

The Implications on the Treatment of 'Boat People' on the Integrity of Our Rights and Freedoms

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The treatment of asylum seekers has deteriorated in recent years with the implementation of policies to deter asylum seekers from coming to Australia by boat. These policies include the erosion of the freedom from arbitrary detention and a winding back of administrative procedural safeguards in the refugee status determination process. In the absence of strong statutory and constitutional safeguards for their rights, asylum seekers are at the mercy of the political will of the government. As a consequence, asylum seekers arriving by boat are rendered the 'Other'. The illiberal treatment of asylum seekers should concern Australian citizens, as it raises the question of how far the Australian government will go in abrogating fundamental rights in the name of sovereign border security.

This piece will first present the legislative regime that has eroded the fundamental rights of asylum seekers down to mere 'personal liberty' and 'due process'. It will then examine how this erosion of rights has been rationalised to the Australian public by the construction of asylum seekers as the 'Other'. It will finally explore the implications of these policies on the integrity of our rights and freedoms, Australia's standing in international politics and the reasons why Australians should care about the treatment of asylum seekers.

I. CURRENT LAW AND POLICY: MANDATORY DETENTION AND THE WINDING BACK OF PROCEDURAL RIGHTS

Mandatory detention was originally envisaged as an interim measure to overcome an influx of asylum seekers, but has become a cornerstone of Australian immigration policy.¹ Unlawful non-citizens are held in immigration detention until they are either removed from Australia, deported or granted a visa.² Detention is imposed regardless of the likely outcome of their immigration status,³ forming a basis for indefinite detention.⁴ Asylum seekers who arrive by boat are currently detained in the offshore detention centres in Nauru and Papua New

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Guinea, a policy introduced by the Gillard government in 2012.

In a recent law reform, the Minister for Immigration and Border Protection ('the Minister') was given the power to detain boats containing asylum seekers at sea and transfer them to another country without parliamentary or judicial scrutiny.⁵ The United Nations Special Rapporteur on Torture has criticised this law as contrary to the *United Nations Convention Against Torture*, to which Australia is a party.⁶ He stated that such a policy amounts to arbitrary detention and allows for refugee determination at sea without access to lawyers. In one instance of the exercise of this power, the government detained Vietnamese asylum seekers at sea for one month before they were returned to Vietnam.⁷ According to evidence put before the Senate, it is estimated that the screening interviews regarding the asy-

lum seekers' refugee claims ranged anywhere between 40 minutes and two hours. Not only would the limited time span be insufficient to a complete and fair determination of the merits of their refugee claims, it would also result in refoulement before they can formally declare that they have well-founded fear of persecution and are entitled to refugee protection.⁸

The courts have refused to extend the implied constitutional freedom from deprivation of liberty to 'aliens'. However, the High Court has expressed that there could exist — for citizens — an implied freedom from detention without court adjudication of criminal guilt.⁹ Although this implied freedom has been rendered unclear over time,¹⁰ the original argument was that detention is de facto so severe that it constitutes punishment. In this way, it has been suggested that detention could only be ordered by the judiciary for the punishment of a

criminal wrong. However, the courts have decided that immigration detention of asylum seekers is constitutionally valid because the initial decision to detain is for administrative rather than punitive reasons.¹¹ Therefore, the court has adopted a formalistic argument, which is divorced from the well-documented substantive punitive effect of immigration detention.

In contrast to the mandatory detention policy imposed against asylum seekers, the protection against arbitrary detention for citizens is fundamental to the development of democracy.¹² The notion of freedom from detention but for the 'lawful judgment of his peers or by the law of the land' has been enshrined in the Magna Carta.¹³ The courts have previously used the habeas corpus writ to review the lawfulness of detention, holding jailors to account for detaining subjects in a manner 'repugnant to the common law'.¹⁴ Australia is also a party to human rights conventions that hold freedom from arbitrary detention as a universal and inalienable human right. Therefore, the denial of fair judicial process, before the detention for asylum seekers, is contrary to rights ingrained in our legal system and to the international human rights norm.

Furthermore, the Abbott government has championed the erosion of independent review of Minister's decisions regarding refugee status determination. Access to appeals for many asylum seekers arriving by boat have been removed by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, through the introduction of the 'fast-tracked refugee processing regime'. This regime creates classes of asylum seekers for which merits review is limited, ostensibly to ensure the faster determination of applications.¹⁵ The 'excluded fast track review applicant[s]' include asylum seekers whose applications have been previously rejected, or have made a 'manifestly unfounded claim for protection', or have rights to enter another country.¹⁶ This class of asylum seekers have no entitlements to merits review with the Refugee Review Tribunal (RRT) or the Migration Review Tribunal (MRT). Additionally, these decisions cannot be referred to the Immigration Assessment Authority (IAA), which is a newly established division of the Administrative Appeals Tribunal (AAT).¹⁷ This is problematic as it results in regime where the criteria for removing rights to merits review is not based on the merits of the existing application for refugee status. Rather, the status as 'excluded fast track review applicant[s]' is based on their previous applications or their alleged right to seek protection elsewhere. There is a potential for many asylum seekers with bona fide refugee applications to be rejected arbitrarily without access to merits review.

