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Introduction

On 1 July 2015, the Border Force Act 2015 (Cth) came into force. The Act provides the legislative basis for an Australian Border Force (ABF) to be established within the Department of Immigration and Border Protection. The creation of the ABF marks a significant shift in the focus of the immigration portfolio away from nation-building and ensuring economic prosperity towards compliance and enforcement.

This article examines the secrecy provisions in the Border Force Act and how they seek to silence whistleblowers from speaking out about matters relating to Australia’s offshore detention centres.

Offshore detention and secrecy

Since August 2012, asylum seekers who arrive in Australia by boat have been subject to ‘offshore processing’. Under this policy, these asylum seekers are transferred to Manus Island in PNG or Nauru for processing. The Australian Government contracts out the day-to-day running of these offshore detention centres to private companies.

Offshore processing has continued under the Abbott/Turnbull Governments, under Operation Sovereign Borders (OSB).

OSB has operated under a shroud of secrecy. Since 2013, the government has refused to divulge information to the public about asylum seeker boat arrivals, claiming that these are ‘operational matters’ that cannot be discussed with the public. Former Prime Minister Tony Abbott justified the policy of withholding information as part of a ‘war’ against people smugglers.

Further, no Australian journalist has been allowed to visit the offshore detention centres in order report on their conditions. Access has also been previously denied to UN experts and the Australian Human Rights Commission.

The lack of access is concerning given consistent allegations of human rights abuses in the detention centres. In 2013, the Moss report examined claims of sexual assault and inappropriate conduct on behalf of contractors on Manus Island. The report found that many asylum seekers were apprehensive about their safety and that, in some cases, claims of sexual abuse and physical assault were not reported.

On 16 February 2014, a riot broke out on Manus Island between asylum seekers and locals leading to the death of one asylum seeker, Reza Berati. A subsequent parliamentary inquiry found that the riot was foreseeable and could have been prevented by the Commonwealth Government. It also raised concerns about living conditions and the lack of medical services available.

Given these concerns — and in the interest of transparency — the Committee recommended that the Commonwealth Government allow full access to the detention centres to UN representatives, lawyers, the Australian Human Rights Commission, and journalists. This recommendation was not implemented.

The secrecy that surrounds Australia’s offshore detention centres raises many questions about freedom of speech, and in particular, freedom of the press. Should the Australian public have the right to know and understand the policies implemented by their government on their behalf? If the Commonwealth Government is breaching its international obligations, is it not in the public interest for the media to report such things?

Government secrecy is the antithesis of ‘open government’: the principle that as government becomes more a part of our lives, it must be held more accountable for the decisions it makes. A key principle of open government is accountability. There must be measures by which to measure and test that the government is acting in the public interest.
Secrecy and public interest disclosure

The Border Force Act contains a number of secrecy provisions. It makes it unlawful for an ‘entrusted person’ to make a record of, or disclose ‘protected information’. The penalty for the offence is two years’ imprisonment. An ‘entrusted person’ is widely defined to include an employee, consultant or contractor of the department, a public service employee or anyone else who makes their services available to the department. ‘Protected information’ includes any information a person obtains in the course of their employment. In practice, this means that almost anyone who works in providing services in offshore detention centres – a doctor, social worker, detention centre guard – is prevented from disclosing any information they obtain during the course of their employment. The intent of the provision is clear: to prevent information being filtered through to the public.

There are limited exceptions to the offence. Section 48 permits disclosure where the person ‘reasonably believes that the disclosure is necessary to prevent or lessen a serious threat to the life or health of an individual’. Any individual who wishes to rely on the exception must be willing to defend their actions in a court of law and bears the onus of proof that the disclosures were necessary.

There are also exceptions for disclosures that are authorised under a Commonwealth, state or territory statute, including the Public Interest Disclosure Act 2013 (Cth) (PIDA). The PIDA is the whistleblower legislation that seeks to encourage public officials to disclosure wrongdoing in the public sector. Where it applies, it provides immunity to whistleblowers from criminal, civil and administrative liability. Importantly, the PIDA applies extra-territorially, meaning that it applies to cover the conduct of public officials outside Australia.

