton, 'From Hiroshima to the Nazi Doctors', in *International Handbook of Traumatic Stress Syndromes*, ed. J. P. Wilson and B. Raphael (New York: Plenum Press, 1993), 11-24.

4. Finally, shame and guilt are the most destructive effects – to the individual. Even when nothing could have been done to change a situation, people imagine that they should have been able to do something. This is a particularly enduring torment for children and adolescents.

Robert Jay Lifton, amongst many other prominent writers in the field of trauma, wrote about survivor guilt – the terrible feelings which accompany survival in the face of others having not. He writes that it is inevitable that people who witness harm being done to others whilst being helpless to do anything about it experience a sense of *failed enactment*.

In ordinary circumstances, failed enactment is the basis for healthy guilt. But torturers, perpetrators and oppressors purposefully plan to put their victims in situations where they transgress their most sacred values and moral principles rendering them weak and ashamed. Forcing the victim to witness atrocities committed against others is deliberately contrived to maximise not only the person's fear but to force them into a position of having failed to protect loved ones. As Judith Herman writes, 'the sense of shame and defeat comes not merely for his/her failure to intercede but also from the realisation that his/her captors have usurped his inner life'.⁵

Retraumatization

It is against this background that one can readily understand how detention and the conditions under which asylum seekers live in the community leads to so much harm. I do not think that any psychiatric diagnostic system captures the assault on safety, connections, trust and dignity which accompanies human rights violations wherever they occur.

Figure 1 (page 51) summarises the way the retraumatization occurs.

Asylum seekers live with constant uncertainty, under the threat of return against their will. This maintains the anxiety and fear caused by previous violence. Furthermore, threatening circumstances in the host country such as prejudice and exposure to news of continued violence and threats to family in their country of origin stimulate new fears. In some countries family members will be interrogated. With fewer rights than citizens of the host country and far fewer resources, asylum seekers constitute an extremely powerless group.

It takes little to imagine how a detention regime with its confinement, guards and the very fact of being detained without having committed a crime would re-evoke in survivors of torture and trauma past repression.

5. J. L. Herman, *Trauma and Recovery* (New York: Basic Books, 1992).

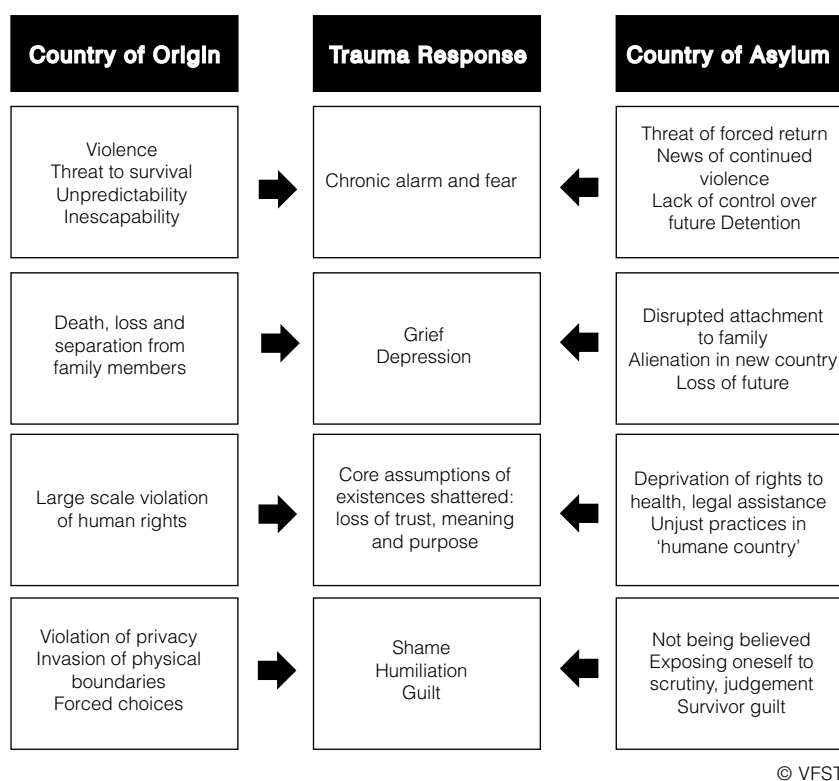


Figure 1. Country of Origin Antecedents of the Trauma Response and Maintenance in the Country of Asylum.

The sense of loss due to separation from family is acute and becomes more intense with the passage of time. The asylum seeker is robbed of their vision and hope for a new life. One of my clients who was tortured and raped described how being left alive meant that she could start again. Two years after her arrival in Australia she was still hopeful of being accepted. When her rejection came she became severely depressed and highly symptomatic, reliving her past experiences of torture.

Central assumptions about human values and rights continue to be assailed in the host country. Government policies and the rapid changes to them create a deep sense of injustice. The violation of human rights and the injustice of subjecting people to degradation is the mark of the oppressor. Acts of injustice in a country which was sought for protection are triggers for previous trauma and renew stimuli evoking betrayal of human values. A sensitivity to injustice understandably develops. Unfortunately survivors can become victim to an inability to tolerate any incursion on fairness. As a result everyday life can become a constant source of frustration and anger.

Guilt is probably the source of greatest pain. One of the factors which has broken the spirit of people held in detention for long periods of time, if not irrevocably harmed them, is their complete inability to contribute to the well-being of loved ones whilst held in such conditions. People risked everything for safety – rarely just for themselves. And instead of being honoured for that sacrifice, for we certainly bestow honours of bravery on people who risk everything to save others, they have been vilified and blamed.

Recovery Through Justice

Until the asylum seeker is successful in obtaining permanent residency, the asylum seeker clearly cannot achieve a sense of safety. Legal advocates and other services are critical to contributing to decision making processes. The public and community based organisations can contribute through English classes, accommodation and supporting employment seeking and job provision. What is terrible about the loss of work rights is that even voluntary work is prohibited.

The greatest contribution can come from reducing isolation and the loss of faith and trust in human beings. This can be achieved in all sorts of ways through forging friendships, recognition, providing financial assistance which allows telephone calls to be made to families overseas, genuine and consistent relationships, and especially support for children and young people who are developing and internalising the goodness or otherwise of human relationships.

There are ways to assist with guilt, not by telling people that there is nothing else they could have done or can do, but by exposing the intentions of perpetrators, the purposeful intent, the manipulation of the victim's guilt to render them passive, also the intent of government policy which creates victims rather than survivors in order to deter others. In this way self-blame can shift and energy for exposing injustice can be harnessed. This is obviously a long term process. Critically important in the shorter term is providing survivors with some means to meaningfully assist family members still living in circumstances of danger.

Where honour cannot be officially bestowed it can certainly be bestowed by individuals and communities working with survivors. The value of the work of professionals and volunteers is incalculable in this regard. Material support to asylum seekers for example is not just about providing food and shelter – it is a recognition of the wrongs they have been subjected to.

Susan Kneebone

The Legal and Ethical Implications of Extra-Territorial Processing of Asylum Seekers: Europe Follows Australia

Susan Kneebone

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Associate Professor Susan Kneebone is a foundation member of the Castan Centre and has been working in the area of the rights of asylum seekers and refugees, in the context of forced migration issues, since 1998. Susan has organised several international workshops dealing with these issues which have led to publications of the workshop proceedings. She has recently organised a workshop in partnership with the UNHCR and King's College London, on the European proposals for an off-shore processing facility. Susan is also researching and writing in the area of citizenship and migration law.

Abstract

In this paper I will discuss the current European proposals in comparison with our Pacific Strategy and canvass the legal and ethical implications of such plans in the light of the international system of refugee protection.

The Legal and Ethical Implications of Extra-Territorial Processing of Asylum Seekers: Europe Follows Australia

In this presentation I explained how Europe is looking to Australia as a model for the treatment of asylum seekers, and in particular at Australia's use of extra-territorial processing under the Pacific Solution. Generally when lawyers talk about asylum seekers they talk about rights – the right to seek and enjoy asylum, the right not to be *refouled* or returned to a place where they would be persecuted. But in this talk I took another theme, which fits with the idea of 'Europe Follows Australia', namely the ethical. Legal talk about rights and duties (of states) gets tangled up particularly as states (governments) respond by referring to their sovereign right to control who comes into a country. And whilst not denying that, the ethical view, which I take to be focussed upon outcomes, upon fairness and equity, helps us to stand aside. In particular it directs us to the global picture, and here we see that amidst all the problems stemming from protracted refugee situations, wealthy industrialised nations follow each other in denying the right to seek asylum. For this is essentially what happens with extra-territorial processing of asylum seekers. They are prevented from making a claim for asylum in the territory to which they head whilst they are in flight and instead are interdicted and taken to another place for processing.

So the question I asked was whether extra-territorial processing is ethical? My starting premise is that in a world where we see poverty on a large-scale, does extra-territorial processing lead to an equitable distribution of resources? Does it take the burden off the poorer countries of origin and transit? Moreover does it lead to better humane outcomes for the individuals? Overall are human rights respected?

I first explained why Europe is now looking at the possibility of extra-territorial processing and then used Australia's Pacific Strategy as the measure to answer the questions above.

European Policy (The European Union)

Unlike Australia, the European Union (EU) does not have an offshore resettlement programme. European countries are not generally speaking countries of immigration. Over the last decade and more the EU has erected barriers around itself in the name of harmonisation. One aspect of this is that member states share the responsibility for processing asylum seekers. In practice this means that on the basis of agreed cri-

teria (such as the fact that a person has already passed through another EU member state), states can shift the responsibility onto another. So paradoxically, as the policy has tightened up (through the creation of the Schengen area) the burden has fallen on the southern transit states – Italy and Spain in particular.

The crisis of asylum seekers and other forced migrants seeking to cross the Mediterranean to reach Italy, Greece and Spain has escalated in the past two years. In a speech on 12 October 2005 Mr. Antonio Guterres, UN High Commissioner for Refugees said:

In the last few weeks we have seen terrible images, which we should not have to see – from North Africa, the Mediterranean, the Gulf of Aden.¹

The majority of these persons have moved from sub-Saharan Africa and areas of known ‘protracted’ refugee situations in Africa. Coincidentally they come from poor countries. It is not known how many of these people are asylum seekers because most are not given a chance to make a claim. Many are being returned without a hearing. Many others have lost their lives at sea.

It is these Mediterranean ‘boat people’ which is driving the push for offshore processing, or a ‘Mediterranean Plan’ in that region. In this context Europe and the UK have turned to Australia for inspiration, just as Australia looked to an earlier USA model in constructing its Pacific Strategy. But the EU is also focussing upon other extra-territorial and regional solutions which could lead to fairer outcomes. For example, the European Commission to the Council and the European Parliament proposes the establishment of *Regional Protection Programmes* (RRPs). RRP’s aim to ‘enhance the capacity of areas close to *regions of origin* to protect refugees’. RRP’s are intended to comprise two main elements: first measures to enhance the protection capacity of areas close to refugees’ regions of origin; and secondly a joint EU *resettlement* programme. In a response dated 12 October 2005 the UNHCR has given cautious support for this idea. Mr. Antonio Guterres, UN High Commissioner for Refugees remarked that it will be important to ensure full coordination of these Programmes with other initiatives and especially to ensure consultation with the countries concerned. He warned that ‘building protection capacity in third countries cannot replace asylum in Europe.’²

In this context, Europe is being forced to see the problem of asylum seekers in the context of ‘forced migration’ issues, but is arguably putting undue focus on the Mediterranean situation. The bulk of asylum seekers to the EU in fact come from the eastern borders of the EU.

1. ‘Remarks by Mr. António Guterres, UN High Commissioner for Refugees, on the occasion of the European Union Council of Ministers of Justice and Home Affairs’: <http://www.unhcr.org/cgi-bin/texis/vtx/admin/opendoc.htm?tbl=ADMIN&id=435612ec4>.

2. Ibid.

The Ethical Implications

There are many lessons to be learnt from Australia's approach, the primary one being that refugee policy must be concerned foremost with protection outcomes and burden sharing, rather than deterrence. The focus of the Pacific Strategy was on punishing 'secondary movers', that is it attempted to keep the asylum seekers in the countries of first asylum and transit. But they were poor countries with limited resources. Whilst the Pacific Strategy has assisted some of our poorer Pacific neighbours, it did nothing to alleviate other regional refugee situations, and did little for the overall global refugee problem. There is no evidence that the Pacific Strategy involved direct support to refugee communities in the countries of origin, or addressed the 'root causes' of the refugee situation. Rather it boosted the flagging economy of Nauru in particular by providing it with a new industry. It also provided additional contracts to the private organisation that runs Australia's detention centres.

The human rights aspects of the Pacific Strategy have been well documented.³ The conditions of detention, the quality and timeliness of the processing and the eventual outcomes in the form of temporary protection are all matters that raise concern. Some specific lessons for the EU from the Pacific Strategy are these:

- Processing of asylum seekers must be fair, transparent and efficient to ensure confidence in the outcomes and to guard against *refoulement*.
- The detention of asylum seekers must be for the minimum duration, for the purpose of identity and security checks. Persons whose claims are clearly 'unfounded' should be returned to their country of origin, but others must be released into a community.
- If found to be in need of protection and if temporary protection is granted, it must provide genuine protection. For example, it should be recognised that it will lead to permanent protection after a specified time, if conditions in the country of origin have not improved, and the asylum seeker continues to have a 'well founded fear'.
- The conditions which are attached to temporary protection must respect the human rights and dignity of persons. The need for stability in the lives of asylum seekers must be recognised.
- The costing of such strategies must ensure that those who need support and can contribute to the solution of a refugee crisis are the main recipients of financial aid.

For the remainder of this paper I want to concentrate on Australia's relationship with Indonesia as a country of transit.

3. See in particular Oxfam, *Community Aid Abroad, Adrift in the Pacific: The Implications of Australia's Pacific Refugee Solution*, February 2002 accessed at <http://www.caa.org.au/campaigns.PDF> (refer to page 110).

