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Published in:
Round Table

DOI:
[10.1080/00358533.2018.1448337](https://doi.org/10.1080/00358533.2018.1448337)

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Recommended citation(APA):
Bonython, W. E., & Arnold, B. B. (2018). Freedom of speech under the southern cross-it arrived and departed by sea? *Round Table*, 107(2), 203-216. <https://doi.org/10.1080/00358533.2018.1448337>

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Title

Freedom of speech under the Southern Cross – it arrived and departed by sea?

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Abstract

Freedom of speech under the Southern Cross – it arrived and departed by sea?

Australian offshore processing of asylum seekers and others seeking to enter the country without authorisation has attracted substantive criticism for abuses of the human rights of those people, particularly their mandatory detention in Australian-funded facilities located in Nauru and Papua New Guinea. Official and corporate disregard of the rights of Australians in dealing with those people – a disregard that is contrary to the official accountability that underlies the liberal democratic state – has attracted less attention.

This article explores the offshore processing regime through an examination of how legislation that criminalises the disclosure of information about mandatory detention is conceptually inconsistent with the freedom of political communication implied under Australia's Constitution, and expected by Australian citizens. That legislation treats asylum seeking as a matter of national security rather than humanitarian law. It conflicts with the ethical obligations of health practitioners and others, and with Australian expectations about effective mandatory reporting intended to prevent abuse of children and other vulnerable people. It affects Australian and other officials, contractors, care providers, advocates and journalists who deal with asylum seekers inside and outside Australia.

The article argues that accountability and minimisation of harms to non-citizens can – and should – be achieved through an independent oversight mechanism reporting directly to parliament, rather than the executive, irrespective of whether Australia's High Court finds that the offshore processing regime is ultimately found to be illegal.

FREEDOM OF SPEECH UNDER THE SOUTHERN CROSS – IT ARRIVED AND DEPARTED BY SEA?

Law is often a matter of conflicting values, interests and rules. Freedom of speech and accountability – distinguishing features of the liberal democratic state – ; maintenance of sovereign borders (with the ability to exclude non-citizens); the protection of vulnerable people from harm; and respect for contract that restricts disclosure of information by employees are all subjects governed by discrete bodies of law. Where those laws intersect in regards to Australian asylum seeker policy, tensions between those laws reflecting underlying values, interests and rules become evident. This article explores those tensions by considering Australia's offshore processing of refugees, particularly detention occurring in a privately-operated facility on Nauru, a state that is formally independent but in practice heavily dependent on its Australian partner. Claims of sexual abuse, other violence and self-harm at detention facilities are credible and concerning; public discussion and investigation of those claims has been restricted through official disregard of access principles articulated in the national freedom of information statute, and more recently through 'border protection' law that criminalises unauthorised disclosure of potentially relevant information. That border protection law co-exists uneasily with legal and ethical obligations binding professionals, including health and social workers and educators, to mandated reporting of child abuse. It also collides with the freedom of political communication that is discerned by Australia's High Court in interpretation of the national constitution.

The article begins by considering Australia's recent history regarding exclusion of asylum seekers, an exclusion marked by public policy rhetoric about national security and existential threats to the state requiring both militarisation of border policing, and restrictions on reporting about that policing. The rhetoric has culminated in

establishment of the Australian Border Force within a national Department of Immigration & Border Protection, along with passage of the Australian Border Force Act 2015 (the 'border protection law') and associated Secrecy & Disclosure Rule.

The article then considers Australia's weak constitutional protection for dignity, official accountability and public participation, in particular that regarding an implied freedom of political communication rather than broader freedom of expression and the absence of a recognised 'right to know'. It notes that the secrecy regime is inconsistent with the freedom of political communication that Australian citizens working as contractors or Australian government employees at Nauru or Papua New Guinea should enjoy in informing the Australian and international communities on matters of public interest. It identifies ethical and statutory obligations of health professionals and other individuals to support asylum seekers, in particular by reporting specific and systemic abuse, but identifies inconsistencies in the effectiveness of that reporting, likely to be further entrenched by the Border Force secrecy provisions. Secrecy provisions criminalising the dissemination of information about the mistreatment of vulnerable people impermissibly reduce the accountability of the Australian government and its agents, irrespective of whether that mistreatment occurs within Australia or in a client state.

The article concludes by suggesting an alternative model of reporting that would be consistent with international obligations and assuage political concerns regarding national security whilst fostering public confidence in the transparency and lawfulness of government action regarding Australia's asylum-seeker policy.