Under the PIDA, a person can only go public if they are confident that the matter has not been ‘adequately dealt with’ under internal review procedures, and that the disclosure ‘is not, on balance, contrary to the public interest’. However, there is little guidance in the PIDA as to what is, or is not, in the ‘public interest’. Further, where the minister has taken any action in relation to the matter raised internally, a person cannot disclose the information publicly on the basis that he or she disagrees with action that has been, is being, or is proposed to be taken by the Minister. In addition, a person cannot make a public disclosure only on the basis that the person disagrees with government policy.

These secrecy provisions sit uneasily with the ethical duties of medical professionals who are employees of the Department. The ethical duties of medical professionals require prompt reporting of child abuse and unethical or maltreatment of patients. In an open letter to the Prime Minister, medical practitioners argued that ‘standing by and watching sub-standard and harmful care, child abuse, and gross violations of human rights is not ethically justifiable’. The provisions place medical practitioners and others in a difficult position: stay silent, or speak out and risk imprisonment or loss of employment. Prominent lawyer George Newhouse has warned that it would be difficult for an average worker to comprehend the PIDA and make judgments necessary to ensure their own protection.

In short, there are significant hurdles for a person who wishes to disclose information to the public. While disclosure does not necessarily lead to imprisonment, the threat of such an outcome is likely to have a ‘chilling effect’ on anyone who wishes to disclose. Such was recognised by the UN Special Rapporteur on the human rights of migrants, Francois Crépeau, who cancelled his visit to Australia in late 2015. Mr Crépeau was not confident that departmental employees could speak to him about the conditions in the offshore detention due to ‘threat of reprisals’ under the Border Force Act.

Student activities

1. Do you think that access to the offshore detention centres is important for freedom of speech in Australia? Why or why not?
2. What were the findings of the parliamentary enquiry into the death of Reza Berati and conditions being experienced by asylum seekers?
3. Why do you think accountability of governments is important in a democracy?
4. Under what conditions could the government reasonably withhold information from the public?
5. What is the right balance between secrecy and open government?
A hypothetical example: assault by a detention security staff

You are a social worker on Manus Island. In the course of your work, you observe a minor verbal and physical assault by a detention centre security staff on a detainee. As a result of the assault, the detainee suffers some body bruising and a black eye. You are made aware that detainee has been previously assaulted. You consider disclosing the incident to a journalist in Australia.

If you record the incident in a notebook, you are already in breach of the secrecy provisions of the Border Force Act. Similarly, if you disclose the information to the journalist, it would also be a breach. It is questionable whether the exception in S48 would apply, as there needs to be a ‘serious threat’ to the life and health of an individual. The injuries sustained by the detainee appear minor, and may not meet that threshold of a ‘serious threat’. Under the PIDA, you would have to first report the matter internally before going public, as the incident was arguably not a ‘substantial and imminent danger to health and safety’ of the individual. While any investigations are being made, the detainee may be exposed to further harm.

Reference

1. Australian Border Force Act 2015 (Cth) s 1. The section contains a ‘simplified outline’ of the structure of the ABF.


10. Stephanie Small, ‘Moss review: Immigration report finds no evidence charity staff encouraged Nauru


12. Senate Committee on Legal and Constitutional Affairs, Report into the incident at Manus Island Detention Centre from 16 February to 18 February (11 December 2014), Recommendation 5.


16. Ibid s 41.

17. Ibid s 42.


20. Ibid s 42(2)(c).


22. Public Interest Disclosure Act 2013 (Cth) ss 4, 5.


24. Ibid s 31(b).

25. Ibid s 31(a).


ASYLUM SEEKERS CHANGE OF LAWS AND PROTECTION

By Kerry Murphy, D’Ambra Murphy Lawyers

The area of protection visas has seen many changes in the Migration Act and regulations over the last two decades. It is also an area that has been the subject of considerable interpretation in the Courts. Commonly when the Australian Government loses a case in the courts, it changes the laws. Sometimes it changes the laws to legalise what would otherwise be illegal – and frequently this is done with retrospective effect. These two articles consider some recent changes for protection visa applicants.