The other class of asylum seekers who are captured by the 'fast track' process are asylum seekers who arrive by boat after 13 August 2012, for whom adverse decisions are referred to the IAA for review.¹⁸ Review by the RRT and the MRT is barred. The review is to be heard on the papers only — preventing new evidence to be brought before the IAA.¹⁹ This is contradictory to the

usual practice of hearing evidence *de novo*, a principle of administrative law that ensures the decision affecting the asylum seeker is 'correct and preferable'.²⁰ The gravity of such decisions has potentially severe consequences. Therefore, independent review is required as a check and balance on executive power to prevent arbitrariness. This speaks to the fundamental values in our legal system of 'fairness, rationality, openness' and accountability.²¹

II. WHAT UNIVERSAL AND FUNDAMENTAL RIGHTS FOR THE 'OTHER'?

The legitimacy of removing rights, which are otherwise afforded to citizens, has been justified for the protection of sovereign borders against unlawful non-citizens. While the exclusion of non-citizens is constitutionally valid,²² and afforded to Australia by its status as a sovereign state,²³ the differential treatment of asylum seekers is in conflict with the modern international human rights regime that transcends beyond borders.²⁴

The hostility towards asylum seekers for 'sneaking in' has been encouraged by the political rhetoric, making the erosion of rights of refugees uncontroversial to Australian citizens.²⁵ It has created an adverse presumption on asylum seekers purely based on their method of arrival.²⁶ The framing of asylum seekers by the government and the media as 'economic migrants'²⁷, 'queue jumpers' and 'illegal maritime arrivals'²⁸ has served to dehumanise and construct asylum seekers as a threat to Australia's national identity.²⁹

Therefore, their deviance is seen to be incompatible to the Australian values of what is good and genuine and marks them as the 'Other'.³⁰ One defines the 'Self', Australian values and cultures, by alienating the 'Other'. This process of 'Othering' justifies the removal of fundamental rights thought to be universal. In the balance between respecting universal claims to rights and competing policies that violate these claims — the distinction between citizen and the 'Other' determines who is entitled to certain rights in our legal system. Hence, when liberal democratic governments use the language of human rights — it is on the assumption of a closed society to the exclusion of the 'Other'.³¹ The 'Other' is prevented from having rights to participate in legal and democratic institutions and share in its finite resources.³²

In contrast to this binary between the citizens and non-citizens, it must be said that we are living in an increasingly globalised society. Judgements are passed about human rights abuses in other countries, condemning the use of the death penalty in Indonesia, and Russia's act of aggression in Crimea.³³ The government is concerned about the threat of terrorism and have become involved in conflicts in Syria and Iraq to confront the threats that asylum seekers are trying to escape by coming to our shores. However, the Australian government has protected their sovereign right to exclude to the disregard of their international human rights obli-

gations and fundamental rights inherent in the common law. When a class of people in our society are treated as undeserving of such protections which should be afforded to them by virtue of being human beings – it is a slippery slope for the respect of our rights and freedoms as citizens.

III. FIGHTING THE SLIPPERY SLOPE: STANDING UP FOR UNIVERSAL RIGHTS AND INTERNATIONAL CITIZENSHIP

Australian citizens should be concerned about Australia's trend in moving to restrict political communication by citizens to obstruct scrutiny of their immigration policy. Journalists have been met with logistical barriers to accessing Nauru and Manus Island to report on the conditions of the detention camps, impeding access to information to the Australian public on the true nature of detention centres, and removing an element of accountability. The asylum seekers are rendered 'out of sight, out of mind'. Furthermore, the government has passed a bill to criminalise the reporting of human rights abuses by those working on Nauru and Manus Island, contrary to their ethical and legal obligations to report child abuse.³⁴ The assault on fundamental rights now bleeds into the civil rights of citizens.