Asylum, Anxiety and the Liberal Democratic State

Australian history is a story of human migration. Along with its cargo of prisoner settlers and soldiers, the First Fleet brought with it the extant British legal system, consisting of common law decided by the courts, and legislation passed by the British parliament. This legal system was subsequently imposed on the colonies – including indigenous peoples – providing the basis of the Australian legal system. In drafting the national constitution at the time of Federation, constitutional drafters expressly rejected including a Bill of Rights, unlike their American counterparts, preferring instead to rely on protections provided under the common law. (Twomey, 2010; Williams, 1999; Williams, 2004).

This observation is significant for a couple of reasons. Firstly it illustrates that for the majority of people dwelling in Australia, our roots of citizenship are only a few generations deep (Rubenstein, 2000). Secondly, it contextualizes the weak and narrow protections for what are widely regarded as fundamental rights – including freedom of speech – enjoyed in Australia today.

In contrast to its limited formal protections for human rights, Australian law and policy has always afforded strong protection to its borders, consistent with its right as a sovereign state to determine who enters the state, and under what conditions that entry will be permitted. That right has been a feature of political discourse in Australia over the past century, as it has in comparable states. It continues to be significant, with the European Union for example during the past decade seeking to strengthen ease of movement within the Union (ie between EU member states) but restrict unauthorised access to the EU as a whole by migrants and refugees (Bigo, 2005) and rights advocates questioning extraterritorial migration controls (Ryan and Mitsilegas, 2010).

There has been bipartisan agreement within Australia about the importance of borders. In contrast, there has been disagreement between and within the major political parties regarding who is allowed across those borders, for example as refugees, and the criteria used to award citizenship. That disagreement reflects Australia's conflicted history as a 'settler state' that on occasion has been generous in accepting refugees from Asia and Europe (for example after the Vietnam War and conflict in Lebanon) and on other occasions has excluded migrants on the basis of ethnicity or religion (for example under the White Australia Policy in the post World War Two period) (Crock and Saul, 2006). [NOTE]

Contemporary politicians have not echoed overtly racist *fin-de-siecle* 'White Australia' rhetoric. There has however been a willingness to gain political advantage by pandering to anxieties about what have been dubbed 'illegals' or 'boat people' (Marr and Wilkinson, 2004), notwithstanding evidence that in recent decades most non-citizens in Australia without authorisation are not refugees travelling by sea, but rather aircraft arrivals who enter using a visa, and then remain after expiration of that travel document (Mares, 2001). Ironically, the anxieties have sometimes been most strongly voiced by communities who have only recently arrived in Australia. They have reflected perceptions about de-industrialisation of the overall economy and rustbelt electorates, a fear evident in Europe and North America (Spoonley, 2011), along with more parochial alarms that migration is punishing 'real' Australians by driving a housing price bubble, or increasing unemployment.

Policy responses of successive governments have differed in tone rather than substance. Since 1992 there has been a consensus across the major parties that people who have sought to enter Australia 'illegally' or who are otherwise in Australia without authorisation should be mandatorily detained (Pickering and Weber, 2013). The characterisation of 'illegal' in essence reflects the person's non-authorisation by

the Australian government and accordingly encompasses individuals who are stateless or who are fleeing persecution in their countries of origin (ie asylum seekers), along with individuals whom the government deems to be motivated by economic need rather than a substantive threat to personal safety (McAdam, 2014). With varying degrees of severity the governments have sought to confine all illegals pending deportation to the place of origin (eg return to Sweden or Canada after overstaying a tourist or education visa) or processing of claims for asylum, a practice also evident in other nations including indefinitely (Nicholls, 2007; Wilsher, 2011; Nethery and Silverman, 2015; Thwaites, 2014).

Processing involves consideration of matters including whether the applicant poses a security threat (for example has a terrorist affiliation), has a criminal background (including that relating to drug trafficking, people smuggling and even the war crimes evident in parts of Africa and the Middle East), has a disability, and meets expectations under international law about identity as a refugee. Determination of that status may take months or even years. Individuals have on occasion sought to 'jump the queue' by attempting to enter Australia as 'illegals' rather than waiting for processing in an overseas refugee camp or at an Australian consulate. Mandatory detention policy has purportedly addressed perceptions among potential entrants and facilitators – typically dubbed as people smugglers – that stepping foot on Australian soil will result in recognition of refugee status or even a grant of citizenship after the individual has lived undetected in Australia for a specific number of years (Schloenhardt and Martin, 2011).