No retrospective fix for traumatised refugees

In May 1992, a group of Cambodian asylum seekers who had been in detention since their arrival in Australia in November 1989 were preparing for their court case in the Federal Court the next day. Their legal team was confident that this detention was not lawful. Their hearing was set for 6 May in the Federal Court to consider the application for the Cambodians to be released from detention.

What the Cambodians did not know was that on the evening of 5 May, the Labor Government under Prime Minister Paul Keating would rush through a Migration Amendment Bill, supported by the Liberal opposition, which legalised this long detention.

When the lawyers arrived at court the next day, the goal posts had not only shifted, all the rules had dramatically changed.

Eventually the case was heard in the High Court, in *Lim v Minister for Immigration* (1992) 176 CLR 1. Although the Cambodians lost their application to be released, the High Court held that prior to the amendment of 5 May, they were unlawfully detained. The Commonwealth Government again reacted and passed a law that all the detained Cambodians were only entitled to $1 a day for their unlawful detention – an insulting offer of compensation. I recall a Labor Senator telling me that ‘a dollar is a lot of money in Cambodia’. ‘But we are not in Cambodia’. The Senator walked away.

This is not the only time governments have used the parliament to change the law in order to win cases before the court. It is an unfair practice, as only one party to a court case has the power to do this.

The *Plaintiff M68* case decided on Wednesday 3 February 2016. This case, which challenged the detention and transfer to Nauru of asylum seekers, was effectively won by the Commonwealth Government because they changed the law retrospectively to make sure they would win. Although one judge, Justice Gordon, the newest judge on the court, wrote a strong dissent, the other six judges found for the Government, mainly because of the retrospective change.

The change was the insertion of s198AHA on 30 June 2015, with bipartisan support. This amendment was made to operate retrospectively from 18 August 2012.

This was not an arbitrary date, but a critical date when the agreement with the Nauruan Government was made to accept asylum seekers as part of Prime Minister Gillard’s attempt to slow the boats, after the High Court threw out the controversial Malaysian refugee swap plan in 2011 in the *Plaintiff M70* case – the so-called Malaysian Declaration case.

In August 2012, Labor amended the Migration Act (yet again) after the loss in *Plaintiff M70*, with reluctant bipartisan support. While the changes were then thought to be watertight, the Government’s view changed after the asylum seeker known as M68 commenced her High Court challenge to being returned to Nauru in September 2015. She claimed the detention in Nauru was not lawful as it was really detention by Australia, because the Australian government organised and paid for everything, from the construction of the centre to the contracts for the provision of maintenance, security, health and welfare services.

The challenge revisited the 24-year-old *Lim* case which had set out principles about the lawfulness of executive detention. Such detention had to
be for a proper administrative purpose, such as assessing a case or organising an alien’s removal or deportation. It could not be for ‘punishment’ because punitive detention could only be ordered by a court — not a bureaucrat.

M68 also argued that there was no legislation authorising either the detention or the expenditure of money.

The addition of s198AHA on 30 June 2015, with retrospective effect back to 18 August 2012, meant that while the government may not have acted within the law to transfer M68 to Nauru originally or to pay for the construction of the camps, that did not matter because the law was changed retrospectively, so the questionable legal actions were all fixed. Section 198AHA explicitly authorised the government to restrain a person’s liberty and make whatever payments it thought necessary in relation to ‘regional processing’.

The Lim principle was considered, but for three judges it did not matter because s198AHA did all that was required. Other judges considered it, and no doubt lawyers will need to study the case to see whether the wall of mandatory detention has a crack.

Legally the case may be over and M68 could be returned to Nauru. Politically the government does not want to be seen as going soft on detainees, not after their aggressive ‘Stop the Boats’ campaign both in opposition and now in government.

Also it may undermine the punitive intentions of the detention and offshore processing policy. You do not send people to Nauru at considerable expense simply to help develop Nauruan refugee resettlement: you make things unpleasant so that people will not be tempted to make the journey in the first place. It is a deterrent for others – and deterrence is invariably punitive for the asylum seekers caught up in the policy.

It seems unlikely that we will ever be able to approach this contentious area with a humanitarian and reasoned approach, given the fact that since 1992 the policies of both Labor and the Coalition have been reactive and punitive. And it is easy to make retrospective laws to fix a legal problem.