The Failure of Co-operative Arrangements

The Pacific Strategy did not work as a burden-sharing arrangement. During the *Tampa* crisis which led to the Pacific Strategy, Australia was isolated by both the international community and Indonesia. Clearly Indonesia's practical capacity to help during the *Tampa* crisis was limited and on the basis of previous practice, it considered the refugees to be Australia's responsibility. And presumably so did the international community, especially those industrialised countries with their own refugee crises.

Although Australia had put in place a 'Regional Co-operation Model' with Indonesia in 2000, which was later formalised through the 'Bali Process' in 2002 and 2003, the focus of this was on prevention of people smuggling within a transnational crime framework rather than upon protection of refugees. At the 2003 meeting the UNHCR reminded the parties that the issue was not 'about rejecting persons who flee to your countries but in treating them properly'. The UNHCR argued that if durable solutions and burden sharing were practiced, they would result in a reduction in people smuggling and related transnational crime:

But to be effective in fighting crime, it is not sufficient to increase border control and attack criminal networks. You have been engaged in this for many years, but the problem is still with us. One needs to limit the 'oxygen' of this crime, to reduce the number of victims available to be exploited by criminal networks. You must therefore not only live up to the spirit of the 1951 Convention, but also engage in comprehensive solutions – in Convention Plus. Solutions for refugees and burden sharing is not only a humanitarian but a political challenge. It is also about fighting crime.⁴

However the Australian Government did not heed this warning.

Australia – Indonesia Co-operation – A Missed Opportunity?

For those coming from the Middle East, the key countries of transit in South East Asia have been Malaysia and Indonesia. Indonesia is not a signatory to the Refugees Convention, but despite its own massive internal problems, and its shaky relationship with Australia, it has been willing to co-operate with the UNHCR in relation to asylum seekers. As it is not a signatory to the Refugees Convention, it cannot be regarded as a 'safe country' of first asylum as the risk of *refoulement* exists.

As a result of Australia's intervention, the UNHCR and the IOM 'fill the Indonesian domestic legal and policy vacuum' in regards to the administration of asylum seekers and refugees. Under the arrange-

4. UNHCR, Statement to the Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, 29-30 April 2003, at p 10.

ment between Australia, Indonesia, UNHCR and IOM, Australia funds the upkeep of asylum seekers in Indonesia, who are placed under the care of IOM (who provide accommodation, food and medical supplies to the applicants), and provides funds for UNHCR's processing of asylum seekers. IOM's role is to provide an initial assessment to asylum seekers and advise them of their options, one of which is voluntary return to their country of origin or a transit country. If a fear of return is expressed, IOM is obliged to contact the UNHCR who will then process the asylum seeker's claim. However, the ability of this cooperative arrangement to provide protection to asylum seekers is questionable, as 'the provision of temporary refuge is entirely dependent upon UNHCR and IOM, organisations which do not have the same legal accountability as a sovereign state and which rely upon cooperation from Indonesian authorities at their discretion'.⁵

Neither the current or past Minister for Immigration has put a dollar figure on the cost of this agreement but the former Minister Ruddock promoted the notion that Australia saves considerable amounts of money 'in comparison to what it would cost if people arrived in Australia and had to be dealt with under our determination program and detained in the humane conditions in which we do detain people'.⁶ But, unless sufficient resettlement places are found for those determined by the UNHCR to be refugees, they will end up living indefinitely in Indonesia. In light of this 'cost – benefit' analysis, it is clear that what is being sold, is the right of asylum seekers to due process and to live with dignity.

The evidence suggests that asylum seekers in Indonesia live in a twilight world. The processing of asylum seekers in Indonesia is slow and difficult. UNHCR is stretched for resources and personnel in Indonesia and asylum seekers must often wait weeks and even months simply for an interview. Those asylum seekers who do gain access to the UNHCR processing system but whose claims for protection are rejected, are in theory subject to deportation from Indonesia. However that requires Indonesia to have the funds to effect deportation or that the asylum seekers' home embassy provides the necessary funds.

Asylum seekers who are processed by the UNHCR and determined to be in need of protection are under the care of UNHCR, not the IOM. They are relocated to Jakarta, found temporary housing, provided cash assistance by the UNHCR, and submitted for potential resettlement. As the UNHCR has stressed, these persons do not have 'effective protection' in Indonesia. They do not have lawful residence and their presence in Indonesia is merely tolerated. They have no lawful access to the labour market and are not able to work legally. There is no possibility of their exercising civil, economic, social or cultural rights. The only basic rights they hold are of freedom of movement and stay of deportation. Australia does not pay UNHCR's costs of assistance to approved refugees, but contributes to the accommodation costs of those who remain in Indonesia but are denied refugee status by the UNHCR.

5. HRW, *'By Invitation Only': Australian Asylum Policy*, Australia Vol 14 No 10(C) December 2002, p 49.

6. Peter Mares, 'Moving the Barriers Offshore: Cooperation with Indonesia reduces the number of 'boat people' arriving on Australia's shores', *Rantau* (edition 2) September 2001, p 11.

In terms of 'durable solutions', sheltering in Indonesia is ambivalent. The number of resettlement places available is very limited. For example, between January 2000 and February 2002, UNHCR in Indonesia identified 535 Afghans, Iraqis and Iranians as refugees but only 65 had been found resettlement places.⁷ When Australia initiated the cooperative arrangement with Indonesia, it declared that it would not accept any person for resettlement who was intercepted under the arrangement. However following pressure from the US government, the Howard Government agreed to consider those with family links in Australia. Out of 389 refugees resettled by the UNHCR between January 2001 and October 2001 Australia resettled 41, New Zealand resettled 65 and Canada resettled 70. However, the problem facing refugees awaiting resettlement in Indonesia is that other resettlement countries view them as Australia's responsibility and are therefore generally reluctant to accept them. Australia will not acknowledge its resettlement responsibility, and argues that to combat the people smuggling, refugees should never reach their desired destination.

There is evidence that there are still large numbers of asylum seekers in Indonesia although less than at the height of the Afghan crisis. In 2003, 196 persons mostly from Iraq and Afghanistan asked for asylum and it was estimated that Indonesia hosted over 300 asylum seekers and refugees that year. As at June 2004, IOM estimated that they were caring for 370 persons, of whom 210 were refugees.⁸

Conclusions

A key goal of the UNHCR's Convention Plus approach is:

Sharing burdens and responsibilities more equitably and building capacities to receive and protect refugees.

By contrast the Pacific Strategy was conceived in the self-interest of Australia as a short-term policy of deterrence. It is to be hoped that the Europeans can do better by entering into arrangements which lead to equitable distribution of resources and which take the burden off poorer countries of transit.

Some Readings:

US Committee for Refugees, *Sea Change: Australia's New Approach to Asylum Seekers* (February 2002)
Oxfam, Community Aid Abroad, *Adrift in the Pacific: The Implications of Australia's Pacific Refugee Solution* (February 2002) available at: <http://www.caa.org.au/> (refer to page 110).

Oxfam, Community Aid Abroad, *Still Drifting: Australia's Pacific Solution Becomes 'A Pacific Nightmare'* (August 2002) available at: <http://www.caa.org.au/> (refer to page 110).

7. Oxfam, Community Aid Abroad, *Adrift in the Pacific: The Implications of Australia's Pacific Refugee Solution*, February 2002, p 15 accessed at <http://www.caa.org.au/campaigns.PDF> (refer to page 110).

8. Information supplied by the Department of Immigration to the author.

Bernadette McSherry

Providing Mental Health Services and Psychiatric Care to Immigration Detainees: What the Law Requires

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Professor Bernadette McSherry was appointed to the Louis Waller Chair of Law in 2005. She is a Legal Member of the Mental Health Review Board of Victoria. She researches and teaches in the areas of Criminal Law, International Criminal Law, Mental Health Law and Bioethics. She is the co-author of two major texts on Criminal Law and has published widely in refereed journals. She is on the editorial Boards of the journals *Psychiatry*, *Psychology and Law* and *Monash Bioethics Review* and is the co-editor of the Legal Issues Column for the *Journal of Law and Medicine*.

Abstract

There is increasing evidence that the provision of mental health services is inadequate for immigration detainees. In *S v Secretary, Department of Immigration Multicultural and Indigenous Affairs* [2005] FCA 549, Justice Paul Finn held that the Commonwealth had breached its duty to ensure that reasonable care was taken of two Iranian detainees 'S' and 'M' in relation to the treatment of their respective mental health problems. The lack of proper psychiatric care at Baxter Detention Centre was also highlighted in the Palmer Inquiry into the detention of Cornelia Rau.

The case brought on behalf of a child refugee, Shayan Badraie, against the Department of Immigration and Multicultural and Indigenous Affairs and Australasian Correctional Services Pty Ltd and Australasian Correctional Management Pty Ltd has the potential to clarify the government's legal duty to provide reasonable care toward immigration detainees. Shayan Badraie, through his parents, is seeking compensation for the harm caused to Shayan by his detention and the traumatic events he witnessed in the Woomera and Villawood detention centres.

This paper will analyse the Commonwealth Government's legal duty to provide adequate levels of psychiatric services and psychiatric care to immigration detainees as well as the implications of the Badraie case.

Providing Mental Health Services and Psychiatric Care to Immigration Detainees: What the Law Requires

Introduction

There is growing evidence that the detention of 'unlawful non-citizens' under section 189(1) of the *Migration Act* 1958 (Cth) contributes to feelings of anxiety, hopelessness and depression¹ and that children are particularly vulnerable to the effects of prolonged detention.² It has been suggested that the detention environment is a direct contributor to psychological stress, either on its own or as a 'retraumatising influence'.³ This is borne out by suicide rates in detention centres which are estimated to be between 3 to 17 times that in the Australian community.⁴ Already, a number of lawsuits have been filed on behalf of detainees for harms sustained while in detention and it is expected that these will continue.⁵

It is well established through its own documents that the Commonwealth Government has a duty to provide health care to immigration detainees. Ian Freckelton has pointed out that the civil justice system may have a role to play in ensuring that the Government's duty of care accommodates the vulnerability of immigration detainees to psychiatric illness.⁶ Legal action may be an unfortunate last resort to ensure adequate mental health services and psychiatric care in detention. A recent decision by Justice Paul Finn in *S v Secretary, Department of Immigration Multicultural and Indigenous Affairs*⁷ certainly paves the way in this regard and this will be explored later in this paper.

1. D. Silove and Z. Steel, eds, *The Mental Health and Well-Being of On-Shore Asylum Seekers in Australia* (Sydney: University of New South Wales, Psychiatry Research and Teaching Unit, 1998); A. Sultan and K. O'Sullivan, 'Psychological Disturbances in Asylum-Seekers Held in Long Term Detention: A Participant Observer Account', *Medical Journal of Australia* 175 (2001): 593; Z. Steel, S. Momartin, C. Bateman, A. Hafshejani, D. Silove, N. Everson, K. Roy, M. Dudley, L. Newman, B. Blick and S. Mares, 'Psychiatric Status of Asylum-Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia', *Australian and New Zealand Journal of Public Health* 28(6) (2004): 527.
2. S. Mares, L. Newman and M. Dudley, 'Seeking Refuge, Losing Hope: Parents and Children in Immigration Detention', *Australasian Psychiatry* 10 (2002): 91.
3. D. Silove and Z. Steel, 'The Mental Health Implications of Detaining Asylum Seekers', *Medical Journal of Australia* 175 (2001): 596.
4. Catholic Commission for Justice, Development and Peace, *Damaging Kids: Children in Department of Immigration and Multicultural and Indigenous Affairs' Immigration Detention Centres*, Occasional Paper No 12 (Melbourne: Catholic Commission for Justice, Development and Peace, May 2002).
5. See, for example, the cases mentioned in A D Mcintee, 'The Failure of Domestic and International Mechanisms to Redress the Harmful Effects of Australian Immigration Detention' *Pacific Rim Law and Policy Journal* 12 (2003): 263 at 276.
6. I. Freckelton, 'Editorial: Madness, Migration and Misfortune: The Challenge of the Bleak Tale of Cornelia Rau', *Psychiatry, Psychology and Law* 12(1) (2005): 1 at 12.
7. (2005) 216 ALR 252.

However, there are two main hurdles that will have to be overcome in any legal claims that the government has failed in its duty of care. First, with the 'outsourcing' of the day to day management of detention centres, a legal issue arises as to whether or not this duty is delegable to third parties. There is now legal precedent suggesting that this duty is not delegable. Secondly, recent changes to tort law under Civil Liability Acts⁸ may greatly limit the scope of claims for psychiatric injury caused by detention. The case of Shayan Badraie which is currently before the Supreme Court of New South Wales has the potential to clarify the scope of such claims in future.

This paper will first outline the Commonwealth Government's duty of care and will then analyse S's case and give some background to the ongoing case of Shayan Badraie in order to explore whether or not the government has been fulfilling its duty of care to provide mental health services and psychiatric care to immigration detainees.

Immigration Detention Standards

Immigration detention services must comply with the Immigration Detention Standards (IDS) which were developed by the Department of Immigration and Multicultural and Indigenous Affairs in consultation with the Commonwealth Ombudsman's Office and the Human Rights and Equal Opportunity Commission.⁹ The IDS relate to the quality of care and quality of life expected in immigration detention facilities in Australia. The IDS form the basis for the contract between the department and the detention service provider.

Part One of the IDS includes the following Table:

1.3 Duty of care

Standards	Performance Measures
1.3.1 The day-to-day care needs of detainees are met.	No substantiated instance where a detainee could not have their day-to-day care needs met.
1.3.2 A secure and safe detention environment is established and maintained.	No instance of a detainee coming to harm as a result of risks not being identified, assessed, managed and ameliorated.

8. This term refers to various pieces of state and territory legislation introduced in 2002 and 2003 under various titles: *Civil Liability Act* 2002 (NSW) as amended by the *Civil Liability (Personal Responsibility) Act* 2002 (NSW); *Civil Law (Wrongs) Act* 2002 (ACT); *Civil Liability Act* 2002 (WA); *Civil Liability Act* 2002 (Tas); *Civil Liability Act* 2003 (Qld); *Wrongs Act* 1958 (Vic); *Civil Liability Act* 1936 (SA); *Personal Injuries (Liabilities and Damages) Act* 2003 (NT). All legislation enacted in 2002 and 2003 has been subject to subsequent amendment.