Some claims have been granted, with people gaining resident status and, ultimately, citizenship. Others have been denied, consistent with policy claims that rejection of people who have not submitted themselves to offshore entry processes will deter potential unauthorised arrivals and thus minimise deaths in transit due to

unseaworthy vessels, in addition to inhibiting human trafficking. There is disagreement about the effectiveness of deterrence, with the UNHCR for example stating that mandatory detention is

generally an extremely blunt instrument to counter irregular migration.

There is no empirical evidence that the threat of being detained deters irregular migration or discourages people from seeking asylum (UNHCR, 2011).

A key feature of the regime over the past decade is what has been dubbed the ‘Pacific Solution’ developed in response to the 2001 *Tampa* incident (Marr and Wilkinson, 2004) and the Federal Court judgment in *Ruddock v Vadarlis*.

The Pacific Solution has emphasised ‘offshore’ detention of refugees and other unauthorised entrants or potential entrants to Australia, with the expectation that ‘illegals’ would never gain citizenship or even permanent residence, if they were prevented from entering Australia, as they would not be able to claim protection under Australian law, but instead have to rely on the weak protection provided by international law (in essence shaming by the United Nations and NGOs) or rights recognised in the domestic law of Nauru, Papua New Guinea or other host nations.

That ‘solution’ incorporated a policy of using the Defence Force and Customs to turn back vessels attempting to transport people to Australia without authorisation to their most recent port (for example in Indonesia) on entering Australian waters, in some instances with provision of fuel to enable the journey, or resulting in passengers being detained on the high seas for several weeks (Metcalf, 2010). Customs traditionally dealt with conventional customs (douane) activity at ports and airports. Its militarized successor – Border Force – has attracted criticism over abortive plans to conduct ostensibly random identity checks of people in Australia’s second largest

city, an initiative disowned by the Minister after a public outcry and questions about legality (Hoang, 2015; Dickson, 2015).

Offshore detention initially meant detention in facilities on Christmas Island, a remote Australian territory in the Indian Ocean. Increasingly, however, it has come to mean holding people in facilities located in other nations, with detention centres at Manus (in Papua New Guinea) and on Nauru.

In 2011 Australia's High Court rejected plans for a 'Malaysia solution' (ie deporting asylum seekers from Australia to Malaysia for processing), finding deportation was impermissible because Malaysia was not legally bound to protect refugees by international or domestic laws (Foster, 2012). (Proposals that Cambodia or other nations host a facility have not progressed.) The government had concurrently excised Christmas Island, the Ashmore and Cartier Islands, and the Cocos (Keeling) Islands from Australia's migration zone, so that non-citizens arriving to seek asylum could not make valid applications for any form of visa (including protection visas) without the exercise of ministerial discretion.

From a legal and administrative perspective offshore facilities are problematic. As indicated above, they are located outside Australian soil and the Australian government has not asserted sovereignty over sites to which it has no recognised claim under international or Australian law. The siting of the facilities is dependent on acceptance by the host nations, presumably on a quid pro quo basis. Nauru, for example, is dependent on foreign aid (Fagence, 1996). New Guinea similarly appears to have welcomed the Manus facility in return for Australian funding and other support, such as training of its police and armed forces.

Although the centres are established under Australian law, funded by the Australian government and hold people detained by the Australian state, they are not staffed by Australian officials. Instead they are operated at arms length, with the government for example funding the host government and commercial entities to provide accommodation, health services, food and security services. The latter centres on exclusion, with restrictions on visits by refugee advocates, lawyers and human rights inspectors. It also centres on containment – preventing detainees from unauthorised departure from the facility – rather than maintenance of a high level of public safety within each centre.

There have been credible reports of theft, extortion, rape, sexual abuse of minors and other harms perpetrated on detainees by people in detention and others. Widespread concerns regarding deficiencies in accommodation and health are salient, as some asylum seekers have pre-existing physical and psychiatric ailments (Momartin et al, 2006; Green and Eagar, 2010). Conditions such as post traumatic stress disorder are likely to be exacerbated by confinement and ongoing uncertainty as to whether an application for admission to Australia will be rejected or accepted. Similar concerns have been voiced about support for people who are detained in facilities located in mainland Australia, notably the Villawood facility and former Baxter facility; they are also apparent in criticisms of detention facilities in Japan, the United States, France and the United Kingdom (Hughes and Liebaut, 1998).

