

3. CONTEMPORARY ISSUES

ASYLUM SEEKERS

EVALUATE THE EFFECTIVENESS OF LEGAL AND NON-LEGAL RESPONSES TO THE PROMOTION AND ENFORCEMENT OF HUMAN RIGHTS ISSUES IN RELATION TO ASYLUM SEEKERS

“Hundreds of children abused in detention: report” – Sarah Whyte, Michel Gordon – SMH – 11/2/2015

- The report, *The Forgotten Children* by the Human Rights Commission
- In the 15 months from January 2013- March 2014, spanning both Labor and Coalition governments: 233 recorded assaults involving children, 128 cases of self-harm and 33 incidents of reported sexual assault
- Called for the establishment of a royal commission, 119 children on Nauru and their families to be released into the Australia community within four weeks; detention facilities on Christmas Island to be shut down; an independent person replace the Immigration Minister as the guardian for unaccompanied children
- 211 children being held in immigration detention centres
- Alleges human rights violations
 - Children being detain indefinitely on Nauru are “suffering from extreme levels of physical, emotion, psychological and developmental distress”
- Royal commission would examine “the use of force by the Commonwealth against children in detention and allegations of sexual assault against these children”
 - Look at the long term effects of the detention policy
 - Consider remedies for a “breach of the Commonwealth’s duty of care to detain children”
 - Breach of Australia’s international obligations under the Convention on the Rights of the Child
- The Greens Sarah Hanson Young: unveils an awful culture of “institutionalised child abuse”

Government defends decision to send four men back to Sri Lanka whose boat was intercepted as part of ‘people smuggling venture’ – ABC AM, Louise Yaxley (20/2/15)

- Each asylum seeker was interviewed on board the border protection boat by trained officers supported by independent qualified interpreters – Immigration Minister Peter Dutton
- **Hugh de Krestor from the Human Rights Law Centre** argued the screening process used was not safe
- “Only two out of over 400 people have been found to have a potential refugee claim yet historically we know that 90% of boat arrivals on Australian shores will be found to be refugees”
- “It is simply implausible that this on-water screening process is a legitimate one ... There are huge risks involved in it, People need to be brought to Australia and properly processed on land with access to proper legal advice”.

Human Rights Watch World Report 2015

- UN Refugee Agency has criticised Australia’s offshore detention policy as “return-orientated”
- Asylum claims are not processed in a fair, transparent or expedient manner
- Gay asylum seekers detained on Manus Island fear persecution and sexual assault as well as fear resettlement in Papua New Guinea where consensual adult same-sex relations are criminalised
- Migration Amendment Bill 2014 allowed further strengthening of ASIO’s power to administer adverse security assessments through a secretive process that is not subject to judicial review

Andrew Greene – ABCNews – Human Rights Commission recommends Royal Commission into children in immigration detention – 11/02/15

- Royal commission be set up to examine “the long-term impacts of detention on the physical and mental health of children in immigration detention”
- Investigate “reasons for continued use of this policy since 1992, including offshore detention and processing” and “remedies for any breaches of the rights of children that have been detained”

Manus Island: What will it take to shock us? – The Drum, Julian Burnside, 23/01/2015

- Media reports of hundreds of asylum seekers on a hunger strike, many have sewn their lips together, reports of asylum seekers willing to die and donate their organs to Australians (Asylum seekers on Manus Island want to donate organs to Australians if they die in centre, ABCNews, 19/01/2015)
- Asylum seekers are held in captivity without charge and without trial – their conduct in seeking asylum is not an offence under Australian law

- “There is not much doubt that our treatment of asylum seekers in Manus constitutes a crime against humanity. This is a matter of legal analysis, not political rhetoric.”