9. The IDS are available at http://www.immi.gov.au/detention/standards_index.htm accessed 29th November 2005 (refer to page 110).

Part Two deals specifically with health matters and includes the following:

2.2 Care needs

2.2.1 Health

[2].2.1.1 General

Standards	Performance Measures
<p>2.2.1.1.1</p> <p>Detainees are able to access timely and effective primary health care, including psychological/psychiatric services (including counselling):</p> <ul style="list-style-type: none"> • in a culturally responsive framework • where a condition cannot be managed within the facility, by referral to external advice and/or treatment. 	<p>No substantiated instance of a detainee not having access to health care of this nature.</p>
<p>2.2.1.1.2</p> <p>In establishing the health care service, the Services Provider:</p> <ol style="list-style-type: none"> ensures services are delivered by qualified, registered and appropriately trained health care professionals develops and implements a health care plan for each facility draws on the advice, knowledge and experience of a health advisory panel. 	<ol style="list-style-type: none"> Department is provided with evidence on a monthly basis that the health care service is available and accessible. No substantiated instance of health care staff not being qualified, registered and appropriately trained. No substantiated instance of the centre health plans not being implemented, effective or reviewed periodically. No substantiated instance of advice of the health advisory panel not being drawn on.

The IDS contain a statement that while the service provider is under a duty of care in relation to detainees, ‘ultimate responsibility for the detainees remains with DIMA [the then Department of Immigration and Multicultural Affairs] at all times.’¹⁰

In addition to the IDS, on 12 May 1999, the Commonwealth released a document called ‘General Detention Procedures’¹¹ which states that ‘officers are obliged to take all reasonable action to ensure detainees do not suffer any physical harm or undue emotional distress while detained’.¹²

In a submission to the Human Rights and Equal Opportunity Commission, the Commonwealth has also stated:

While retaining ultimate responsibility for all detainees, the Department exercises its duty of care commitments through the engagement of a Services Provider within the framework of relevant legislation, comprehensive contractual obligations, the Immigration Detention Standards and associated performance measures... While in detention, the ability of individuals to control their own environment is restricted... this places particular responsibilities on the Commonwealth with regard to duty of care...¹³

10. Department of Immigration, Multicultural and Indigenous Affairs, ‘Principles Underlying Care and Security’, *Immigration Detention Standards* at <http://www.immi.gov.au/illegals/det_standards.htm> accessed 29 November 2005, fourth dot point (refer to page 110).

11. Department of Immigration, Multicultural and Indigenous Affairs, ‘Migration Series Instruction MSI-234: General Detention Procedures’ issued on 12 May 1999.

12. Ibid, Section 8.1.

13. Department of Immigration, Multicultural and Indigenous Affairs, Submission to the Human Rights and Equal Opportunity Commission, quoted in Human Rights and Equal Opportunity Commission, *A Last Resort? Report of the National Inquiry into Children in Immigration Detention* (May 2004) at Chapter 5.3.2, p 115.

While these documents clearly indicate that the Commonwealth Government owes a duty of care to detainees, one of the legal issues that arise is whether or not this duty of care is 'delegable'. The Commonwealth contracts out the day-to-day operations of detention centres to private companies such as GSL (Australia) Pty Ltd. These companies then subcontract out health care services to other companies which may also hire private medical practitioners. This outsourcing means that service provision is fragmented between a variety of unconnected service providers. In contracting out its responsibilities, there is a legal question as to whether the Commonwealth is also contracting out its duty of care. The case discussed in the next section strongly suggests that the government's duty of care is non-delegable.

The Case of 'S'

The most significant case to date as to the Commonwealth's duty of care to immigration detainees is that of *S v Secretary, Department of Immigration, Multicultural and Indigenous Affairs*¹⁴ which was heard by Justice Paul Finn of the Federal Court of Australia.

Two Iranian men, known only as 'S' and 'M' who had both been detained in various detention centres for about five years, applied to the Federal Court for an order compelling their assessment for admission to a mental health facility in Adelaide. After S had given evidence during the hearing of the application, a doctor assessed him and made an order for his transfer under the *Mental Health Act* 1993 (SA). Shortly prior to the delivery of Finn J's judgment, M was also transferred to a mental health facility. Accordingly, Finn J did not have to grant relief for the men's applications, but he stated that he would have made the orders sought and then gave detailed reasons why the applications were properly made. He also ordered that the applicants' costs be paid for by the Commonwealth Government.

Justice Finn found that the Commonwealth had breached its duty to ensure that reasonable care was taken of S and M in detention in relation to the treatment of their respective mental health problems. This was attributable to the systematic defects in the manner in which mental health services were provided at the Baxter Detention Centre in South Australia.

The Commonwealth Government has outsourced the day-to-day operation of Baxter to a company called GSL (Australia) Pty Ltd. GSL in turn contracted its obligation to provide health care services to two companies, Professional Support Services which provides psychological services including a full-time psychologist who is on duty week days from 9 am to 5 pm and a full-time counsellor and International Medical Health Services which provides general medical services. The latter contracted with a Port Augusta Medical practice to provide general medical services and a psychiatrist, Dr Andrew Frukacz, a private practitioner from Bathurst in New South Wales. Dr Frukacz agreed to visit once every six to eight weeks on Saturdays. At the time of the hearing, there were 326 detainees in Baxter, with a third being long term detainee asylum seekers, between 20 and 30 of whom were seen by Dr Frukacz.

14. (2005) 216 ALR 252.

S had committed acts of self-harm on a number of occasions prior to December 2004 including cutting his arms and chest with a razor and cutting his head by putting it into a window. After the latter incident, he was taken to the Management Unit for over a week. This Unit has 10 single rooms where individuals considered disruptive are incarcerated 24 hours a day. In April 2004, he was placed in the Management Unit for a week, and was then put in Red One for about two months. Red One is an alternative 'step-down' facility to the Management Unit for less disruptive detainees. He described this as 'terrifying'.

Towards the end of 2004, S found out that his plans to get married in Baxter had fallen through. He became very distressed and tried to cut his neck. In December, he took part in a hunger strike with 'M' and another man. The three men stayed on top of the roof of the gymnasium for nine days which caused them all to suffer from dehydration and severe sunburn.

On 30 December 2004, S was seen by a psychiatrist who was voluntarily attending Baxter to prepare reports for immigration lawyers. This was the first time S had been psychiatrically assessed during his year at Baxter. The psychiatrist wrote: 'because of the severity of his condition, he needs further psychiatric treatment, probably in an inpatient facility. He also needs a thorough medical review'.

On 12 and 13 February 2005, S was reviewed by the psychiatrist contracted to Baxter who diagnosed him with severe depression and put him on antidepressant medication. He raised the possibility of electro convulsive therapy which would have to be administered at a psychiatric facility, but was not prepared to recommend transfer at that stage.

On 29 March 2005, S was assessed by another psychiatrist for the purpose of legal proceedings who diagnosed S with severe depression with anxiety symptoms. He stated that S needed to be transferred as the current state of his illness needed review by a psychiatrist on a daily basis.

M, like S, had spent about five years in detention. He was placed in the Management Unit on one occasion where he was assaulted. Several guards were later dismissed because of this incident. He took part in the roof top hunger strike along with S and another man in December 2004. M was assessed by a general practitioner who voluntarily attended Baxter after the hunger strike and was diagnosed as being profoundly depressed and as requiring care in a psychiatric facility. This was not acted upon.

M saw the psychiatrist contracted to Baxter for the first time on 12 February 2005. The psychiatrist was of the opinion that M was 'significantly depressed and...anxious with feelings of despair largely related to his fear of deportation'. He prescribed medication, but was of the opinion that M did not need to be transferred to a psychiatric facility. However, he went on to note that the conditions of detention were contributing to M's depression and anxiety and that the medical treatment 'will only have a partial affect [sic] on his condition'.

M was seen by another psychiatrist on 29 March 2005 for the purpose of legal proceedings. This psychiatrist agreed that while M remained in detention, he was likely to remain depressed and his demoralisation and despair were likely to increase. Transfer to a psychiatric facility was recommended.

Justice Finn found that there was an inadequate level of provision of psychiatric services at Baxter and the failure to provide psychiatric care to both applicants in December 2004 after the roof top protest was in breach of the Commonwealth's duty to take reasonable care for the detainees. In relation to S, Justice Finn held that his mental health needs were not only not being met, but that he was being treated with neglect and disregard. He found that M's difficulty in accessing reasonable mental health care services was not as striking as S's, but that the condition from late December 2004 was treated with neglect. He found that the applicants 'did not have to settle for a lesser standard of mental health because they were in immigration detention'.¹⁵

In relation to the outsourcing arrangement in relation to medical services, Justice Finn remarked:

The Commonwealth entered into a complex outsourcing arrangement for the provision of mental health services which left it to contractors and subcontractors to determine the level of services to be supplied. The hallmarks of these arrangements were devolution and fragmentation of actual service provision. The service provision was so structured that there was a clear and obvious needs [sic] for regular and systematic auditing of the psychological and psychiatric services provided if the Commonwealth was to inform itself appropriately as to the adequacy and effectiveness of these services for which it bore responsibility. There has to date been no such audit.¹⁶

Justice Finn's findings were echoed in that of the Palmer Report, which found that the mental health care given to the detainee Cornelia Rau while she was detained in Baxter was inadequate.¹⁷

In Justice Finn's opinion, the Commonwealth's duty of care to S and M was not delegable on the basis of the complex outsourcing arrangements. Rather, the Commonwealth itself had the responsibility to ensure the provision of medical services was adequate and effective.

The Case of Shayan Badraie

In January 2000, five year old Shayan, his father and pregnant stepmother flew out of Iran to Malaysia.¹⁸ Shayan's father, Mohammad Badraie, and his wife, Zahra Saberi, were members of a minority

15. Ibid, p 305.

16. Ibid.

17. Mick Palmer, *Inquiry into the Cornelia Rau Matter* (6 July 2005), Finding 24, p xii, available at http://www.minister.immi.gov.au/media_releases/media05/palmer-report.pdf accessed 29 November 2005.

18. The facts of this case are based on the transcript of evidence in matter 020286/03 – *Shayan Badraie by his Tutor Mohammad Badraie v The Commonwealth of Australia (by the Department of Immigration and Multicultural and Indigenous Affairs) and 2 ors* (Johnson J., The Supreme Court of New South Wales Common Law Division, 29 August 2005). My thanks to Rebecca Gilson, Principal, Maurice Blackburn Cashman Pty Ltd, Lawyers for enabling me access to the transcript.

religious group, Al-Haqq, and feared that they would be harmed by Iranian authorities if they stayed in Iran. From there, they travelled by boat to Indonesia and then by boat to Australia. In March 2000, because they arrived in Australia without visas, they were placed at the Woomera Detention Centre in South Australia. They stayed there until 3 March 2001 when they were moved to the Villawood detention centre in Sydney. On 23 August 2001, Shayan was separated from his parents and placed with foster parents in Sydney where he stayed until 16 January 2002. While with the foster parents, his legal status remained that of an immigration detainee. This meant that the house where he was staying and the school he attended were classified as places of detention and he had to be supervised at all times.

On 16 January 2002, Shayan, now aged 7, was removed from foster care and placed in the community with his mother and baby sister who had been granted bridging visas. Shayan's father remained in detention at Villawood until 9 August 2002, when he was also released on a temporary protection visa, having been recognised as a refugee.¹⁹

In his year at Woomera Detention Centre, Shayan regularly witnessed confrontations between officers and detainees. Woomera was designed as a short term temporary centre for the processing of new arrivals and lacked facilities for long term detainees. It was closed down in April 2003.

At the time Shayan and his family were detained, Woomera had at times as many as 1400 detainees. There were riots in April, June and August and mass hunger strikes in November 2000. In August 2000, Shayan witnessed officers beating detainees with batons and the use of water cannons and CS gas (commonly called tear gas). On 28 November 2000, Shayan saw a fellow detainee holding a broken piece of mirrored glass in his right hand against his chest threatening to kill himself.

The next day, Shayan was seen by a counselor who noted that, 'he is very frightened. He fears that the man will come and cut the children...He has generalised his fears to all windows and mirrors seeing them all as potential weapons. He was unable to sleep last night and is not eating. I believe that Shayan needs to be moved to a different and safe environment in order for him to be able to psychologically deal with his fears.'²⁰

Following the incident in November, Shayan started wetting the bed and suffering nightmares. In January 2001, Shayan witnessed a man climb a tree in the Main Compound and threaten to jump and he also saw one of the officers making masturbating gestures at detainees and telling his father to 'fuck off out of here'.

19. The Badraies faced detention in May 2001 after a single Federal court judge upheld the decision of the Refugee Review Tribunal that they should not be granted a visa; *Badraie v Minister for Immigration and Multicultural Affairs* [2001] FCA 616 (Unreported, Federal Court of Australia, Stone J, 25 May 2001). However, a successful appeal was held before Justices Lee, Moore and Madgwick in April 2002; *N1202/01A v Minister for Immigration and Multicultural Affairs* (2002) 68 ALR 21.

20. Transcript, 29 August 2005, p 24.

On 20 January 2001, Shayan and his family were moved to Sierra Compound, which was the security compound, apparently to move them away from an influx of new detainees, although they were not told this. Shayan and his sister who was then aged three and two teenage girls were the only children there.

On 25 January 2001, Shayan had his first meeting with a psychologist who was of the opinion that Shayan was exhibiting signs of post traumatic stress disorder and that Shayan and his family be relocated to a more appropriate centre as a matter of urgency. Over the next month, the psychologist made repeated reports to the Department indicating that Shayan and his family be moved. On 27 February 2001, he wrote, 'I am of the opinion that the failure to take any action to protect this child from further exposure is abusive on the part of the governing authorities'.²¹

That same day, Shayan witnessed a detainee smash windows and window frames in the compound.

