Editorial

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

Jacob Lancaster

I Introduction

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

'Stop the boats!'

The challenge ahead lies in discrediting the three-word slogan, 'Stop the Boats', that has come to characterise Australia's stance toward asylum seekers attempting to enter Australia by sea. Rather than attempting to distinguish claims on the basis of the refugee definition enshrined in art 1A(2) of the *Refugee Convention*,[3] our politicians focus instead on a claimant's mode of arrival.[4] At a time when refugees and asylum seekers are treated with suspicion and cast offshore, we must remember their humanity and our obligations under international law.[5]

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

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

Reframing the refugee crisis

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

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

II Overview of Issue 13

This Issue begins with two articles prepared by the Court of Conscience Editorial Team, titled 'A Brief Primer on Australia's Treatment of Refugees and Asylum Seekers' and 'Timeline of Australia's Refugee Policies' to assist readers who are unfamiliar with the Australian refugee law and policy landscape. In addition to the preparatory materials prepared by the Court of Conscience Editorial Team, this Issue features 14 articles written by academics, legal professionals, and students. A close reading of each text reveals nuanced perspectives covering five areas: 'Rethinking the Popular Narrative', 'Increasing Support to Refugees and Asylum Seekers', 'Scrutinising Government Practices', 'Tension Between the Government and the Courts', and 'The Need for Statutory Reform'.

Rethinking the popular narrative

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

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

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

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

Increasing support to refugees and asylum seekers

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

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

Scrutinising government practices

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

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

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

Tension between the government and the courts

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

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

The need for statutory reform

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

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

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

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

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

III Concluding comments

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

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References

1 See Sara Dehm and Max Walden, 'Refugee Policy: A Cruel Bipartisanship' in Anika Gauja et al (eds), *Double Disillusion: The 2016 Australian Federal Election* (Australian National University Press, 2018) 593, 595-6.

2 See, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) Preamble.

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

4 See Sanjay Alapakkam, 'A 'Legacy' of Uncertainty: The Need to Abolish Temporary Protection Visas' (2019) 13 *UNSW Law Society Court of Conscience* (forthcoming October 2019) (on file with editors).

5 See, eg, Linda Briskman, 'Vanquishing Asylum Seekers from Australia's Borders: Creating Visibility for Justice' (2019) 13 *UNSW Law Society Court of Conscience* (forthcoming October 2019) (on file with editors).

6 Explanatory Memorandum, Migration Legislation Amendment (Regional Processing Cohort) Bill 2019 (Cth) 2 ('Explanatory Memorandum to Regional Processing Bill').

7 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 22 August 2019, 3–5 (Georgina Costello), 8 (Carolyn Graydon) ('Senate Committee Review of Regional Processing Bill'). See also Ingrid Matthews and James Arvanitakis, 'Whose Island Home? Art and Australian Refugee Law' (2019) 13 *UNSW Law Society Court of Conscience* (forthcoming October 2019) (on file with editors) for an explanation as to how it has been ostensibly reconciled with art 31.

8 Senate Committee Review of Regional Processing Bill (n 7) 3 (Georgina Costello), 8 (Carolyn Graydon).

9 Explanatory Memorandum to Regional Processing Bill (n 6) 25.

10 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 July 2019, 296 (Peter Dutton, Minister for Home Affairs). See also Anna Talbot and George Newhouse, 'Strategic Litigation, Offshore Detention and the Medevac Bill' (2019) 13 *UNSW Law Society Court of Conscience* (forthcoming October 2019) (on file with editors) for a discussion on the developments that led to the Medevac Bill.

11 Roland Bleiker et al, 'The Visual Dehumanisation of Refugees' (2013) 48(4) *Australian*

Journal of Political Science 398, 399. See also Briskman (n 5).

12 Bleiker et al (n 11) 406.

13 'The Story of Our Times the Government Doesn't Want Told', *Media Watch* (Australian Broadcasting Corporation, 2018) <https://www.abc.net.au/mediawatch/episodes/the-story-of-our-times-the-government-doesnt-want-told/9980886>; Department of Immigration and Citizenship, 'Deed of Agreement: Media Access' (Undated) <https://www.abc.net.au/mediawatch/transcripts/1326_diac.pdf>.

14 See Jeswynn Yogaratnam, 'Reimagining the Protection Response to Irregular Maritime Arrivals: A Principle-Based Regulation with a Human Security Approach' (2019) 13 *UNSW Law Society Court of Conscience* (forthcoming October 2019) (on file with editors).

15 Minister for Home Affairs (Cth), *Direction No 79: Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (28 February 2019) ('Direction 79').

16 Dehm and Walden (n 1) 593.

17 See Ethical Journalism Network, 'Moving Stories: International Review of How Media Cover Migration' (Report, 2015) 7, which notes that 'In Australia the media in a country built by migrants struggles to apply well-meaning codes of journalistic practice within a toxic political climate that has seen a rise in racism directed at new arrivals'.

18 Ibid.