In contrast to the very large number of displaced people in parts of Europe, Africa and the Middle East there are fewer than 10,000 detainees in Australian facilities in most years. Contrary to the rhetoric about an imperative need to ‘turn back the boats’ Australia has not seen what would be reasonably construed as an unmanageable flow of refugees and other people over the past three decades. The overall cost of the detention regime is unavailable, given the secrecy philosophy discussed below, but is

likely to be substantial given expenditure on Border Force patrols, payments to contractors and a proliferating bureaucracy within the Department of Immigration & Border Protection. Expenditure by the government of what is estimated as several billion dollars over the past 15 years is a legitimate matter of public interest, both at the level of principle (articulated in the Objects clauses of the national Freedom of Information enactment) and as the basis for critique regarding effectiveness, efficiency and appropriateness (articulated in the 2013 Public Governance, Performance and Accountability Act).

It is difficult to place those figures in context and to evaluate the effectiveness of the detention regime because of increasing security around the refugee program and the Border Force.

Armed with information?

Discussion about the implementation of the Border Force in Australia has largely focused on its expanded power to arm its officers. However its approach to secrecy and information control is just as consistent with the conduct of a military or police force, prompting some commentators to term it a 'paramilitary organisation'.

The Australian Border Force Act, in effect from 1 July 2015, makes it a criminal offence for an 'entrusted person' to record or disclose 'protected information'. Somewhat expansively, an 'entrusted person' covers officials, contractors and others – including people affiliated with international public organisations and foreign governments and service providers. Perplexingly, the Act also purports to bind personnel of the United Nations rather than merely nongovernment entities such as the Red Cross, domestic human rights organisations and commercial service providers. Equally expansive is the definition of 'protected information'. According to

the legislation, it includes, but is not limited to, information obtained by an entrusted person performing duties as an officer under the Customs, Migration, or Maritime Acts, or under another law of the Commonwealth ‘as a delegate of someone else; or in any other capacity’. This is disquieting for several reasons. Firstly, it is not an exhaustive definition, and people could quite legitimately not recognize that information could be deemed to be protected on an ad hoc basis. Secondly, it assumes that all ‘entrusted persons’ – including contractors and employees of foreign governments and international public organisations – are either going to be sufficiently familiar with Australian Commonwealth law to avoid inadvertently falling foul of the provision or are going to respect that law.

The penalty for unauthorised disclosure of ‘protected information’ gained through contact with people in the detention system or with someone who deals with those people (both on-shore and offshore) is two years’ jail. Exceptions to the criminal liability provisions are available if the disclosure is required by order of a court or tribunal, is required or authorized under Australian law, or occurs in the course of the entrusted person’s employment.

Excepting disclosure in accordance with other Australian laws is a problematic provision. Most whistle-blower or public interest disclosure legislation in Australia *permits* disclosure of information that would otherwise be restricted: it doesn’t mandate, require, or authorize it, in contrast for example to requirements that health practitioners and others dealing with minors *must* report child abuse. In the absence of specific provisions expressly authorizing the disclosure of ‘protected information’ as defined by the Border Force Act, it is unlikely that this provision would provide much protection to ‘entrusted persons’ who disclose.

The legislation then goes on to identify circumstances under which disclosure or recording of protected information by an entrusted person will be permitted. Perniciously, with the exception of disclosure required in the Border Force Act itself, or the Law Enforcement Integrity Act, disclosure of ‘protected information’ requires the authorization of the Secretary (ie the Department’s chief executive) – presumably of the Department of Immigration and Citizenship, of which Border Force is administratively a part – although this is not identified in the legislation. Secretarial authorisation of disclosure of protected information is required for activities including government investigations and enquiries, police investigations, coronial enquiries, and disclosure to foreign governments and public international organisations in accordance with agreements between the Commonwealth of Australia, and other foreign governments, agencies or organisations.

Such investigations are likely to be relevant given past coronial inquiries into suicides and other deaths in detention facilities and the reports noted below of self-harm, murder, other assault, extortion and abuse by guards, fellow-detainees and civilians at the facilities. The results of the investigations are likely to be embarrassing to the Secretary, senior Border Force personnel and the Government. They are also likely to foster calls for greater accountability through enhanced transparency. (The Department’s resistance to accountability was criticised by the Federal Court in *SZSSJ v Minister for Immigration and Border Protection*.)