Shayan and his family were finally taken to Villawood on 3 March 2001. He was not given any psychiatric assessment there, but his care was restricted to psychological services and general practitioner services. On 30 April 2001, it was recorded that Shayan had witnessed a detainee slash his wrists. He did not speak for the next two days and was taken to the Westmead Children's Hospital for treatment.

Throughout the course of 2001, Shayan was hospitalised on eight separate occasions for a total of 86 days. Despite medical evidence that it was in his best interests to reside with his family outside of the detention centre, he was placed with foster parents in August 2001 who were unknown to him and who had no experience in caring for a foster child.

Shayan's family was finally reunited on 9 August 2002 and they have been living in the community on temporary protection visas. Shayan continues to suffer from nightmares, has difficulty in sleeping and wets the bed. He is on antidepressant medication.

Following a complaint by his father on 29 August 2001, the Human Rights and Equal Opportunity Commission investigated Shayan's treatment at Woomera and Villawood.²² The Commission found that his detention had breached a number of Articles in the Convention on the Rights of the Child²³ and recommended an apology and compensation of around \$70,000. These recommendations were not followed by the Commonwealth.

21. Transcript, 29 August 2005, p 33.

22. Preliminary Findings 19 April 2002; Human Rights and Equal Opportunity Commission, *Report of an Inquiry Into a Complaint by Mr Mohammed Badraie on Behalf of his Son Shayan Regarding the Acts or Practices of the Commonwealth of Australia (the Department of Immigration, Multicultural and Indigenous Affairs)*, HREOC Report No. 25 (2002).

23. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; entry into force 2 September 1990; Ratified by Australia on 16 January 1991.

Shayan's story was featured on *Four Corners* on ABC TV in August 2001 and in many ways it was his story that galvanised activists working toward stopping the immigration detention of children. The Human Rights and Equal Opportunity Commission's Report, following its inquiry into children in immigration detention over the period 1 January 1999 to 31 December 2002, was tabled in Parliament on 12 May 2004.²⁴ While the government rejected the Report's major findings and recommendations,²⁵ there seems to have been a change in the approach toward detaining children.²⁶

Shayan's father is now bringing an action detained in the common law division of the Supreme Court of New South Wales on Shayan's behalf. The action is against the Commonwealth Government and Australasian Correctional Services Pty Ltd and Australasian Correctional Management Pty Ltd, the companies that operated Woomera and Villawood at the time Shayan was detained. At the time of writing, the matter is part-heard and it is being carefully watched by lawyers and advocates for immigration detainees.

One of the main arguments being put by the plaintiff is that the Commonwealth owed Shayan a duty to exercise reasonable care to prevent foreseeable injury which is a non-delegable duty. Significantly, the Commonwealth has accepted the analysis of Finn J in *S's* case concerning the Commonwealth's duty of care and has acknowledged that this is non-delegable.²⁷ The main issue in contention is whether the Commonwealth breached that duty. It is alleged that the defendants breached their duty of care by permitting Shayan to remain in immigration detention and in foster care for a prolonged period of time with no provision or adequate provision of expert psychological and psychiatric assessment and treatment and in allowing him to be exposed to numerous traumatic and aversive events.

The Commonwealth applied to amend its defence to include the claim that Shayan's injuries, which are not admitted, were caused by the actions of his parents, including causing his detention by entering Australia as unlawful non-citizens and by refusing to agree to leave Australia. Justice Johnson refused the Commonwealth's application, stating that '[s]uch factors are as irrelevant to this claim as would be the reasons why a prisoner was sentenced to imprisonment in a claim brought by the prisoner against prison authorities in negligence.'²⁸ Justice Johnson has, however, allowed the Commonwealth

24. Human Rights and Equal Opportunity Commission, *A Last Resort: The National Inquiry into Children in Immigration Detention* (May 2004), available at http://www.humanrights.gov.au/human_rights/children_detention_report/index.html accessed 29 November 2005 (refer to page 110).

25. Joint media release, Senator Amanda Vanstone and the Hon. Philip Ruddock MP, HREOC Inquiry into Children in Immigration Report Tabled 13 May 2004 available at http://www.minister.immi.gov.au/media_releases/media04/v04068.htm accessed 29 November 2005.

26. Senator Amanda Vanstone announced on 29 July 2005 that 42 children belonging to 20 families had been moved from detention into the community: Senator Amanda Vanstone, *All Families with Children Out of Detention*, Media Release, 29 July 2005 at http://www.minister.immi.gov.au/media_releases/media05/v05098.htm accessed 29 November 2005.

27. *Shayan Badraie by his Tutor Mohammad Saeed Badraie v Commonwealth of Australia and Ors* [2005] NSWSC 1195 (Unreported, Supreme Court of New South Wales Common Law Division, Johnson J, 22 November 2005) [28]: Interlocutory judgment on evidence and submissions on applications.

28. *Ibid.*, [101].

to amend its defence to claim that the parents engaged in behaviour which encouraged Shayan not to eat and promoted his injuries.²⁹ The Commonwealth wishes to call evidence from Shayan's biological mother in order to undermine the credibility of Shayan's father and stepmother as witnesses.

The case was originally set down for four weeks. It has already run for over six weeks with a current estimate of eleven weeks. The ultimate decision will have far-reaching effects for future actions brought by immigration detainees. It is clear that if those who manage detention centre fail to comply with their duty of care, they may be liable in tort.³⁰ However, there remains an onus on plaintiffs to prove their case on the balance of probabilities. Detainees who bring actions in negligence will have to prove that they are suffering from a recognised psychiatric illness that was caused by detention and which was reasonably foreseeable.³¹ There is still a great deal of uncertainty concerning psychiatric injury in negligence claims, perhaps because mental disorders are more difficult to detect than physical injuries.³² Recent changes to tort law under Civil Liability Acts³³ may also limit the scope of claims for psychiatric injury caused by detention.

Conclusion

Justice Finn's decision in *S v Secretary, Department of Immigration, Multicultural and Indigenous Affairs* sets out a framework for the Commonwealth's duty of care to provide immigration detainees access to primary health care, including mental health services. The decision in the Shayan Badraie case will undoubtedly have repercussions for the scope and type of negligence claims in the future.

On 19 September 2005, the Immigration Minister, Senator Amanda Vanstone announced that a mental health team would be 'proactively screening detainees to identify any mental health concerns' at Baxter Detention Centre.³⁴ On 6 October 2005, she announced that \$230 million would be provided over five years for a 'broad range of initiatives to improve training, provide better health and wellbeing to immigration detainees, much better records management, decision quality assurance, and a much stronger focus on clients.'³⁵ These initiatives are to be welcomed, but whether they will assist in providing the highest attainable standard of physical and mental health to immigration detainees remains to be seen.

29. Ibid, [104].

30. *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 208 ALR 271 at 279-280 (Gleeson CJ), 283 (McHugh, Gummow and Hayden J. J.), 293 (Kirby J.), 313 (Hayne J.), 326 (Callinan J.).

31. *Koehler v Cerebos* (2005) 214 ALR 355.

32. *Hatton v Sutherland* [2002] 2 All ER 1 at 4 per Hale L. J.

33. This term refers to various pieces of state and territory legislation introduced in 2002 and 2003 under various titles: *Civil Liability Act* 2002 (NSW) as amended by the *Civil Liability (Personal Responsibility) Act* 2002 (NSW); *Civil Law (Wrongs) Act* 2002 (ACT); *Civil Liability Act* 2002 (WA); *Civil Liability Act* 2002 (Tas); *Civil Liability Act* 2003 (Qld); *Wrongs Act* 1958 (Vic); *Civil Liability Act* 1936 (SA); *Personal Injuries (Liabilities and Damages) Act* 2003 (NT). All legislation enacted in 2002 and 2003 has been subject to subsequent amendment.

34. Senator Amanda Vanstone, *Minister Announces Action Plan for Baxter*, Media Release, 19 September 2005 <http://www.minister.immi.gov.au/media_releases/media05/v05114.htm>, accessed 29 November 2005.

35. Senator Amanda Vanstone, *Palmer Implementation Plan and Comrie Report*, Media Release, 6 October 2005 <http://www.minister.immi.gov.au/media_releases/media05/v05119.htm> accessed 29 November 2005.

Klaus Neumann

Seeking Asylum in Australia: A Historical Perspective

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Abstract

The debate about Australia's response to refugees and asylum seekers is largely devoid of a historical perspective. In my paper, I will demonstrate the benefits of such a perspective when reflecting on the terms 'refugee' and 'asylum seeker', and on previous responses to people seeking Australia's protection.

Klaus Neumann

Seeking Asylum in Australia: A Historical Perspective¹

My interest in historical perspectives stems from a frustration with the current debate about Australia's response to refugees and asylum seekers. This debate tends to be unnecessarily narrow. More often than not, those advocating a more generous response seem preoccupied with playing a catch-up game by reacting to government spin. Attempts to move outside the terms set by the current government are regularly informed by a wider agenda that is also set by this government: thus refugee advocates often try to argue that asylum seekers are deserving applicants for a visa – either because they supposedly are essentially good people (to counter allegations such as those made by Prime Minister John Howard and members of his cabinet during the 2001 federal election campaign) or because they supposedly could play a useful role in the Australian economy (in response to the government's muddling of refugee and immigration policies).

Too often, crucial principles underlying the government's policy are accepted as a given – as if these principles were not in themselves historically contingent. Sometimes a certain state of affairs seems set in concrete because it supposedly has existed as long as anyone can remember. Generally, informed historical perspectives do not feature prominently in Australian political debate. Take, for example, the controversy over the Howard Government's anti-terror legislation: how many of those defending or criticising the bills before parliament in late 2005 explored historical instances in which the Australian Government used preventive detention and racial profiling to counter a perceived security threat? Or take the debate over Australia's response to refugees and asylum seekers: how many of those contributing to it have acknowledged the long and complex historical genealogies of the issues involved?

I am confident that it would be possible to broaden the current debate about refugees and asylum seekers – if only we remembered other states of affairs, and revealed the historical contingency and extraordinariness of the present. In this paper, I take two specific and very recent incidents as pretexts for delving into the past. One concerns the asylum request by the Chinese diplomat Chen Yonglin in May 2005, the other the discovery of four stowaways on an Australia-bound cargo ship some six months later.

1. This is the revised text of a paper delivered at the 'Seeking Asylum in Australia' conference at Monash University (Caulfield), 28 November 2005. I thank Susan Aykut and Jess Taylor for inviting me to speak at the conference, and Peter Mares for his comments on a draft of the paper. The research for this paper has been funded by Swinburne University of Technology and the MacArthur Foundation.

On 31 October 2005, crew on board the bulk carrier *Furness Karumba* became aware that stowaways had hidden in the ship's cargo hold when it had sailed with a consignment of rock phosphate from the port of Laayoune, the capital of the former Spanish colony of Western Sahara which was annexed by Morocco and Mauritania in 1975.² By the time the stowaways were detected, two of them were dead. The ship was in international waters when their bodies were discovered, but was heading for Western Australia. The captain notified the Australian authorities, and after the ship's arrival in an Australian port, police questioned the crew and the two survivors, two young Moroccan men, who had been close to death themselves.³ The two were also interviewed by DIMIA officials, who initially determined that there was no lawful reason for them to remain in Australia and that they would therefore be deported. Subsequently, the men lodged applications for a protection visa. While their applications were processed, they were kept in the Perth Detention Centre.⁴

Australians have become accustomed to associating leaky boats from Indonesia with those who reach Australia by sea and try to enter the country without being in possession of a valid visa. But since the end of 2001, there have been very few 'unauthorised boat arrivals'. Only three boats carrying 82 people arrived in 2003-04, and none in 2002-03 and 2004-05. The small but steady number of people who enter Australia as 'seafarer deserters' (that is, after jumping ship) or as stowaways has gone almost unnoticed. Between 1 July 2001 and 30 June 2005, DIMIA recorded a total of 64 stowaways, and almost four times as many seafarer deserters. Most of the former were removed from Australia by the

2. The fact that the *Furness Karumba* and its cargo had sailed from Laayoune raises other interesting issues which I cannot pursue in this paper but which could make us reflect on globalisation and on the links between seemingly unrelated issues: irregular and forced migration; Australian wheat farming; and the unsuccessful quest for self-determination by the people of Western Sahara. While the Moroccan Government claims that the northern two-thirds of the phosphate-rich Western Sahara (which includes the port city of Laayoune) is now part of Morocco, this claim is not recognised by the United Nations (see, e.g., United Nations Security Council, 'Report of the Secretary-General on the situation concerning Western Sahara', 19 April 2005, UN document S/2005/254, <http://www.unhcr.ch/cgi-bin/texis/vtx/rsd/rsddocview.pdf?tbl=RSDCOI&id=42b921894>) or, for that matter, the Australian government. Interestingly, the Australian journalists reporting the death of the stowaways in early November 2005 consistently referred to Laayoune as a Moroccan port; none of them raised the possibility that the stowaways were from Western Sahara (rather than from Morocco and Mauritania proper, as initially reported), or that the men's departure might have been connected to the unsolved dispute over who ought to control Laayoune and its hinterland. Given the protracted refugee situation in the region, which is the direct result of the conflict over Western Sahara, and the history of human rights violations in the territory occupied by Morocco (see, e.g., 'U.S. Department of State Country Report on Human Rights Practices 2004 – Western Sahara – February 2005', 28 February 2005, <http://www.unhcr.ch/cgi-bin/texis/vtx/rsd/rsddocview.html?tbl=RSDCOI&id=4226d98df>), such a connection was certainly conceivable. Several weeks after the story about the four stowaways first broke, however, concerns were raised about the provenance of the *Furness Karumba*'s cargo (see Julie Macken, 'Wesfarmers "unaware" of illegality of cargo', *Australian Financial Review*, 2 December 2005).
3. They pulled through not least thanks to the medical care they received on board the *Furness Karumba*. This is worth mentioning because such care can no longer be taken for granted. In January 2006, three crew members and the captain of the cargo ship *African Kalahari* appeared on murder charges in a South African court because they were accused of throwing seven stowaways overboard, two of whom drowned ('Stowaways overboard', *Sunday Mail* (Adelaide), 8 January 2006). See also Elissa Steglich, 'Hiding in the hulls: attacking the practice of high seas murder of stowaways through expanded criminal jurisdiction', *Texas Law Review* 78,6 (2000): 1323-46.
4. Amanda Banks, 'Slow death at sea', *Weekend Australian*, 26-27 November 2005; Amanda Banks, 'Bid for a better life ends on freighter', *Weekend Australian*, 5-6 November 2005.

shipping company responsible for their arrival. There are no reliable estimates about the proportion of stowaways who evade detection before entering Australia. Some obviously do, as is evidenced by the Immigration Department's statistics about the detection of illegal immigrants: between 1 July 2004 and 30 June 2005, DIMIA located 25 people who had entered the country as stowaways.⁵

Of those arriving as stowaways in Australia now, a minority lodge protection claims. As David Manne's experience suggests,⁶ this may be partly due to the fact that the Immigration Department has prevented prospective asylum seekers arriving as stowaways from lodging an applications for a protection visa. Those failing with their claims as well as all those who don't lodge a claim are deported. There was therefore perhaps nothing remarkable about DIMIA's initial advice that the two survivors from the *Furness Karumba* would be removed as soon as practicable. The only important issue seemed to be the question of whether they had no lawful reason for being in Australia only because they had not been given the opportunity to state that reason in a format acceptable to the Immigration Department.