The situation for asylum seekers is bleak. The Australian government has heralded 'stopping the boats' as a major achievement in their first term of government.³⁵ They have dismissed growing cries of opposition raised by Australian human rights groups.³⁶ They have expressed contempt for the United Nations and international human rights conventions.³⁷ The Australian government has repudiated its responsibilities towards asylum seekers now detained in offshore processing centres in appalling conditions and towards refugees crises such as the Rohingya asylum seekers adrift at sea.³⁸ However, there are pending constitutional challenges,³⁹ and suits of negligence against the government for the poor conditions of offshore detention centres.⁴⁰ There is growing scrutiny into the conditions of immigration detention with the Australian Human Rights Commission Inquiry into children in detention, the *Moss Review*, and the *Senate Inquiry into Nauru* and potentially the *Royal Commission into Child Sexual Abuse*.⁴¹ If the system falls – one must replace it with strong legal protections so that these punitive policies cannot be implemented again.

Key to combatting these issues is increasing awareness and education of the true issues concerning asylum seekers and the flaws in the system. A call to the government to account for their actions is essential, through the democratic system that is unavailable to asylum seekers.⁴²

REFERENCES

1. Janet Phillips and Harriet Spinks, 'Immigration Detention in Australia' (Background Note, Parliamentary Library, Parliament of Australia, 2013) 8.
2. *Migration Act 1958* (Cth) ss 189, 196.
3. *Ibid* s 196(5).
4. See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562.
5. *Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Act 2014* (Cth).
6. Juan Mendez, *Report of Special Rapporteur on Torture and Other cruel, inhuman and degrading treatment or punishment*, Human Rights Council, 28th sess, Agenda item 3, UN Doc A/HRC/28/68/Add1 (6 March 2015) 7 – 9.
7. Sarah Whyte, 'Vietnamese Asylum Seekers Kept on Customs Boat for a Month', *The Sydney Morning Herald* (online), 25 May 2015 <<http://www.smh.com.au/federal-politics/political-news/vietnamese-asylum-seekers-kept-on-customs-boat-for-a-month-20150525-gh991c.html>>.
8. Sarah Whyte and Bevan Shields, 'Asylum Seekers No Longer Asked Torture Question During First Encounter with Australian Officials', *The Sydney Morning Herald* (online) 21 May 2015 <<http://www.smh.com.au/federal-politics/political-news/asylum-seekers-no-longer-asked-torture-question-during-first-encounter-with-australian-officials-20150521-gh6hu2.html>>.
9. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27.
10. See, eg, *Kruger v Commonwealth* (1997) 190 CLR 1; *Al-Kateb v Godwin* (2004) 219 CLR 562; *Fardon v Attorney General (Qld)* (2004) 223 CLR 575.
11. *Al-Kateb v Godwin* (2004) 219 CLR 562, 650 (Hayne J).
12. Gillian Triggs, 'Gillian Triggs on Magna Carta: Alice Tay Lecture in Law and Human Rights', *The Guardian* (online), 15 June 2015 <http://www.theguardian.com/australia-news/2015/jun/15/australia-and-the-magna-carta-how-the-coalition-and-labor-agree-on-laws-that-violate-our-freedoms?CMP=soc_567>.
13. Laurent Marcoux Jr, 'Protection from Arbitrary Arrest and Detention Under International Law' (1982) 5(2) *Boston College International and Comparative Law Review* 345, 346.
14. Brandon L Garrett, 'Habeas Corpus and Due Process' (2012) 98 *Cornell Law Review* 47, 61.
15. Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) [729].
16. *Migration Act 1958* (Cth) s 5(1).
17. *Migration Act 1958* (Cth) s 473CA; Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act

(Cth) 2014 [711].