There are some limited protections available for ‘disclosure with consent’ and ‘disclosure to reduce threat to life or health’. However these are vague in their wording, and do not make it clear who must provide the consent (presumably in most cases it will once again be the Secretary), or to whom disclosure for the purposes of risk minimization is permitted.

The Border Force secrecy regime has not been enacted while Australia is in a state of war or otherwise facing an existential threat. It does not formally oust the jurisdiction of Australian courts, something that the High Court in the past has held to be unconstitutional and that is of course contrary to the separation of powers expected in a liberal democratic state. However the restriction has much the same effect as a formal ouster, given that release of information would serve as the trigger for litigation or an inquiry. Put simply, if information is unavailable litigation is unlikely to eventuate (Milbrandt and Reinhardt, 2012).

On 26 September 2015 UN High Commission for Refugees special rapporteur Crepeau cancelled his scheduled visit to Nauru and Manus because of a concern that workers in the detention facilities would be unable to provide information for fear of prosecution by Australian authorities. Australian Human Rights Commissioner Gillian Triggs had been informed that the government of Nauru would not issue her with a visa for entry to that nation, precluding her investigation of claims about abuse within the Nauru facility, when she conducted an own-motion enquiry into asylum seeker detention.

When combined with increasingly strict economic and migration barriers restricting media access to Nauru and Papua New Guinea, it might be inferred that restricting access to information about conditions in offshore and onshore asylum seeker detention facilities has been identified by the government as a way of stifling public discourse in light of increasing public disquiet about Australia's policy and human rights abuses. By casting asylum seekers as a national security issue best addressed through secrecy laws, rather than a human rights right issue, the government has sought to distract attention from its handling of the issue in a way that is inconsistent with fundamental principles of transparent and accountable government.

Political Communication and Accountability

The protection of human rights in Australia, and framework for the accountability of the national and state/territory governments to the Australian people, involves the national constitution and a diverse patchwork of statute law made by the national, state and territory legislatures. In contrast to nations such as Germany and Israel, the Australian Constitution does not provide an explicit reference to inalienable human dignity and does not offer a justiciable Bill of Rights, ie constitutionally enshrined rights that can be used in court by citizens to minimise official abuses (Harris, 2002). Discrete human rights statutes are inconsistent and protections are weak, and can be overridden by a government that has the necessary votes in the relevant legislature. There is no enshrined ‘right to know’ (Schudson, 2015), Australia’s national freedom of information regime is weakened through substantial exceptions (Cremean, 2015) and one of the most senior national officials has fostered disregard by recurrently characterising it as “pernicious”. Official watchdogs regarding public sector activity enjoy some autonomy but have been hobbled by resource restrictions and on occasion through strong ad hominem attacks by Government ministers on their executives, most notably sustained condemnation of Australian Human Rights Commissioner Gillian Triggs for her willingness to articulate concerns regarding the treatment of asylum seekers and her persistent requests to inspect the facilities.

Although a right of free speech or broader free expression is not an express feature of the Constitution, which is primarily concerned with relationships between the national and state/territory governments, the national High Court has cautiously but increasingly discerned an implied freedom of political communication in that Constitution (Chesterman, 2000). Recognition of the freedom reflects an acknowledgement that public discourse about public policy and the operation of government is a fundamental requirement of the liberal democratic state. Citizens,

whether directly or through the media, should be able to exchange views on matters of public interest such as defence, law enforcement and migration policy (Gelber, 2011). They should also be able to critique the performance of ministers, senior officials, government agencies and government contractors. Such critique should not be restricted to election campaigns and implicitly citizens should bear the responsibility in a 'monitorial state' and 'monitory democracy' of guiding policy-makers on an ongoing basis rather than merely in the polling booth (Schudson, 2015; Keane, 2009).

So what is in the public interest?

Australian courts over the past three decades have taken a robust view of information as a public good, endorsing disclosure in the public interest of information that governments have sought to restrict through claims of confidentiality, national security or law enforcement. In essence, the social good legitimises what would otherwise be a breach of law.