Stowaways have not always been automatically deported unless they could convince the Australian authorities that they were refugees according to a relevant international convention. Hersz Rozenberg, the young man on the cover of my book *Refuge Australia*, arrived in Sydney as a stowaway in 1941 on a ship from Japan. He was allowed to remain in Australia, and by 1946 had been naturalised.⁷ Arguably in his case, the government's generous response was unsurprising given that he was a Polish Jew (although once the war had started, Australia accepted very few European refugees).

There were other cases in which the stowaway in question could not be easily identified as somebody fleeing persecution. Bas Wie was a seventeen year old from Timor who in 1946 arrived in Darwin by stowing away in the undercarriage of a Dutch plane. He did not claim to be a refugee and would hardly have been classified as one today. But he, too, was allowed to remain in Australia, even though his admission contravened the White Australia policy.⁸

I thought of Bas Wie, who was unconscious and had severe burns when he arrived in Darwin, as I read of comments made by Detective Sergeant Trevor Troy of Rockingham Police. The police in Rocking-

5. Department of Immigration and Multicultural and Indigenous Affairs, *Managing the Border: Immigration Compliance: 2003-04 Edition* (Canberra: Department of Immigration and Multicultural Affairs, 2005), pp. 29 and 33.

6. David Manne, 'Foundering justice: stowaways' rights to seek asylum are being denied', *Eureka Street* 13,2 (2003): 18-19, <http://www.eurekastreet.com.au/articles/0303manne.html>.

7. Klaus Neumann, *Refuge Australia: Australia's Humanitarian Record* (Sydney: UNSW Press, 2004), pp. 55-56; O'Donnell, report on naturalisation application, 26 September 1946, National Archives of Australia: A435 1945/4/6017.

8. 'NT remembers Bas Wie's great escape', *7.30 Report*, ABC television, 7 July 2004, <http://www.abc.net.au/7.30/content/2004/s1149010.htm>; 'Javanese stowaway in amazing adventure', *Northern Standard*, 9 August 1946; 'Will boy stowaway be turned over to Dutch?', *Northern Standard*, 30 August 1946; 'Boy to remain in Darwin', *Northern Standard*, 13 September 1946; Garry Dembon, 'Aussie who rode the wheel of fortune', *Australian Geographic*, no. 43, July-September 1966, pp. 21-22.

ham had been involved in recovering the bodies of the two dead stowaways and in interviewing the two survivors, because that's where the *Furness Karumba* had first docked to unload its cargo of fertiliser. 'Obviously [they] were desperate to find somewhere else to live,' Troy had said.⁹ In its simplicity, his observation was a powerful reminder that it is possible to regard fellow human beings like the two survivors not as 'unauthorised arrivals' but as individuals driven by hopes and fears that deserve to be taken seriously. 'The desperation contained in the stories of those people caught, often fatally, at the border needs to be reckoned with,' Les Black wrote recently in a challenging essay.¹⁰ One would have to be desperate to hide in a plane's undercarriage or in a cargo hold full of rock phosphate. It was partly in recognition of that desperation that in 1946 the Immigration Minister had allowed Bas Wie to remain in Australia.

Bas Wie's trip to Australia was not organised by an international people smuggling syndicate. Neither were the journeys of the two African men from the *Furness Karumba*, of the three Iranians who arrived five years ago as stowaways in Portland, Victoria,¹¹ or of the Rwandan man who stowed away to Melbourne as a sixteen year old and was deported to Kenya in 2002.¹² Allowing those people to stay in Australia would hardly have sent a signal to people smugglers that Australia was a soft target.

Many stowaways, however, have engaged people smugglers. In recent years, there were several cases in the United States of stowaways having been found in containers that had been fitted out to accommodate dozens of clandestine 'passengers'.¹³ In Australia, stowaways used to account for a sizeable proportion of illegal immigrants. Most of them were Chinese. Many of them avoided detection. In many cases, it seems, their transport to and landing in Australia and their subsequent employment were organised by traffickers who received payments from the stowaways as well as from their Australian employers. In June 1959, the issue of Chinese illegal immigration was dramatically highlighted when the dead bodies of two men, who had stowed away to Australia on the *Taiyuan*, were found floating in Sydney harbour.

In line with established government policy, Chinese stowaways, once detected, were automatically deported – until 1962, that is. In April 1962, two Liberal Party backbenchers tried to stop the deportation of a Chinese man, Willy Wong, who, after allegedly arriving as a stowaway in 1954, had been found in a Sydney market garden in February 1962. They argued that nobody should be deported to

9. Tim Clarke and Denise Cahill, 'Stowaways face deportation', *Australian*, 11 November 2005.

10. Les Black, 'Falling from the sky', *Patterns of Prejudice* 37,3 (2003), p. 344.

11. Neumann, *Refuge Australia*, p. 102.

12. Phil Glendenning *et al.*, *Deported to Danger: A Study of Australia's Treatment of 40 Rejected Asylum Seekers*, s.l. ([Sydney]: Edmund Rice Centre for Justice & Community Education, 2004), p. 9.

13. See, e.g., '32 Chinese stowaways found in LA container', *China Daily*, 15 November 2005, http://www.chinadaily.com.cn/english/doc/2005-01/18/content_410007.htm.

the People's Republic of China. Wong had not claimed to be a refugee. And he was deported anyway because the backbenchers' intervention came too late. But the outcry triggered by his case effectively prevented any further deportations to China for at least the next ten years. Given the number of illegal immigrants from China who qualified for deportation, this was a significant departure from established government policy. Wong was an illegal immigrant, had probably made his way to Australia with the help of a people smuggling or trafficking syndicate, and was not a refugee, yet many Australians were deeply concerned about his deportation because they felt that it would be partly Australia's responsibility if he came to harm in China on his return.¹⁴

The situation of many of those who these days try to enter 'first world' countries without being in possession of appropriate documentation is similar to that of Bas Wie and Willy Wong. For a variety of legitimate reasons, they feel compelled to leave their homes but have little hope of being accepted as refugees under the 1951 Refugee Convention. In her remarkable work of fiction, *Hope and Other Dangerous Pursuits*, Laila Lalami writes about the lives of four Moroccans, two men and two women, who try to cross by inflatable boat from North Africa to Europe.¹⁵ All of them are fleeing intolerable situations at home, but the question of whether or not they would qualify as refugees is not at all an issue in Lalami's work of fiction. The stories she tells may remind us that the fears and aspirations of 'unauthorised arrivals' are often far more complex than either the proponents of restrictive asylum-seeker policies or refugee advocates admit. Lalami's book also suggests that codified criteria of who is and who isn't a refugee (and thus a person deserving of asylum) may not always allow us to gauge the desperation of 'unauthorised arrivals'.

In the current debate about Australia's asylum-seeker policies, it is often taken for granted that the criteria of the 1951 Convention are the ultimate yardstick. Thus in the case of the two survivors from the *Furness Karumba*, it seemed to matter only whether or not DIMIA would allow the men to lodge claims for protection and have these claims assessed fairly. If one accepted that this was the only issue, however, then one would also have to accept that the two men could legitimately be – and indeed should be – removed from Australia if it were found that they are not refugees according to the terms of the 1951 Convention.

But maybe the cases of Bas Wie and Willy Wong hint at ways of reasoning in favour of inviting the two survivors from the *Furness Karumba* to stay, or at least not deporting them to whence they came. (Incidentally, according to the DFAT travel advice, the Western Sahara, where the four stowaways

14. Neumann, *Refuge Australia*, pp. 99-100; H. I. London, *Non-White Immigration and the 'White Australia' Policy* (Sydney: Sydney University Press, 1970), pp. 130-31.

15. Laila Lalami, *Hope and Other Dangerous Pursuits* (Chapel Hill: Algonquin Books, 2005).

embarked on their journey to Australia, is so dangerous a place that no Australian should venture there.)¹⁶ Informed historical perspectives could prompt us to disregard the seemingly self-evident parameters within which we tend to discuss the fate of people such as the two survivors from the *Furness Karumba*.

I would like to leave the stowaway stories here for the time being, and now turn to the case of Chen Yonglin. In May 2005, this Chinese consular official delivered a letter to a DIMIA office in Sydney in which he sought political asylum in Australia.¹⁷ The DIMIA officers were at first unsure as to how to deal with him. They communicated his request to the Department of Foreign Affairs and Trade, which in turn informed Minister Downer. He declined the request. Questioned about his decision Downer said on 7 June: 'Well, look there have been only . . . two cases as far as I know in Australian history where asylum of that kind – political asylum – has been given – in the Petrov case, and I think there was one other case, a very long time ago'.¹⁸ The next day, he added: 'Well, he [Chen] didn't lodge a formal application at all'.¹⁹

Hadn't Mr Chen filled in the correct form? There are no forms to fill in. The Foreign Minister may, at his discretion, grant political asylum to anybody requesting it. A request may be made orally or in writing. The granting of asylum is an executive act. Successful asylum seekers are issued with a visa by the Department of Immigration. There is a special visa category for people granted political asylum by the Minister for Foreign Affairs: subclass 800.

The *outcomes* sought by Mr Chen on 26 May, when he requested political asylum, and then on 3 June, when he applied for a protection visa, are very similar. In both cases he sought Australia's protection, including a guarantee that he would not be extradited or otherwise returned to China. But the processes triggered by a request for political asylum on the one hand, and by an application for a protection visa, on the other, are very different. One concludes with an executive decision informed by the Minister's judgment, in the other a person's claim to be a refugee is assessed by DIMIA in the light of well-defined, indeed codified, criteria. The Foreign Minister's decision on political asylum is discretionary and non-reviewable. The Immigration Department's assessment of a person's refugee claim can be contested before the Refugee Review Tribunal.

16. Department of Foreign Affairs and Trade, travel advice for Morocco, <http://www.smarttraveller.gov.au/zw/cgi/view/Advice/Morocco> (viewed 26 November 2005).

17. For a detailed discussion, see Foreign Affairs, Defence and Trade References Committee, *Mr Chen Yonglin's Request for Political Asylum*, Canberra: The Senate.

18. Alexander Downer, transcript of doorstop interview, Chennai, http://www.foreignminister.gov.au/transcripts/2005/050607_ds.html.

19. Alexander Downer in an interview with Geoff Thompson, ABC AM, 8 June 2005, <http://www.abc.net.au/am/content/2005/s1387177.htm>.

While refugee status is a twentieth-century invention, the institution of political asylum is at least two-and-a-half thousand years old.²⁰ The Greek city states knew about and respected it. A citizen of, say, Sparta, who feared for his life for reasons to do with his politics, could seek, and be granted, asylum in, say, Athens. The system worked as long as the state which the asylum seeker had fled was not powerful enough to make the harbouring state extradite the asylum seeker. Historically a nation-state's capacity to grant asylum was a mark of its international standing. In the nineteenth century, Britain's ability to grant asylum to dissidents from all corners of Europe was testimony to its hegemony.

The early twentieth century witnessed mass flights and mass expulsions on a previously unknown scale. From the 1920s, international organisations charged with representing the interests of stateless people promoted solutions whereby refugees would be protected by international law. In 1951, several countries, including Australia, collaborated in drafting the Convention Relating to the Status of Refugees. Article 1 of that convention defines those to be protected by it, namely persons who are outside their own country and unwilling to return to it 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'. Over the next few decades many countries acceded to the 1951 Convention and its 1967 Protocol and incorporated their terms into domestic legislation.

Australia didn't sign the Protocol until 1973. It was not until 1978 that the Australian Government established a procedure for dealing with onshore applications for refugee status in accordance with the Refugee Convention. But today, usually anybody in Australian territory who is seeking Australia's protection applies for a protection visa. The application is approved if, to cite the Immigration Department's official advice, the applicant 'engages Australia's obligations under the UN Refugees Convention'. Whether or not an applicant does is decided by 'assessing the claims against the definition of a refugee set out in that Convention',²¹ that is by establishing whether the applicant is outside their own country owing to well-founded fear of being persecuted etc. etc.

What happened in Australia before 1978? On 16 October 1956, Cabinet approved 'of the principle that political asylum and refuge should be available in appropriate instances to various categories of aliens namely Olympic Games visitors, members of visiting trade and other delegations, members of diplomatic and consular missions in Australia, certain other defectors and Asian leaders'.²² The policy was applied when several Eastern European athletes sought to stay in Australia after the conclusion of the 1956 Olympic Games.

20. On the history of asylum, see: Liza Schuster, 'Asylum and the lessons of history', *Race & Class* 44,2 (2002): 40-56; Otto Kirchheimer, 'Asylum', *American Political Science Review* 53,4 (1959), pp. 985-1016; Felice Morgenstern, 'The Right of Asylum', *British Yearbook of International Law* 26 (1949), pp. 327-57.