Did Gillian Triggs hit a raw nerve with her report? – Malcolm Fraser, SMH, 4/2/15

- Increase of arbitrary powers, not subject to appeal or judicial review the government has granted its own ministers
 - Government is not concerned about the separation of powers of judiciary/executive
- More than 2500 asylum seekers on mainland, all in detention; more than 400 children
- Only nation in the world that demands the arbitrary detention of children and their families on arrival
- Do so indefinitely, for periods exceeding a year and sometimes several years
- Britain, asylum seekers must be released after 72 hours
- Children born in Australia are to be treated like their parents, regarded as illegal maritime arrivals

\$1.2 billion spent on offshore detention – Sarah Whyte (SMH) 6/02/15

- Abbott government has spent more than 1.2 billion to run detention centres on Manus Island, Nauru and Christmas Island in one year, newly released Senate Estimate documents show
- Resource inefficiency
- Greens immigration spokeswoman Sarah Hanson-Young said it was “shocking that Australian taxpayers were paying for people to be detained by the government... if the government wanted to save money, they’d shut down these multi-billion dollar gulagags”

'FORGOTTEN CHILDREN' REPORT CALLS FOR ROYAL COMMISSION – STEPHANIE ANDERSON SBSNEWS, (11/02/15)

- Save the Children’s Director of Policy and Public Affairs Mat Tinkler said the government needed to “immediately end the practice of mandatory detention”
- UNICEF Australia’s Chief Technical Adviser Amy Lamoin said “you can’t keep children safe in detention”.
- Human Rights Law Centre’s Director of Legal Advocacy Daniel Webb labelled Australia’s mandatory and indefinite detention of children as “one of the most punitive policy approaches in the world”

'DETENTION CENTRE LAWS: DOCTORS WORN BORDER FORCE ACT CLASHES WITH MEDICAL BOARD OF AUSTRALIA CODE OF CONDUCT- ANGELA LAVOPIERRE (19/06/2015)

- Under the [Border Force Act 2015](#) which comes into force on July the 1st, doctors and other workers at detention centres could be punished with two years in prison if they speak out against conditions in the centres or provide information to journalists
- Health law and patient rights expert Dr Marie Bismark says those rules could clash with at least five parts of the Medical Board of Australia's Code of Conduct – the official Australian standard for doctors
- The Medical Board of Australia says it expects all registered medical practitioners to meet its standards, but on the other hand, it says the law must take precedence over the Code of Conduct
- A written statement from the office of Immigration Minister Peter Dutton said there were already appropriate mechanisms for reporting misconduct or maladministration.
- The government claims that the laws protecting whistle blowers who act in the public interest would not be overridden by the Border Force Act

LEGAL MECHANISMS

DOMESTIC

- [Migration Act 1958 \(cth\)](#)
 - Children born on Australian soil, are still considered illegal maritime arrivals
 - Asylum seekers who arrive in Australia without a valid visa must be held in immigration detention until they are granted a visa or removed from Australia
 - No legal limit under Australian law to the length of time for which a person may be held in immigration detention
 - Note: according to ABCFact Check (4/02/15) – it is not a criminal offence to enter Australia without visa, they have not broken any law
 - Arriving without a visa can only result in criminal sanctions if there is some other offence involved such as falsifying a passport or forging a document
 - complying with administrative rules relating to immigration”

- August 2012, Australian government introduced a system of third country processing for asylum seekers who arrive in Australia at an ‘excised offshore place’ by boat
 - Extend in May 2013 to apply to anyone who has arrived by boat
 - Must be transferred to a third country as soon as is reasonable
 - Government established resettlement agreements with the Governments of PNG and Nauru
- [Migration and Maritime powers legislation amendment \(resolving the asylum legacy caseload\) bill 2014](#)
 - Gives the immigration minister “unprecedented, unchallengeable and secret powers to control the lives of asylum seekers” (Ben Doherty, The Guardian, 5/12/14)
 - Enables the minister to block an asylum seeker from making a protection claim on the “ill-defined grounds of character or national interest” – his reasons can be secret
 - Government is now entitled to return an asylum seeker to a country where they have been, or it is known they will be, tortured
 - Boat arrivals have no access to the *Refugee Review Tribunal* will only have a paper review to a new agency – the Immigration Assessment Authority
 - Bill strips the checks and balances that have always existed in Australia’s immigration system, and removes basic protection for asylum seekers