In 1988 McHugh J commented in *Attorney-General v Heinemann* (aka the Spycatcher Case) that

Private citizens are entitled to protect or further their own interests, no matter how selfish they are in doing so. Consequently, the publication of confidential information which is detrimental to the private interest of a citizen is a legitimate concern of a Court of Equity. But governments act, or at all events are constitutionally required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest. Public and not private interest, therefore, must be the criterion by which equity

determines whether it will protect information which a government or governmental body claims is confidential

That jurisprudence is consistent with the High Court's discernment of an implied freedom of political communication, with the Court taking a broad view of what is political. Chief Justice Mason in the 1992 decision in *Australian Capital Television v Commonwealth* commented that 'ordinarily paramount weight would be given to the public interest in freedom of communication'. Mason in *Commonwealth v John Fairfax* (1980) had indicated

It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice of the information is that it enables the public to discuss, review and criticise government action ... Unless disclosure is likely to injure the public interest, [the information] will not be protected.

Expectations about freedom of expression and about official accountability are situated uneasily alongside the culture of secrecy noted above, including restrictions on access by representatives of the Australian Human Rights Commission and lawyers for individual refugees. Ministerial and official disquiet about the transparency of Border Force operations and the detention program is evident in resistance to applications under the Freedom of Information Act 1982 to performance statistics, financial data, incident reports and internal reviews. That resistance typically takes the form of exemptions on the basis of national security, or even the personal privacy of detainees, and in the form of imposition of inordinate processing costs. Those costs are a meaningful burden on refugee advocacy, given that the national government has recurrently reduced legal aid funding to refugee and other legal aid centres. Resistance on the part of the Minister and his agencies has been accompanied by judicial criticism of the Department's punitive approach in

responding to legitimate criticism about readily avoidable large-scale data breaches that potentially imperiled the safety of numerous asylum seekers.

A consequence is that although Australians have a freedom of political communication the persuasiveness of what they communicate is impeded by difficulty in accessing official information that would substantiate particular claims. Information gained by healthcare practitioners and other professionals in servicing the facilities is thus of fundamental importance. Those people are however restricted from sharing the information, a restriction that is potentially in conflict with professional codes of practice and with statutory schemes for mandatory reporting by practitioners of harms and risks affecting vulnerable people.

Ethical Expectations and Duties of Disclosure

Most health practitioners are not national government officials. They have a special legal status under national and state/territory law as professionals, ie as whose expertise is acknowledged through formal accreditation and who enjoy substantial autonomy with discipline by non-government professional bodies whose regulation of each practitioner is situated within a statutory framework.

That means the practitioner is expected to abide by the profession's ethical code and expectations of how a reasonable practitioner will behave, for example a duty not to harm or financially exploit a person in the course of that professional relationship. It is axiomatic that clinicians take particular care in dealing with someone of special vulnerability because of age, physical or psychological infirmity, or institutional confinement. The clinician's duty places that person's interests ahead of those of the Minister, the Border Force or the government as a whole.

Similarly, teachers, social workers, counsellors and pastoral care providers are bound by ethical obligations to treat the best interests of some of their clients – typically children and others with particular vulnerabilities – as paramount.

These ethical obligations are reflected in child protection legislation throughout Australia, which mandates that practitioners within these professions must report suspicions of children at risk of a range of harms, typically including, but not limited to, physical, sexual, and psychological harms. Typically such reports are made to the relevant child protection authorities in each jurisdiction.

In the case of professionals providing these services to offshore asylum seekers, however, these ethical obligations become far more complex. There is no independent child protection agency: the Minister, under legislation, is the *de facto* guardian of children, by virtue of being the only one with the power to authorize the removal of a child at risk from exposure to that risk. However exercise of that power is in effect an act of censure against the Minister's own department, or government's policy. Unsurprisingly, many professionals who have previously reported concerns about children in detention facilities have found their reports falling on deaf ears.

In the past some have taken those concerns to the media, or other bodies of enquiry, including international nongovernment organisations. Under the provisions of the Border Force Act, such actions are likely to be unlawful and the Government has indicated its willingness to prosecute people who make disclosures. The ethical obligations of those professionals have been effectively reduced to little more than procedural lip-service, in a way that is inconsistent with the mandatory legal obligations binding those same professionals in their professional practice in every Australian jurisdiction.

Many of those professional have protested loudly about the secrecy provisions contained in the Border Force Act: in doing so, they draw attention to a significant, but by no means isolated, problem with the legislation.

Collisions and Containment

In *General Medical Council v Spackman* Australian-born UK jurist Lord Atkin famously commented at 638 that “Convenience and justice are often not on speaking terms”. That is the case with the offshore detention regime, where political benefit and administrative convenience are underpinned by secrecy and collide with expectations about official accountability.