21. Public Affairs Section, Department of Immigration and Multicultural and Indigenous Affairs, *Fact Sheet 61: Seeking Asylum Within Australia* (Canberra: Department of Immigration and Multicultural and Indigenous Affairs, 2003), p. 2.

22. Cabinet, decision no. 487, 16 October 1956, National Archives of Australia: A4926 398.

Between 1956 and 1978, most requests for asylum were decided much like Mr Chen's application of 26 May 2005: by the foreign minister, in consultation with other relevant ministers and ASIO. Hundreds of people sought asylum in Australia or its territories in this period.²³ They were not required to fill in a form or to formulate their request in writing. Among those requesting political asylum before 1973 were diplomats and their dependants; seamen from Eastern Bloc countries; three naval ratings deserting a Portuguese frigate in 1961; and a Chinese stowaway. In the 1960s and early 1970s, West Papuans crossing from Indonesian-controlled West Irian into the Australian Territory of Papua and New Guinea comprised the majority of asylum seekers. While receiving hundreds of asylum requests, the government granted political asylum on few occasions (although more than twice). In many instances, it categorically ruled out the option of granting political asylum (as it did in Mr Chen's case), but at the same time allowed asylum seekers to remain in Australia or its territories. Many (but by no means all) West Papuan asylum seekers were granted five-year permissive residence visas, the precursors of today's TPVs.

I have referred to the history of asylum partly to lay to rest the claim, advanced by Minister Downer and others, that the institution of political asylum has been of little relevance in Australia. Fortunately, Downer's own department seems to be aware of his powers regarding asylum seekers. A few years ago, a Foreign Affairs official highlighted these powers when questioned about the department's role during the 2000 Sydney Olympics.²⁴

Australia would do well to retain a dual system, *if* the granting of asylum were understood as an unbureaucratic means to offer protection to people in particularly precarious circumstances. There may even be situations when *Australia's* interest would be better served by the swift and unbureaucratic granting of asylum (or the swift and unbureaucratic granting of permanent residence, as happened with some previous applications for political asylum), than by the issuing of a protection visa. (That was certainly the case with Mr Chen.) Today a dual system could also be useful because the human rights of unauthorised arrivals are often ill served by the Immigration Department's narrow interpretation of the terms of the 1951 Refugee Convention.

That convention was not drafted with either defecting diplomats or 'unauthorised arrivals' – be they stowaways or boat people – in mind. Those drafting it had the experience of two groups of people in mind: refugees from Nazi Germany in search of a sanctuary, and displaced persons from Eastern Eu-

23. For the following, see Neumann, *Refuge Australia*, chapters 4 and 5; Klaus Neumann, 'Asylum seekers and "non-political native refugees" in Papua and New Guinea,' *Australian Historical Studies* 33,120 (2002): 359-72.

24. Ms Dunn, Joint Committee on Migration (Immigration entry requirements for the Olympic Games: Discussion), 5 February 1999, p. 54, http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=22352&table=COMMJNT.

rope who refused to return to their home countries after the war had ended. The convention was the product of a very specific historical context: that of postwar Western Europe at the beginning of the Cold War. Those drafting the Convention were particularly mindful of the interests of those Western European countries that were accommodating refugees at the time, and of resettlement countries such as the United States and Australia.²⁵

It was widely recognised that there was a significant difference between those being temporarily accommodated in a refugee camp and awaiting an offer for resettlement, and those seeking asylum after crossing a border. In the 1950s and 1960s, members of the UN therefore discussed the need for a second international instrument for the protection of asylum seekers (in addition to the 1951 Refugee Convention). This second instrument was to flesh out ‘the right to seek and to enjoy in other countries asylum from persecution’, which is guaranteed in article 14 of the Universal Declaration of Human Rights. In 1967, the UN General Assembly unanimously passed the Declaration on Territorial Asylum. It does not define those eligible to seek asylum but instead contains the so-called principle of unilateral qualification, which accords the state granting asylum the right to evaluate the reasons for doing so.²⁶

According to international law, a person fleeing her own country and seeking another country’s protection is not entitled to be granted refugee status in that second country. Nor does she have the right to be accorded political asylum. But governments that signed up to the 1951 Convention and the 1967 Protocol, as Australia did in 1973, are bound by international law to apply the criteria of Article 1 of the 1951 Convention. In that sense, refugee status and political asylum are different privileges. Nation-states extend the latter to asylum seekers if they can afford doing so: because they are affluent (and can accommodate asylum seekers) and because their sovereignty is secure (and they therefore don’t have to fear reprisals from the asylum seeker’s country of origin).

A historically informed critique of the present could lend weight to an argument for the revival of a broader institution of asylum, as opposed to the reliance on the protection claim process. The plau-

25. See Neumann, *Refuge Australia*, pp. 79-86; Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford: Oxford University Press, 2001), pp. 34-46.

26. On the Declaration on Territorial Asylum, see P. Weis, ‘The United Nations Declaration on Territorial Asylum’, *Canadian Yearbook of International Law* (1969), pp. 92-149. The declaration is not legally binding; it could, however, be argued that Australia has obligations towards those seeking its protection beyond those emanating from its being a signatory to the 1951 Refugee Convention and the related 1967 Protocol, because it has acceded to other human rights international instruments. See Richard Plender and Noala Mole, ‘Beyond the Geneva Convention: constructing a *de facto* right of asylum from international human rights instruments’, in *Refugee Rights and Realities: Evolving International Concepts and Regimes*, edited by Frances Nicholson and Frances Twomey, Cambridge: Cambridge University Press (1999), pp. 81-105.

sibility and coherence of the narratives of persecution that are produced by those seeking to engage Australia's protection obligations shouldn't be the only criteria for Australia's response to unauthorised arrivals. Other considerations could include: an emigrant's desperation (as evidenced, for example, by their mode of arrival here), the fact that they arrive here and not elsewhere (that they happen to be knocking on *our* door),²⁷ the dangers they could be exposed to if deported, and our capacity to accommodate them.

History is usually credited with helping us to understand how the present became the present. But in this and in other instances, history could also prompt us not to take the present for granted.

27. See David Corlett, *Following Them Home: The Fate of the Returned Asylum Seekers* (Melbourne: Black Inc., 2005), pp. 208-16.

Jessie Taylor

Culture Shock: Australian Youth Responding to Refugees

Jessie Taylor

Board Member, The Justice Project & Monash University Arts/Law Student

At 23, Jessie Taylor has a background of activism and advocacy, particularly on behalf of refugees in the community and in detention. She is on the board of The Justice Project, with Julian Burnside QC, The Hon Malcolm Fraser and Hugh Evans (Young Australian of the Year 2004). Since early 2004 Jessie has been the Director of the Local Response team of the Oaktree Foundation. Jessie has published a number of articles on her experiences with refugees, their stories, and her observations, following visits to the Baxter and Maribyrnong Immigration Detention Centres over the past three years. As well as weekly visits to Maribyrnong, Jessie has taken around 130 visitors through the gates of the centres and into face-to-face contact with the realities of detention.

She is a regular speaker to School, Church and Community groups, on various topics relating to Human Rights and Refugee Policy. She has co-ordinated public awareness events and letter-writing campaigns (both to politicians and detainees), liaised between asylum seekers and their lawyers, supported asylum seekers during RRT and Federal Court proceedings, and assisted detainees to understand correspondence, procedure and the law on refugees in Australia. Jessie has been selected as the Castan Centre Global Intern for the Australian Delegation to the United Nations Human Rights Commission in Geneva for 2006.

Abstract

Jessie will speak of her experiences visiting detainees at Baxter and Maribyrnong. She will speak of the challenges of bringing the refugee issue into the consciousness of her generation of young Australians. Among her observations and stories will be an examination of the complexities and difficulties involved in advocacy and the inevitable personal bonds formed.

Jessie Taylor

Culture Shock: Australian Youth Responding to Refugees

From a distance, the Baxter Detention Centre looks like an oasis. Against a backdrop of desert, it reflects the grey-green of the gum trees that fringe the centre's perimeter. As you draw closer to it, you will see a huge piece of white graffiti, spray-painted on the road, a remnant from protests past. As you drive over it, the words 'SHAME AUSTRALIA' will disappear under your wheels. You're almost there.

We were a motley crew who went to visit. A handful of law students, two young school teachers, a girl with six part-time jobs, and a recent recipient of a temporary protection visa, Bahram, who had until recently been detained at Maribyrnong Detention Centre in Melbourne's inner-western suburbs where many of the group are regular visitors. The thread that we all have in common is that somehow, somewhere along the line, we have been sewn into the lives of some people living in detention, and in some small way, we will never quite be the same again. We were on a mission to visit a friend who had been relocated to Baxter from Maribyrnong. We had arrived in Port Augusta late on a Monday night. After a fitful night's sleep we were ready to seek out Baxter and embark on the first of our visits.

On the day of our visit, it was a beautiful sunny day with bright blue sky and cotton-wool clouds. Leaving town, we drove north over a long, sweeping bridge that curves above the sparkling ocean. Just after the bridge, we took a left, and promptly drove over what seemed to be the threshold of civilisation. At first, we were driving down a nondescript suburban street – house, house, tree, car, house – then suddenly, there was nothing. Nothing in front of us except a long, narrow road, snaking its way through the dusty red desert that stretched out as far as the eye could see. The bright, noisy chatter subsided. For the next 20 minutes the car was almost silent.

As we arrived at the front of the detention centre, the huge metal gates squealed open to allow a truck to enter. We watched – lost and small as children observing the secret business of grown-ups – as the gates clanged shut, swallowing the truck between the two massive steel barriers marking the entrance. Somebody commented on what it must be like for detainees to be driven through those gates, not knowing where they are, what awaits them, or when they'll be coming out again. We tried to imagine what it would be like to arrive here, to be dumped and forgotten in the middle of nowhere. It really is the middle of nowhere.

On that beautiful Tuesday morning, we emerged from the car, feeling very, very far beyond our comfort zones. It was, for all of us, our first visit to the infamous place where Cornelia Rau was, in the words of her sister Christine, 'locked up in isolation... treated like a caged animal'. What were we thinking, spending a week of our holidays in a place like this?

We went through the rigorous security checks, had our IDs checked, our bags locked away, our jackets X-rayed and our bodies metal-detected (twice), before being funnelled through various cages and locked doors and, finally, spat out into the Visits Centre. Baxter's Visits Centre is portable classroom chic: fluorescent lighting, plastic tables and chairs, and a kitchenette. We wandered outside to a grassy area with metal tables and chairs in a strange sort of mock-picnic area set-up, with a brightly coloured set of children's play equipment stuck awkwardly in the middle of it. We sat on some plastic chairs for a while, staring at our shoes and wondering what to do with ourselves, until we heard the click of the doors opening, and the detainees emerged into the courtyard. The next few hours, indeed the next few days, are hard to describe. We heard stories, we witnessed the obvious physical and mental deterioration of our friends, and we were all infused with the sense of black despair and hopelessness that sits like a heavy fug over the entire place.

Many of the people we met just shook their heads in disbelief, saying 'what am I doing here?' and, 'I don't understand' and, 'this wasn't supposed to happen'... We met a heavily pregnant woman who chain-smoked and drank far, far too much coffee. Her whole body trembled and shook violently, betraying her extreme anxiety and depression. Two weeks after we saw her, she was moved to a psychiatric ward. I hope her baby will be OK. A Cambodian man performed a card trick. His sleight of hand was remarkable, and I could find no possible explanation as to how he had done it. I said, 'how did you do that?!' He walked away grinning, and threw an enigmatic glance over his shoulder to where he had left me, protesting cross-legged and befuddled on the grass. A moment passed, and another young detainee stubbed out his cigarette and walked over to me. He crouched down on the ground and mechanically explained the trick to me, his eyes mute, devoid of sparkle and magic. After 5 years in detention, there is no space in his life for mischief, silliness or laughter.

At the end of each visit, the guards hand back each detainee's ID tag, a gaudy yellow plastic card which reduces each person to a washed-out mugshot, a barcode and a Baxter ID Number. Our friends' reactions to this ritual are difficult to watch. Some dismissively throw it aside, while others clip it back onto their clothes, resigned to this plastic summary of who they are in detention. As we said goodbye on our last day, a 23-year-old man stood, in a plastic room surrounded by plastic furniture, staring at the little plastic card that bears witness to his plastic identity.

Over the course of the few days we were there, the boys we were visiting admitted that they rarely eat more than a bowl of cereal a day. They each puff through two or three packs of cigarettes and typically

crawl into bed at dawn for a few hours of blank, shallow rest. Pale and listless, they appear to enjoy neither appetite nor energy, happiness nor hope. And those are just the physical symptoms...

Thousands of pages have been written about the psychological effects of long-term detention. The suicide rate in Australia's immigration detention centres is 10 times the community average. In Australia, there is no other known situation where pre-pubescent children regularly attempt suicide. Thankfully, since the end of July 2005, there are no more children in detention centres. But let it never be forgotten that in our detention centres, children as young as seven have slashed their own throats, starved themselves, deeply cut their wrists, thrown themselves onto razor wire, hanged themselves with bed sheets, drunk cleaning products, and more. This is what our nation's system of mandatory immigration detention can do.

And yet, this is not a political issue, because the policy has had bipartisan support since its inception in 1992.

As we sat at the Visitors' Centre at Baxter, we certainly didn't talk about politics. We didn't talk about the *Migration Act*, or the legislative amendments that have deliberately disallowed our friends access to judicial review of their cases. We didn't talk about the tactics of fear, alienation and propaganda that have been employed to win votes over the past decade, at the expense of hundreds of suicidal children and damaged adults. We talked about our friends' lives. Their lives in the past, their hopes for the future, how much they miss their families. And how they really, truly fear for their lives if they are returned to their mother countries, so much so that they are willing to spend months, maybe years, in a place like Baxter, despite it making them crazy.

One month after we returned from Baxter, it was my birthday. I received a little parcel from my friend in the detention centre. Inside the envelope was a smaller envelope, and inside that envelope were some flowers. This friend had often said that he wanted to send me flowers, and, lacking all power to do so, he had found a flower patch inside Baxter, picked some beautiful, colourful flowers, put them in an envelope and posted them to me. It was a simple, beautiful gesture of love and thanks, and it broke my heart.