18. *Migration Act 1958* (Cth) s 473CA.
19. *Ibid* s 473DB.
20. *Kioa v West* (1985) 159 CLR 550.
21. Administrative Review Council, 'The Scope of Judicial Review', (Report No 47, 2006) n 76 [4.2].
22. *Australian Constitution* s 51(xxvi); David Weissbrodt and Steph Meili, 'Human Rights and Protection of Non-citizens Whither Universality and Indivisible Rights?' (2004) 28(4) *Refugee Survey Quarterly* 34, 37.
23. Weissbrodt and Meili, above n 22, 38; Arthur C Helton et al, 'Protecting the World's Exiles: The Human Rights of Non-Citizens' (2000) 22 *Human Rights Quarterly* 280, 282, 289.
24. Arthur C Helton et al, above n 23, 281-2; Weissbrodt and Meili, above n 22, 47.
25. Matthew Thompson, 'Queue Jumping' the Hot Button for Australian Thinking About Asylum Seekers', *The Conversation* (online) 26 October 2011 <<http://theconversation.com/queue-jumping-the-hot-button-for-australian-thinking-about-asylum-seekers-4004>>.
26. Fiona McKay, Samantha Thomas and Susan Kneebone, 'It Would be Okay if They Came Through the Proper Channels': Community Perceptions and Attitudes Towards Asylum Seekers in Australia' [2011] *Journal of Refugee Studies* 1, 11-12.
27. Karen Barlow, 'Scott Morrison Says 157 Tamil Asylum Seekers are 'Economic Migrants' Not in Danger of Persecution in India, Calls Labor and Greens 'Surrender Monkeys' *ABC News* (online) 28 July 2014 <<http://www.abc.net.au/news/2014-07-28/consular-staff-begin-processing-of-tamil-asylum-seekers/5627732>>.
28. Emma Griffiths, 'Immigration Minister Scott Morrison Defends the Use of the Term 'Illegal Arrivals', Plays Down PNG Police Incident', *ABC News* (online), 22 October 2013 <<http://www.abc.net.au/news/2013-10-21/immigration-minister-scott-morrison-defends-use-of-illegals-term/5035552>>.
29. Fiona McKay, Samantha Thomas and Susan Kneebone, above n 26, 5; Sharon Pickering 'Common Sense and Original Deviancy: News Discourses and Asylum Seekers in Australia' (2001) 14(2) *Journal of Refugee Studies* 169.
30. Daniel Brunstetter, 'Sepulveda, Las Casas and the Other: Exploring the Tension between Moral Universalism and Alterity' (2004) 72 *The Review of Politics* 409, 410.
31. *Ibid* 410.
32. Susan Kneebone, 'Natural justice and non-citizens: A matter of integrity?' (2002) 26 *Melbourne University Law Review* 355, 359.
33. Australian Broadcasting Corporation (ABC), 'Bali 9 Duo's Execution "Will Have Consequences" Says Julie Bishop', *7:30 Report*, 28 April 2015 (Leigh Sales). <<http://www.abc.net.au/7.30/content/2015/s4225605.htm>>.
34. Greg Barns and George Newhouse, 'Border Force Act: Detention Secrecy just got Worse', *The ABC* (online), 28 May 2015 <<http://mobile.abc.net.au/news/2015-05-28/barns-newhouse-detention-centre-secrecy-just-got-even-worse/6501086>>.
35. Laura Tingle, 'Tony Abbott: The First Year', *Australian Financial Review* (online), (6 September 2014) <<http://www.afr.com/news/politics/national/tony-abbott-the-first-year-20140908-jeqto>>.
36. Lenore Taylor, 'Human Rights Commission President Gillian Triggs Hits Back at the Critics', *The Guardian Australia* (online), 1 April 2015 <<http://www.theguardian.com/australia-news/2015/apr/01/human-rights-commission-president-gillian-triggs-hits-back-at-the-critics>>.
37. Danuta Kozaki, 'Abbott Says Australians 'Sick of Being Lectured to by UN' After Scathing Report on Asylum Policies', *ABC News* (online), 9 March 2015 <<http://www.abc.net.au/news/2015-03-09/tony-abbott-hits-out-united-nations-asylum-report/6289892>>.
38. Lisa Cox, 'Nope, Nope, Nope: Tony Abbott Says Australia will not Resettle Refugees in Migrant Crisis', *The Sydney Morning Herald* (online), 21 May 2015 <<http://www.smh.com.au/federal-politics/political-news/nope-nope-nope-ty-abbott-says-australia-will-not-resettle-refugees-in-migrant-crisis-20150521-gh6eew.html>>.
39. ABC News, 'Australian Lawyers Launch Constitutional Challenge to Detention of 10 Asylum Seekers on Nauru', *ABC News* (online), 7 February 2014 <<http://www.abc.net.au/news/2014-02-07/an-nauru-asylum-seeker-legal-challenge-newhouse/5245408>>.
40. Sarah Whyte and Natalie O'Brien, 'Asylum Seekers Sue the Government for Negligence' (20 December 2014) *The Sydney Morning Herald* (online) <<http://www.smh.com.au/federal-politics/political-news/asylum-seekers-sue-the-government-for-negligence-20141220-12az8a.html>> .
41. Sarah Whyte and Bevan Shields, 'Royal Commission into Child Sex Abuse Investigating Immigration Department', *The Sydney Morning Herald* (online) 21 May 2015 <<http://www.smh.com.au/federal-politics/political-news/royal-commission-into-child-sex-abuse-investigating-immigration-department-20150520-gh5vqi.html>>; Amanda Cavill, 'Nauru Inquiry Frustrated by Lack of Answers from Transfield', *SBS News* (online), 19 May 2015 <<http://www.sbs.com.au/news/article/2015/05/19/nauru-inquiry-frustrated-lack-answers-transfield>>; Phillip Moss, Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru', (Report, Commonwealth government, 2015); Australian Human Rights Commission, 'The Forgotten Children: National Inquiry into Children in Immigration Detention', (Report, Australian Human Rights Commission, 2014).
42. Arthur C Helton et al, above n 23, 294.