INTERNATIONAL

- 1951 [UN Convention Relating to the Status of Refugees](#) → 1967 [Protocol Relating to the Status of Refugees](#)
 - Asylum seeker is a person who has fled their own country and applied for protection as a refugee
 - Refugee is a person who is outside of their own country and is unable or unwilling to return due to a well-founded fear of being persecuted because of their:
 - Race
 - Religion
 - Nationality
 - Membership of a particular social group or
 - Political opinion
 - As a party to the Refugee Convention, Australia has agreed to ensure that asylum seekers who meet the definition of a refugee are not sent back to a country where their life or freedom would be threatened – *principle of non refoulement*
 - Obligations not to return people who face a real risk of violation of certain human rights and to not send people to their countries where they would face a real risk of violation of their human rights
 - By ratification of the 1951 UN Convention, “governments agree precisely not to treat asylum seekers as illegal” – Professor Jane McAdam, director of International Refugee and Migration Law Project at UNSW
 - Australia has removed all references to the Convention from Australian law
 - Ironically, Australia helped write, and willingly signed up to the Refugee Convention
- The Australian Government has obligations under various international treaties to ensure that their human rights are respected and protected
 - ICCPR
 - ICESCR
 - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
 - Convention on the Rights of the Child

CASES:

Human Rights Committee Communication No. 560/1993 ([A v Australia](#))

In 1993 a Cambodian asylum seeker, identified only as A, complained to the Human Rights Committee that Australia had violated his rights under the ICCPR by detaining him in immigration detention for more than four years. The Human Rights Committee agreed that Australia had violated Article 9 of the Convention because A had been subject

to arbitrary detention and denied an effective opportunity to have the lawfulness of his detention reviewed by a court. The Committee stated that Australia should pay compensation to A, but the Australian Government rejected the Human Rights Committee's view and refused to pay compensation to A.

- Under ICCPR, Article 9: “No one shall be subjected to arbitrary arrest or detention”
- “...detention should not continue beyond the period for which the State can provide appropriate justification... The Committee therefore concludes that the author's detention for a period of four years was arbitrary within the meaning of article 9, paragraph 1”

[Plaintiff M61/2010E v Commonwealth of Australia \[2010\] HCA](#)

The High Court ruled, in a 7–0 joint judgment, that asylum seekers detained on Christmas Island were entitled to the protections of the Migration Act. Accordingly, the Commonwealth was obliged to afford asylum seekers a minimum of procedural fairness when assessing their claims.

- Those who conducted assessment and review bound to afford procedural fairness to plaintiffs and act according to law

[CPCF v Minister for Immigration and Border Protection \[2015\] HCA](#)

By a narrow 4:3 majority, the High Court has held that Australia's detention of 157 Tamil asylum seekers at sea was not contrary to Australian law. The decision turned on the scope of powers conferred on Australian officials under the Maritime Powers Act, and the legality of their actions under that statute. The judges did not engage in any detailed analysis of international refugee law. Instead, they focused squarely on the construction of an Australian statute, and the Australian government's powers pursuant to it.

- Not entitled to compensation

NON-LEGAL MECHANISMS

- Media: ABC reporting on the horrific conditions of Manus Island and Nauru as well as the plight of the asylum seekers living there
 - “Iranian asylum seeker on Nauru describes conditions there as ‘God's own hell’” article
- Members of parliament: Green's immigration minister Sarah Hanson Young is a strong advocate for the rights and protection of asylum seekers

'FORGOTTEN CHILDREN' REPORT CALLS FOR ROYAL COMMISSION - STEPHANIE ANDERSON SBSNEWS, (11/02/15)

- Amnesty International and child protection groups are calling for the immediate release of all children in detention, following the release of the report, the timing of which was criticised by Greens Senator Sarah Hanson-Young.
 - Senator Hanson-Young condemned the delayed tabling of the report, claiming the government had “done its best to bury” it.
- Interest groups, including NGO's: Amnesty international campaigns against the government's new policy to refuse to process or resettle asylum seekers who arrive by boat
 - Human Rights Commission reviews and recommendations: Forgotten children report

CHILD SOLDIERS

THE PROSECUTOR v THOMAS LUBANGA DYILO [2012] ICC

- Lubanga was convicted of committing war crimes under the Rome Statue consisting of: enlisting and conscripting children under the age of 15 into the FPLC and using them actively to participate in hostilities in the context of an armed conflict
- Sentenced to 14 years imprisonment which is currently being served at the Detention Centre in The Hague
- He became the first person arrested under a warrant issued by the ICC in 2006, and his trial began in 2009
- Has been the only conviction of the ICC thus far since its establishment in 2002