Statistically, most of our friends will be found to be genuine refugees. But at what cost? Why must our policy take so many years to work, strip people of their dignity and humanity, and damage so many lives in the process of trying to help them?

As with so many things in life, the experience of visiting people in immigration detention centres can be expressed on the parallel planes of the mundane and the profound. On one level, it's taking a few hours out of a Sunday morning to spend what can be a slightly awkward visit session sitting in a plastic

chair, passive smoking and crumpling up a used plastic cup, before leaving again, slightly relieved that another visit is over. On another level, that same exercise is a foray into the human face of injustice. The awkward silence is actually a massive void. It is steeped in unspeakable apology for the gulf between my life, and yours. The powerlessness of knowing that there are only so many times I can shake my head in dismay and regret for what is happening to you. The strange reality that outside of the context of your detention, we probably would never have been friends. The knowledge that hearing the explanation once again of why and how you came to be in detention in Australia won't suddenly make everything clear to me.

In this past year particularly, my understanding of the clouded mess of refugee policy has deepened quite a lot. But I don't mean it's become any less clouded or messy. Actually, as I have got to know more people, learnt about the twists and turns of their cases and become more intimately involved in their lives, things have certainly become more complex, more difficult and a lot less clear-cut. An important lesson to learn is to expect humanity – fallibility, weakness, confusion and brokenness, as well as good hearts belonging to good people. Because aren't we ALL a mixture of those things...

In attempting to broaden young Australians' engagement with this issue, there are a number of problems to be faced. The first is the lack of any material or ideological hunger – generally speaking, there doesn't seem to be a strongly focused striving for justice amongst Australian youth. The second is a simple want for exposure to the issues. People simply are not aware of what has been behind the razor wire of detention centres here and in the Pacific. There is not much less sexy than the slings and arrows of administrative law, under which a large portion of the refugee issue falls. Nobody wants to hear about our obligations under international law, or how the *Migration Act* doesn't REALLY make arriving in a leaky boat 'illegal'. But as soon as they're at a party, or a barbecue with a beer in their hand talking face-to-face with a refugee about their experiences in detention, you can bet good money that they change their tunes pretty fast. Those turn-arounds are the stuff I live for. I want to say thank you again to Bahram and Ali, for telling their stories here this morning. It is only by their willingness to speak about what has happened to them and their friends that our children and our children's children will ensure that Tampa, SIEV-X, Children Overboard and Cornelia Rau can NEVER happen again. Thank you.

Stancea Vichie

Home Is Not Home Until Human Rights Are Respected

Stancea Vichie

Community Liaison Coordinator,
Hotham Mission Asylum Seeker Project, North Melbourne

Stancea Vichie is the Community Liaison Coordinator at the Hotham Mission Asylum Seeker Project in North Melbourne, and works with asylum seekers living in the community as well as in detention. She has been involved in this area for almost six years. She has been involved in developing links with the community through awareness raising and the growth of Asylum Seeker Support Networks and other groups who work with the Project through funding, housing, volunteering and lobbying for better outcomes for asylum seekers. She is involved with the Justice for Asylum Seekers Alliance, the Network of Asylum Seeker Agencies Victoria, coordinates the Project's Women's group, its Volunteer Training Program, and assists with University and student research projects.

Abstract

Asylum seekers have left their home to seek protection in Australia but because of regulations introduced in 1997, some find themselves without rights and entitlements, with no capacity to provide themselves with a home and all that this means as they await a final decision to see if they can remain in Australia and make it their home. Lobbying to change those regulations is just one step towards restoring rights for this vulnerable group of people whether their home will ultimately be here or back in their own country.

Home Is Not Home Until Human Rights Are Respected

Fleeing Home

Early in 2000, Rahul and Sukeena, a family with three small children, fled civil conflict and torture in Sri Lanka. It was a difficult decision and the airfares were costly. On arriving in Australia, they applied for protection, and by chance, it was within the prescribed 45 days. They were soon granted bridging visas that allowed the adults to work. Both found work without much difficulty and were able to support themselves and the family. The children settled into the local school and they were optimistic that they might now find a new safe home and security for the future. However, the Refugee Review Tribunal rejected their case and the family was immediately placed on a Bridging Visa E which denies the right to work, Medicare and benefits.

Without a Home Again

The family was soon on the verge of homelessness and the strain brought them close to breaking point. The situation in Sri Lanka did not improve. Letters from friends warned them it was not safe to return. They became extremely anxious not knowing what to do.

Finding a Temporary Home

Fortunately, a friend said to them that they might be able to receive help from an agency they had heard about but did not know where it was. Some enquiries led them to the Hotham Mission Asylum Seeker Project. The family came to the Project and were welcomed by one of the social workers who talked with them about their needs. They were placed immediately on the Project's monthly Basic Living Assistance Program as well as provision made for them to move to rent-free housing which was to become available during the next month. The children relocated to the local primary school and with volunteer support, the family were introduced to the services in their new local area. They were greatly relieved to be supported in this way even though it was minimal in terms of their access to basic living

funding. Despite the difficulties of not being able to be self reliant and work for a living, they wanted to appeal to the Minister to intervene in their case such was their fear about returning to their own country.

Advocating for a Home

With basic human rights being denied to such a family, and many other families and single persons who are asylum seekers living in the community on Bridging Visa E, Hotham Mission has sought to have continuing dialogue with a range of policymakers. This has included successive Ministers of Immigration and their advisors, Shadow Ministers of Immigration, Department of Immigration officials, and other bodies. A research project, *Welfare issues and immigration outcomes for asylum seekers on Bridging Visa E*, covering February 2001 – February 2003 was completed and has been used in discussions with the aforementioned bodies. It outlines the significant impact of having no rights or entitlements. Another document prepared by Hotham Mission and entitled, *Minimum Standards of Care for Asylum Seekers in the Community*, identifies asylum seekers who have unique and exceptional welfare needs, arguing that these groups should all have access to appropriate healthcare, the right to work, and that those with special needs be able to access specialized care in accordance with the Asylum Seeker Assistance Scheme Exemption Criteria. This has also been used as a focus for change in policy.

In March 2004, the Senate Select Committee on Ministerial Discretion in Migration Matters released a report on an inquiry into ministerial discretion and made a number of recommendations, which, if taken up, have implications for asylum seekers on Bridging Visa E who are awaiting a ministerial decision.

Recommendation 10

- 5.44 The Committee recommends that all applicants for the exercise of ministerial discretion should be eligible for visas that attract work rights, up to the time of the outcome of their first application. Children who are seeking asylum should have access to social security and health care throughout the processing period of any applications for ministerial discretion and all asylum seekers should have access to health care at least until the outcome of a first application for ministerial discretion.

At this moment, there is no change in policy. A strong *'Right to Work' campaign* has been building in some sections of the community who believe that asylum seekers, whether they miss the 45 Day Rule, or whether they are applying for ministerial discretion, should have the right to work. Asylum seekers themselves are constant in their proclamation of desiring to work as they await a final decision, and indeed, have many of the skills which are sought after on the Skilled Occupation List for the General Skilled Migration Program, as well as skills in high demand on the Migration Occupations in Demand List.

Universal Declaration of Human Rights

In 2008, it will be sixty years since the Universal Declaration of Human Rights was completed. Australia was active in the drafting of this significant document. Two articles from the declaration are especially important as we continue to work for change to policy.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone has the right to just and favorable remuneration ensuring for himself and his family and existing for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

and

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Reaching a Home with Dignity

Whatever the final outcome may be, whether Rahul, Sukeena and their children are able to remain in Australia as their new home, or whether they will ultimately have to leave Australia and return to start a home again in Sri Lanka, it will be essential that policy change comes about to honour our international obligations and to ensure that this family and so many others can live with dignity.

Spencer Zifcak

No Way Out: The High Court, Asylum Seekers and Human Rights

Spencer Zifcak

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No Way Out: The High Court, Asylum Seekers and Human Rights

When reading the Human Rights and Equal Opportunity Commission's report on children in detention, *A Last Resort*, late last year, I came close to tears as I took in the following series of entries made by staff in relation to one particular 12 year old child.¹ This case study was not isolated but was one of more than a hundred considered by the Commission:²

- 11 April 2002: Child attempts to hang himself with a bed sheet on playground equipment.
- 12 April: Child's mother becomes very upset and is taken to hospital for observations and assessment by psychologist. Says that she is on hunger strike. Child recorded as saying:

'he wanted to kill himself because his mother doesn't eat and she cries all the time...Very tired of camp, getting up in the morning and seeing the fences and dirt. We came for support and it seems we're being tortured. It doesn't matter where you keep me, I'm going to hang myself'.
- 19 April: Child attempts to hang himself from playground equipment. Child taken to hospital with his father.
- 17 May: Child attempts to hang himself from playground equipment. Taken to Woomera and then returns.
- 30 May: Psychiatrist reports that 'for this child the matter is simple. If he remains in custody he wishes to die. He can no longer bear razor wire and dirt. He worries about his mother's wellbeing and also about his father who he says is constantly worrying and angry...'
- 7 June: Child found in the razor wire. He says 'he can't go on anymore.'
- 8 June: Child found in razor wire again.
- 14 June: Child climbs fence into the razor wire a third time. After about 8 minutes climbs down again.

1. Human Rights and Equal Opportunity Commission (2004), *A Last Resort? National Inquiry into Children in Immigration Detention*, April 2004.

2. Ibid, pp.442-444.

- 24 June: Child on hunger strike.
- 13 July: Child found in razor wire.
- 26 July: Child attempts to hang himself.
- 29 July: Child smashes lights in dining area, slashes arm with fluorescent tube.
- January 2003: Child transferred to Woomera RHP.

It is said frequently of Australia's constitutional and legal system that 'if it ain't broke, don't fix it'. If there is no way out for a child such as this then, in my view, it's broke. In this article, I will explore this theme further by reference to recent High Court decisions which concern the legal position of those seeking asylum in Australia and explore the enactment human rights legislation as one possible solution to the problems raised by them.

Children in Detention

In two important cases late in 2004, the High Court had to rule on the legal validity of the mandatory detention of the children of asylum seekers. In both it concluded that the Commonwealth Government has the constitutional and statutory authority to detain children mandatorily – even for years. The conclusions of the Court were unanimous and, in my view, clearly right. This is not for a moment, however, to endorse the policy of the compulsory incarceration of minors embodied in the legislation that the Court was required to consider. I return to this dissonance presently.

The first case was one of several involving the Bakhtiyari family.³ It came to the High Court as an appeal from the Family Court. The Family Court had decided that it could order the release of the Bakhtiyari children from detention in pursuit of a general, statutory responsibility for the welfare of children. This was a most adventurous interpretation of the Court's jurisdiction. No matter how well intentioned, it was plainly, legally incorrect. The High Court determined properly that the Family Court's jurisdiction was confined by its statute to the pursuit of the best interests of the child only in the context of marital disputes or in the determination of the proper exercise of parental responsibility. Consequently, the Court could not make orders with respect to the welfare of the Bakhtiyari children just because they were children in need. It could not order their release, therefore, particularly in the face of the comprehensive scheme of mandatory detention of those seeking asylum contained in the Commonwealth's Immigration Act. This scheme, the Court ruled, was one which appeared to contain no relevant exception in relation to children.

3. *Minister for Immigration and Multicultural Affairs v B* (2004) 78 ALJR 737.

The proposition that there was no exception for children was then challenged in the second case of *Re Woolley*.⁴ Mr Woolley was the manager of the Baxter Detention Centre. The applicants were four Afghani children aged 15, 13, 11, and 7, who had arrived with their parents on Australian shores seeking refugee status on the ground that they would be in danger of persecution if they returned to their homeland. In *Woolley* the Court confirmed its initial view that the Immigration Act could not be read so as to provide children with a legal or constitutional immunity from mandatory detention. Children stood in no different position from their parents in this respect. The legal reasoning which led to this conclusion was straightforward.

The two central provisions of the *Migration Act* that provide for mandatory detention refer to the detention of ‘unlawful non-citizens’. The definition of an unlawful non-citizen contains no exception for children. An unlawful non-citizen is a person who is not a ‘lawful non-citizen’ i.e. a non-citizen possessing a visa. A child is a person. Therefore, a child may fall within the definition.

In addition, it had to be presumed that parliament would have known that adults and children would have been caught by the definitional provisions. As Justice Kirby observed, the plight of children in detention had been drawn to parliament’s attention in several, detailed parliamentary reports and reports from the Human Rights and Equal Opportunity Commission (HREOC). Despite this, no change to the legislation had been made. This reinforced the view that the mandatory detention of children had been, and continued to be, contemplated explicitly by the parliament.

The Constitution could not help either. It provides the Parliament with the power to make laws with respect to aliens (i.e. unlawful non-citizens). The statutory provisions with respect to mandatory detention are laws concerning aliens. They provide for the detention of aliens pending the scrutiny of their asylum claims, and if rejected, pending their deportation. The laws, therefore, were clearly within the Commonwealth’s constitutional power.

In short, the plain words of the *Migration Act* provided no room for an implication that the detention regime was inapplicable to children. Given the clarity of the words, and the intention behind them, it was not for the Court to undermine the legislature’s will. As Justice Kirby stated:⁵

Fundamental to the Australian constitution is respect for the rule of law. If the law is clear and constitutionally valid, it is the duty of the Australian courts to apply its terms. This is so whatever judges or others might think about the content and effect of the law.

4. *Re Woolley, Ex parte Applicants M276/2003* (2004) 210 ALR 369.

5. *Ibid* at 416.

The *Migration Act*, therefore, provided no way out for the Court and, consequently, no way out for the children.

This outcome, however well it might be justified legally, has presented the nation and legal system with a formidable dilemma. Australia's incarceration of children, often for long periods of time, has been well recognized internationally and nationally as a grave assault on their human rights. It constitutes a significant infringement of Australia's obligations under a number of international human rights conventions including, most notably, the *International Convention on the Rights of the Child*.