Some aspects of Border Force’s activities are relevant to national security, and should remain out of the public eye. Furthermore, much ‘protected information’ undoubtedly overlaps with private information pertaining to individual asylum seekers, an issue that seems to have been largely overlooked in the debate, or treated superficially by the legislation. Notwithstanding that, the default position should be an expectation of transparency, unless dislodged by specific privacy or national security concerns, rather than a wholesale application of secrecy capable of displacement only by court order or Secretarial discretionary authorisation. While it may be politically convenient to silence discussion on this particular issue, it creates an alarming precedent that should be avoided.

There is also a question of proportionality: even if the legislature feels it is inappropriate to permit the media and others to publicly identify and comment on asylum seeker issues, that does not displace the role of an independent oversight mechanism which could be tasked with investigating concerns about asylum seeker policy whilst maintaining both national security and individual privacy.

An Alternative Model

One response to the offshore regime is establishment of an alternative model of reporting that is consistent with international obligations and would assuage political concerns re national security whilst maintaining public confidence in the lawfulness of government action regard asylum seekers.

That model is based on the statutorily-enshrined national Inspector-General of Intelligence Security (IGIS) and Independent National Security Legislation Monitor (INSLM), two positions that report to the national parliament on oversight of Australia's national security agencies and legislation (Baldino, 2013). In the current political climate it is unlikely that the government will resile from offshore processing and mandatory detention, particularly while the operation of that regime is cloaked in secrecy. In order to ensure accountability and effective critique through transparency we suggest establishment of a statutory position tasked with inspection of offshore and onshore detention facilities and with evaluation of the legislation. The position would be independent of the Minister for Immigration & Border Protection, reporting instead directly to parliament (with those reports being publicly available). It would be adequately resourced, given the practice of Australian governments to hobble independent watchdogs by gross restrictions on their funding. The person occupying the position would hold office for a fixed period of years, removable from office only in instances of incapacity or misfeasance. The person would be authorised to inspect any facility in which 'illegals' are detained on behalf of the Australian government.

Creation of such a position would provide concerned 'entrusted persons' with a reporting mechanism capable of achieving outcomes, reflecting many of the benefits

of the well-established whistle-blower protection schemes in place for many government employees who encounter unethical or unlawful practices in the course of their employment. Failure to do so will increase the likelihood that concerned officials, NGO representatives, contractors and others will place public interest ahead of legality and accordingly resort to mechanisms such as Wikileaks (Colaesi, 2014; Sagar, 2014).

Conclusion

Panoptical Jeremy Bentham warned that “In the darkness of secrecy, sinister interest and evil in every shape have full swing”, commenting

Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity (Bentham, 1843).

The authors of this article consider that the Border Force secrecy provisions are inconsistent with both ethical and legal obligations regarding care for vulnerable people. More broadly, they are inconsistent with the implied freedom of political communication, a freedom to observe public administration and to criticise government policies. The restriction of a fact-based public discussion of the offshore regime is repugnant in principle. It has not yet been tested in an appeal to the High Court on the basis of constitutional invalidity. It is however something that should be of concern to anyone concerned with the rule of law, rather than merely Australian workers concerned about disregard of the dignity of refugees or about the national government’s ingenuity in evading responsibility by relying on dependent states. Publicity about the regime may be politically and administratively inconvenient but is something that should be fostered in order to ensure accountability and minimise harms.

Notes

[1] Over 800,000 refugees have settled in Australia since 1945, with some 270,000 Humanitarian entrants in the past two decades (20 years) and an ongoing annual Humanitarian intake (primarily from Sudan, Somalia, Afghanistan, Iraq, Burma, Iran, Bhutan and the Congo) of around 14,000 people. Approximately 8,000 asylum seekers arrived in Australia by plane in 2012–2013, most using a valid visa and subsequently claiming asylum. Some 8,904 asylum seekers arrived by boat in 2000–2008, with 51,637 between 2009 and 2013 and over 20,000 arrivals in 2013. As of March 2015 there were 1,707 asylum seekers (including 103 children) in detention on Nauru or Manus Island, 1848 asylum seekers (124 children) in detention on Christmas Island and the mainland, over 2,500 asylum seekers (1,282 children) in ‘community detention’ in mainland Australia and over 27,000 asylum seekers (2,760 children) on bridging visas in the community.

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