In the meantime, the serious allegations of sexual assault of detainees and children on Nauru remain unresolved. Assuming these offences are true, then no retrospective fix will be possible for those people who fled out of fear of persecution, only to face a punitive and hostile policy.

**Questions**

1. Explain the significance of the decision in the Lim v Minister for Immigration and the subsequent change in the law by the Labor Government under Prime Minister Paul Keating.

2. Why do you think the change in the law to s198AHA, which occurred on 30 June 2015, was made retrospective to 18 August 2012?

3. On what grounds did asylum seeker M68 challenge her detention in Nauru?

4. Do you think that detention on Nauru is punitive? Discuss.

5. Give your opinion on the detention of asylum seekers in Nauru and the actions of the Commonwealth Government.

**Refugees and the PNG Constitution**

The human rights of asylum seekers in Australia’s former colony Papua New Guinea are better protected by the PNG Constitution than they would be in Australia.

On 26 April 2016, the Supreme Court of Justice of Papua New Guinea ruled unanimously that the asylum seekers in the Manus Island Processing Centre (MIPC) were unlawfully detained. The court was very clear on who was responsible for this unlawful detention. The court explained:

- it was the joint efforts of the Australian and PNG governments that have seen the asylum seekers brought into PNG and kept at the MIPC against their will
- these arrangements were outside the constitutional and legal framework in PNG ...

The forceful bringing into and detention of the asylum seekers on MIPC is unconstitutional and is therefore illegal.

What will happen to the asylum seekers is still unclear, as the Australian Minister for Immigration and Border Protection has steadfastly refused to allow them to return to Australia, even to face the watered down refugee determination process that now operates for those who arrived by boat.

The process called ‘Fast Track’ is designed to reduce the chances of winning a case by making refusals easier to make and harder to challenge
in the Tribunals and the courts. No longer is there a requirement to have a hearing on review, and the review authority, the Immigration Appeals Authority (IAA), is directed by the Migration Act not to consider any new information unless exceptional circumstances apply.

The PNG government has quickly moved not to change the law and constitution, but to make arrangements to close the centre and ask Australia to take back the asylum seekers. Already PNG lawyers are talking about claims for compensation for the unlawful detention.

One wonders if considerable money has been tentatively put aside in the forthcoming budget for the compensation of all those affected by the unlawful actions in PNG.

Already Australia has paid vast sums to detain people unlawfully in PNG, and PNG has no capacity to pay any compensation. You would expect PNG to seek some undertakings from Australia to cover these costs given that it was pressure from Australia, most recently from the second Rudd government, that led to the current situation.

Hopefully PNG will not copy Australia’s poor record on compensating asylum seekers for unlawful detention. As noted above, in May 1992, the Labor government decided not to negotiate compensation for their unlawful detention of Cambodians asylum seekers, but to legislate to limit any compensation payments to $1 a day. A similar change was made in 2001 at the time of the Tampa to retrospectively ‘legalise’ any ‘unlawful’ actions by Commonwealth officers for the detention of the Tampa refugees by the SAS.

Since then, others who have been unlawfully detained and later compensated include Cornelia Rau and Vivian Solon-Alvarez. However neither of these people were asylum seekers — Ms Rau was a permanent resident and Ms Solon-Alvarez a citizen. They were rightly compensated; asylum seekers were not.

Given the tough-guy position of Australia, it is possible that rather than properly compensating those who were unlawfully detained, our government will prefer to spend millions of dollars on finding other poor countries to accept those who we have vilified for coming across the seas seeking protection.

Labor did this to the Cambodians, and I cannot imagine that the Coalition will want to be seen as less hardline. Government will readily pay millions to multinational companies to manage the detention centres, but will be reluctant to make any payments to the asylum seekers for unlawful detention.

The default position of both the Coalition and Labor is always to say that the hardline policies must be maintained or people will again be dying at sea. Having played their perceived trump card, no other discussion or debate seems to be needed. But clearly it is.