EXPLOITATION OF WORKERS

Fair Work Act 2009 (Cth)

International Labour Organisation: *International Labour Standards* aimed at promoting opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and dignity

- Extreme labour exploitation of migrant workers of 417 visas in the “gross underpayment of wages, with potentially hundreds of millions of dollars in stolen pay going missing each year” ” (Four Corners, Caro Meldrum-Hanna 7/05/2015)
 - The temporary working holiday, subclass 417-visa stream allows young people to work and holiday in Australia for up to a year with a restriction to not working for any one employer for more than six months.
- The Department of Immigration and Border Protection and the Fair Work Ombudsman are continuing to monitor employers to ensure that they do not employ illegal workers
 - Employers found to be employing overseas nationals in breach of visa conditions are being referred to DIBP and are being prosecuted
- DIBP treats the issue of people working illegally or in breach of visa conditions very seriously and is committed to working with the community, employers, labour suppliers and industry to combat illegal work in Australia
- The **Fair Work Ombudsman v Crocmedia Pty Ltd [2015] FCCA** whereby the company was ordered to pay penalties of \$24,000 as well as reimburse the two employees their minimum entitlements of \$22,000 due to the avoidance of paying minimum employee entitlements by claiming the employees were “interns

HUMAN TRAFFICKING AND SLAVERY

Criminal Code Act 1995 (Cth), Division 271: *Trafficking in persons and debt bondage*

Migration Act 1958 – *Offence of people smuggling*

R v CHEE MEI WONG [2013] NSWSC

- Convicted of conducting a business involving sexual servitude and debt bondage
- Using the threat of deportation and physical violence, Ms Wong forced the 6 women from Malaysia to take medication to prevent menstruation, perform sex acts against their will
- She pleaded not guilty to 7 charges, but the jury found her unanimously guilty of all of them and she was sentenced to 6 years imprisonment

R v TRIVEDI [2012] NSWDC

- Diveye Trivedi pled guilty to one count of people trafficking through the organisation of the travel of an Indian male to Australia in order to work as a chef
- Man was subjected to exploitative conditions and received threats against his person and family
- Mr Trvedi was sentenced to 250 hours community service and a fine of \$1000
- It is the only conviction for labour trafficking in Australia

OTHER CONTEMPORARY ISSUES INCLUDE:

• **GENOCIDE**

Convention on the Prevention and Punishment of Genocide (1948)

• **CAPITAL PUNISHMENT**

Second Optional Protocol to the International Covenant on Civil and Political rights (1976) aims to outlaw the use of death penalty as a sentencing option

Universal Declaration of Human Rights – sentencing someone to death denies them the right to life which is enshrined in the declaration

- 78 states have ratified this treaty
- 99 countries have abolished the death penalty for all crimes, whilst in 2014, at least 22 countries around the world carried out executions
- 2,466 people were sentenced to death worldwide in 2014, up 28% from 2013
- Amnesty International's 'End the Death Penalty' campaign aims to halt all executions in countries who still use the death penalty, remove the punishment from the legal books, and commute death sentences to prison sentences
- United Nations General Assembly has voted for a global moratorium (2007, 2008, 2010), to restrict the number of offences which it punishes with death penalties and eventually, its abolition
 - o However, it is not binding on any state

• **DISCRIMINATION AGAINST WOMEN**

Sex Discrimination Act 1975 (Cth)

Equal Employment Opportunity for Women in the Workplace Act, 1999 (Cth)

Convention in the Elimination of All forms of Discrimination against Women (1979)

- However, discrimination on the basis of pregnancy or potential pregnancy is still rife in the workplace
- OECD Statistics 2014 elucidate that working mothers earn 22% less than female workers without children during their prime working years and 18% less than their male counterpart – the highest in 30 years.
- AHRC finding that “91% of women make no formal complaint of any kind” despite experiencing pregnancy discrimination (ABCNews, 30/07/2014) due to a fear of ramifications and the high onus and difficulty of proof.