Yet, in the face of the plain intention of the parliament to the contrary, nothing other than the replacement of the government at election, or threats by liberal moderates to cross the floor, can be done to rectify or moderate the injury. That, in turn, draws one's attention sharply to certain critical matters that the High Court, as a matter of law, could not take into account when reaching its conclusions.

It could not consider whether the scheme of the legislation might be inconsistent with Australia's international human rights treaty obligations. This is because a treaty's provisions do not have direct effect in Australian law.

It could not consider the consistent opinion of United Nations treaty monitoring bodies and rapporteurs to the effect that Australia was in breach of its human rights treaty obligations: in this case, in breach of its obligation to ensure that no child should be deprived arbitrarily of their liberty and that detention of a child should be used only as a measure of last resort. The Court's task here was simply to interpret the statute and determine its constitutional validity.

It could not consider the comparative law of other similar countries. This is because Australia's detention regime, as set down by law, differs substantially from that in its closest counterparts.

It could not consider the powerful, indeed overwhelming, evidence of the systematic abuse of children's rights and the physical and emotional injury inflicted upon them in mandatory detention adduced by Australia's Human Rights Commission. In its 900 page report *A Last Resort?*, the Human Rights and Equal Opportunity Commission concluded that:⁶

Children in immigration detention suffered from anxiety, distress, bed-wetting, suicidal ideation, and self-destructive behaviour including attempted and actual self-harm. The methods used by children to self-harm included hunger strikes, attempted hanging, slashing, swallowing shampoo or detergents and lip-sewing. Some children were also diagnosed with specific psychiatric illnesses such as depression or post traumatic stress disorder.

6. *A Last Resort?* supra. p.13.

The only way in which evidence such as this might have made its way into the Court's legal deliberations would have been if Australia had a constitutionally entrenched or statutory Charter of Rights, enacting into law the provisions of the international human rights conventions that Australia has ratified. But Australia is now the last country in the Western world not to have adopted such a Charter. Neither Australians nor aliens have recourse to a law of this kind.

Indefinite Detention

A very similar set of problems emerged from the High Court's very controversial decision with respect to stateless persons, *Al-Kateb v Godwin*.⁷ Mr Ahmed Al-Kateb had been born in Kuwait of Palestinian parents. This was insufficient to accord him citizenship of Kuwait. In the absence of a Palestinian state, therefore, he was left as a 'stateless person'. After having spent considerable time wandering the Middle East in search of a home, Mr Al-Kateb arrived in Australia by boat in December 2000, without a passport or a visa. Upon landing he was detained pursuant to the *Migration Act* 1958.

The provision most relevant to his case was section 196. This states, in summary, that a person who is an 'unlawful non-citizen' must be kept in immigration detention until either the person is removed from the country, deported, or granted a visa. Mr Al-Kateb's problem, after three years in detention, was that he had been refused a visa but could not be removed or deported because no country had been found that was willing to receive him. He wished to leave Australia – but had absolutely nowhere to go.

The decision in the case, then, concerned two principal questions. First, how should s.196 of the Act be interpreted? And, secondly, did the Constitution provide any foundation upon which Mr Al-Kateb's continuing detention might be challenged?

The majority in the case, Justices McHugh, Hayne, Callinan and Heydon, decided that s.196 was unambiguous. The provision states that a person must continue to be detained until a visa is issued or removal is effected. If that meant, in the absence of a capacity to remove him, that Mr Al-Kateb's detention would be for life then that was the consequence that must follow as a matter of law. The words, as Justice Hayne put it, were 'intractable'.

The minority, Justices Gleeson, Gummow and Kirby, disagreed fundamentally. S.196, they believed, rested upon an underlying assumption that the purpose of the provision, i.e. a person's removal, was capable of fulfilment. However, if Mr Al-Kateb could not be removed, because no other country would

7. (2004) 219 CLR 562 and see further J. Allan, 'Do the Rights Thing Judging?: The High Court of Australia in *Al-Kateb*' *University of Queensland Law Journal* 24 (2005): 1.

admit him, the provision's purpose lapsed. Where the purpose was spent, therefore, detention must be suspended. This result followed from the great statutory and common law presumption in favour of the liberty of the subject.

The Court was equally divided on the principal constitutional question. Speaking generally the Constitution forbids a person's detention for any punitive purpose unless that detention has been authorised by a court following a judgment of criminal guilt. Nevertheless, it is recognised that the Executive may detain a person for a non-punitive, administrative purpose in certain special circumstances. The detention of a person under immigration law for the purpose of determining whether they should be permitted to enter Australia is one such recognised exception.

On this question, the majority decided that the purpose of Mr Al-Kateb's detention was administrative and so, by definition, was non-punitive in nature. As Justice Hayne summarised the matter, the Constitution permitted the segregation of aliens from the Australian community. Such segregation was neither penal nor punitive.

The minority responded by asserting that no clear line could properly be drawn between punitive and non-punitive detention. The one might easily merge into the other. Consequently, it was primarily with the deprivation of a person's liberty that the Constitution and the Court had to be concerned. In the present case, therefore, as Justice Gummow encapsulated the matter:⁸

It is hardly to be supposed that in speaking of the denial to prohibited immigrants of membership of the Australian community... [this Court] was giving support to the notion that legislative power with respect to such persons would support a system of segregation by incarceration without trial for any offence and with no limit of time...

Yet it is this, precisely, that has been the outcome of the case. The majority's very literal approach to constitutional and statutory interpretation left no room for a consideration of the presumption of liberty. It shut the gate on numerous prior judicial decisions to the effect that, in case of doubt, laws should not be interpreted in a way that is prejudicial to individual liberty. In the most influential of these statements, a prior Court stated that:⁹

the rationale of the presumption is to be found in the assumption that it is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clarity.

8. *Ibid*, p.614.

9. *Bropho v Western Australia* (1990) 171 CLR 1, 18.

The choice not to infringe Mr Al-Kateb's fundamental rights was open. The majority chose not to exercise it. The Court adopted a formal, semantically founded interpretation of both statute and Constitution. This method embodies a degree of deference to the will of the Executive that is likely to narrow significantly its role as a guardian of individual rights and liberties and expand governmental power correspondingly.

A Human Rights Act

Immediately following his retirement from the High Court late in 2005, Justice Michael McHugh, a member of the majority in *Al-Kateb*, gave a speech to students at the University of Sydney's Law School.¹⁰ In that speech he indicated his strong support for the enactment in Australia of a Bill of Rights. The existence of a Human Rights Act of this kind, he said, was the only way in which a legal difference could have been made to the High Court's decision in that case. As he said then:¹¹

There is no doubt that the protection provided [for human rights] under ordinary legislation is no substitute for the protection that could be provided by a national Bill of Rights...Unlike ordinary legislation, a Bill of Rights is expressly designed to place fundamental human rights beyond the reach of day to day politics...A Bill of Rights forces governments to consider the human rights consequences of the legislation they are introducing, allows the judiciary to view legislation through the prism of human rights and provides the public with a clearer overview of the rights they are being asked to give up in the name of national security.

How then might a *Human Rights Act* such as that Justice McHugh advocates have made a difference in the cases discussed above? The short answer is that human rights legislation would set down in Australian domestic law, the rights and freedoms common to and exercisable by all Australians. These, in turn, would be derived from the terms of the international human rights treaties to which Australia is a party. Having done so, the legislation's effect would be to establish clear legal standards against which all other laws would have to be assessed. Consequently, where it is determined by a Court that a law of the Commonwealth is incompatible with a right or freedom set down in the *Human Rights Act*, that law would be returned to the Parliament for reconsideration, amendment or revocation.

By way of example, let me reconsider the cases previously referred to with reference to the draft Commonwealth human rights legislation presently being proposed in a campaign by the online political magazine, *New Matilda*.¹²

10. The Hon Justice Michael McHugh, *The Need for Agitators – The Risk of Stagnation*, Sydney University Law Society Public Forum, 12 October 2005.

11. *Ibid*, pp.12-13.

12. The full text of the *New Matilda Human Rights Act* may be found at www.humanrightsact.com.au.

It was an important feature of the decision in *Al-Kateb* that the legislation underpinning Mr Al-Kateb's indefinite detention was made under the Commonwealth's constitutional power to make laws with respect to aliens. All members of the Court accepted that had Mr Al-Kateb been an Australian citizen, the executive government would have had no similar power to detain him. This is because, under Australia's constitution, a citizen may be detained only consequent upon a finding of criminal guilt and the imposition of a sentence by a properly constituted Federal Court. Had the *Human Rights Act* been in place, however, the situation would have been different. This is because the Act applies to 'all people within Australia's jurisdiction'.¹³ No relevant distinction could be drawn, then, between citizens and aliens. Its guarantee of a 'right to liberty', then, would apply equally to both.

That being the case, Mr Al-Kateb's indefinite detention by the executive would certainly be found to be inconsistent with the *Human Rights Act* which provides that 'every person has the right to liberty and security of the person' and, more particularly, that 'no one may be arbitrarily arrested or detained'.¹⁴ This is derived from a similar guarantee contained in the *International Covenant on Civil and Political Rights*. The key issue here relates to the meaning of the term 'arbitrarily'. It may be quite reasonable for legislation to provide that a person arriving without authorisation on Australian shores should be detained for a period of time that is sufficient to permit appropriate health and identity checks to be carried out and also, perhaps, pending the outcome of their formal application for asylum. However, as the United Nations Human Rights Committee has determined, in its criticism of Australia's mandatory detention regime, where detention is either substantively unreasonable or is perpetuated for a quite unreasonable period of time, the injunction that a person should not be detained arbitrarily is transgressed.¹⁵ The idea that Mr Al-Kateb could be detained indefinitely and perhaps for life, would constitute the clearest infringement of both national and international guarantees with respect to the 'liberty of the subject'.

The *Human Rights Act* also provides for a right to asylum.¹⁶ This right incorporates into Australian domestic law, the provisions of the *International Convention on Status of Refugees*. In doing so it provides an entitlement to asylum to any person who is in genuine fear of political persecution in their home country. Further, the Convention contains a minimum guarantee of humane treatment for applicants for asylum. The *Human Rights Act* gives this guarantee domestic legal effect. While families are in the process of having their asylum claims heard and determined, these basic conditions of humane treatment would not permit the extended and psychologically damaging detention of adults. The prohibition would be even more forceful in relation to children.

13. *New Matilda Human Rights Act*, s.4.

14. *Ibid* s.15.

15. *Concluding Observations of the Human Rights Committee: Australia*. 28/07/2000, A/55/40.

16. *New Matilda Human Rights Act*, s. 34.

The Act provides in addition for the rights of the child. In this respect it incorporates the terms of the *International Covenant on the Rights of the Child*. More specifically it states that:¹⁷

1. Every child has the right –
 - a. to a name and a nationality from birth;
 - b. to family care, parental care, or adequate and appropriate alternative care if removed in accordance with law from the family environment;
 - c. to be protected from maltreatment, neglect, abuse or degradation;
 - ...
 - e. not to be detained except as a matter of last resort and then only for the shortest appropriate period of time;
 - ...
2. A child's best interests are of paramount importance in every matter concerning the child.

Taken in combination these provisions would be likely to rule out the mandatory detention of children. This is first because of the requirement that the child's best interests must be paramount in determining his or her placement. So, except in very special circumstances, it is highly unlikely that a court would find that a child's best interests would be served by their continuing incarceration in an immigration detention centre. Further, as the Human Rights and Equal Opportunity Commission found in its comprehensive report on children in detention, it cannot properly be said that in practice the detention of children has been either a last resort or that it has been instituted for the shortest appropriate time. Finally, it is highly unlikely that a Court would endorse the mandatory detention of children given the overwhelming evidence to the Commission that children have been subject to severe mental trauma and damage consequent upon their incarceration. Such treatment flies in the face of the requirement that children must be protected from maltreatment and abuse at the hands of governmental authorities.

Conclusion

In a lecture, now some time ago, Chief Justice Gleeson pointed out correctly in my view that:

Those for whose rights we need to be zealous are the unpopular, those against whom campaigns of public vilification may be waged, those whose activities, even though lawful, are sought to be made the object of public disapproval.¹⁸

17. Ibid, s.27.

18. The Hon. Justice Murray Gleeson, 'The Rule of Law and the Independence of the Judiciary', *Judicial Officers' Bulletin* 1, no.10 (1989), p.2.

And yet it seems that the Government is not willing, and the High Court perhaps is not able, to act to give effect to this principle.

The enactment of a strong and effective *Human Rights Act* at federal level, as Justice Michael McHugh observed, provides one avenue through which the rights of the dispossessed and disadvantaged, of whom asylum seekers are one category, may more actively be pursued and, where appropriate, be vindicated. It is time to consider such legislation seriously.

Relevant Publications and Websites

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- Julian Burnside, ed. *From Nothing to Zero: Letters from Australia's Detention Centres*. Lonely Planet, 2003.
- Simon Bronitt and Bernadette McSherry. *Principles of Criminal Law*. 2nd edition. Sydney: Thomson LBC, 2005.
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The URLs for some websites cited in the text have changed.

<<http://www.caa.org.au/>> is now at:

<http://www.oxfam.org.au/>

Oxfam publications previously at <<http://www.caa.org.au/campaigns.PDF>> include the following:

<http://www.oxfam.org.au/campaigns/refugees/pacificsolution/>

http://www.oxfam.org.au/campaigns/refugees/still_drifting/

The URLs for several government websites have been updated:

<http://www.immi.gov.au/detention/standards_index.htm> and

<http://www.immi.gov.au/illegals/det_standards.htm> are now at:

http://www.immi.gov.au/managing-australias-borders/detention/standards_index.htm

<http://www.humanrights.gov.au/human_rights/children_detention_report/index.html> is now at:

http://www.humanrights.gov.au/human_rights/children_detention_report/report/index.htm

See also DIMIA's response to allegations raised by witnesses in the Senate Inquiry into the operation of the migration Act. Available as word and pdf versions on our website at:

http://www.ajustaustralia.com/informationandresources_researchandpapers.php?act=papers&id=60