In June, the ABC’s 4 Corners aired a report on how bureaucrats were delaying lifesaving medical treatment to detainees on Manus Island because they were not satisfied it was warranted. This was despite the opinions of medical experts. This was followed by an Iranian self-immolating on Nauru, a terrible act of despair.

The system reactivated under Labor and reinforced under the Coalition is not only coming undone, but inflicting serious harm on those who are seeking protection.

Maybe we can learn from the PNG Supreme Court which stated: ‘The human rights and dignity of the detainees or the asylum seekers, which are guaranteed by the relevant provisions of the Constitution need to be respected.’ Sadly we have no such protections in our Constitution. The former colony of PNG has better constitutional protections of human rights than that of their former colonial master.

Questions

1. Why do you think the Supreme Court of Justice of Papua New Guinea ruled that the detention of asylum seekers in the Manus Island Processing Centre was unlawful?
2. How do you think the Fast Track process reduces the chances of asylum seekers winning their cases?
3. Why do you think both the Labor Party and the Liberal Party agree that harsh treatment is acceptable for asylum seekers?
4. What do you think would be acceptable treatment for asylum seekers?
There have been 174 sexting offences recorded in Victoria since new laws came into effect.

School children are among the 53 people who have been charged with new sexting offences in Victoria.

There have been 174 sexting offences recorded since the laws came into effect, and around 29 per cent of alleged offenders were minors aged between 10 and 17, according to figures from the Crime Statistics Agency.

While the bulk of these young alleged offenders were given warnings, seven children have been charged with sending or threatening to distribute explicit images without consent over the past 15 months.

It comes as police investigate an Instagram account set up by two year 11 students at Brighton Grammar School which featured photos of young girls and invited people to vote for the “slut of the year”.

Similar accounts have been set up by students at other schools. One father, who did not want to be named, said his young daughter was shocked to discover that a sext she sent her boyfriend was uploaded on to a pornographic Instagram account.

“It was devastating,” he said. “She was humiliated. These photos of girls were being passed around like football cards.”

Australia’s first sexting offences came into effect in Victoria in November 2014 following a parliamentary inquiry into the phenomena.

The new laws included exceptions to child pornography offences so that minors who sent or received raunchy but non-exploitative sexts were not placed on the sex offenders register.

The parliamentary inquiry was triggered by Fairfax Media reports of young people whose career prospects were shattered after they were caught with intimate images and placed on the register.

Academics have warned that social media such as Snapchat had made it harder for schools to deal with sexting and cyber bullying, because the evidence appears to disappear.

University of New England education academic Dr Sue Gregory, who is conducting a large study on the impact of Snapchat in schools, said principals were confronting extremely sensitive issues.

She said that the dangers of sexting needed to be discussed with children when they were in primary school.

Victoria Legal Aid Youth Crime Program Manager Anoushka Jeronimus agreed.

“We know that young people have access to smartphones and tablets at a young age. That means the education that accompanies that usage need to happen early,” she said.

“There’s no point teaching them at year 9.”

Legal Aid runs a Sex, Young People and the Law program in Victorian secondary schools which teaches students about consent and the dangers of sexting.

“The message is to be cyber safe and to know the consequences of your actions. In some cases, they can have criminal consequences.”

A police spokeswoman said transmitting any intimate image without consent was a crime.

“Those young people who seemingly willingly text their naked image or sexual references often do not consider the longer term consequences of the
image or information being in a space outside their control for years afterwards,” she said.

She said the police had dedicated youth resource officers who supported and educated young people, their families and schools to ensure they were safe.

**Student activities**

1. What do the figures quoted from the Victorian Crimes Statistics Agency indicate?

2. What is the crime that seven children have been charged with over the past 15 months referred to in this article?

3. What occurred at Brighton Grammar School? How prevalent do you think this type of behaviour is in Australia? Give an example of something similar that you know about.

4. How does this type of behaviour affect the victim?

5. Do you think that people who text intimate material without consent should be placed on a sex offenders’ register? Explain.

6. Why is it difficult for schools to deal with sexting and cyber bullying on Snapchat?

7. Do you think children in primary school should be educated about the perils of sexting? Explain.

8. Investigate and briefly explain the law relating to sexting in your state.