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# Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps

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## **Abstract**

Penny Pether often focused her considerable energy and talents on marginalised, invisibilised and absent bodies and subjects. Her work also sometimes focussed on texts of national imaginaries, what she called, drawing on Robert Cover, Constitutional Epics, narratives that provide the necessary supplement to the rules of law (Cover 1983: 4-5; Pether 2009: 110-111). One of her current, unfinished, projects was a book titled 'Perverts', 'Terrorists', and Business as Usual: Comparative Indefinite Detention before and after 9/11,<sup>1</sup> which brings together both of these concerns. Her book proposal and first chapter maps a genealogy of indefinite detention through colonial India and Ireland, US chattel slavery and Jim Crow era convict leasing, twentieth century Australian detention camps for Aboriginal people, sexually violent predator laws targeted at homosexual men post WWII that provided for the indefinite detention of 'sex psychopaths', the current mass incarceration of black men under life sentences without parole in the US, detention at Guantanamo Bay and immigration and asylum seeker detention. Her focus was on governmental imperatives, the shapes and boundaries of the nation, and constitutional epics of the indefinite detention of marginal subjects. Pether's interdisciplinary expertise across constitutional and criminal law, law and literature, critical legal studies, analyses of race and gender, colonial and postcolonial studies, and political economy, among other areas, a range matched by few scholars, is evident in even this brief sketch of her proposed book.

# **Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps**

**Nan Seuffert\***

This is our country and we determine who comes here. That was the position under the last Coalition government, that will be the position under any future Coalition government.

*Tony Abbott, leader of the opposition 16 August 2013*

Australia maintains one of the most restrictive immigration detention systems in the world. The [Australian Human Rights] Commission has for many years called for an end to this system because it leads to breaches of human rights obligations under treaties to which Australia is a party ...

There are particular concerns about the removal of any lesbian, gay, bisexual, transgender or intersex (LGBTI) asylum seekers to a country in which homosexual activity is criminalised, as it is in PNG.

*Australian Human Rights Commission (2014: 33, 36)*

The [United Nations] Committee [against Torture] is concerned at [Australia's] ... policy of transferring asylum seekers to the regional processing centres located in Papua New Guinea (Manus Island) and Nauru for the processing of their claims, despite reports on the harsh conditions prevailing in these centres, including mandatory detention, including for children; overcrowding, inadequate health care; and even

## Seuffert

allegations of sexual abuse and ill-treatment. The combination of these harsh conditions, the protracted periods of closed detention and the uncertainty about the future reportedly creates serious physical and mental pain and suffering.

All persons who are under the effective control of the State party, ... transferred by the State party to centres run with its financial aid and with the involvement of private contractors of its choice, enjoy the same protection from torture and ill-treatment under the

Convention [against Torture and Other Cruel, Inhuman and Degrading treatment of Punishment] (arts 2, 3, 16).

*United Nations Committee Against Torture* (2014: 6)

## Introduction

Penny Pether often focused her considerable energy and talents on marginalised, invisibilised and absent bodies and subjects. Her work also sometimes focussed on texts of national imaginaries, what she called, drawing on Robert Cover, Constitutional Epics, narratives that provide the necessary supplement to the rules of law (Cover 1983: 4-5; Pether 2009: 110-111). One of her current, unfinished, projects was a book titled *'Perverts', 'Terrorists', and Business as Usual: Comparative Indefinite Detention before and after 9/11'*,<sup>1</sup> which brings together both of these concerns. Her book proposal and first chapter maps a genealogy of indefinite detention through colonial India and Ireland, US chattel slavery and Jim Crow era convict leasing, twentieth century Australian detention camps for Aboriginal people, sexually violent predator laws targeted at homosexual men post WWII that provided for the indefinite detention of 'sex psychopaths', the current mass incarceration of black men under life sentences without parole in the US, detention at Guantanamo Bay and immigration and asylum seeker detention. Her focus was on governmental imperatives, the shapes and boundaries of the nation, and constitutional epics of the indefinite detention of marginal subjects. Pether's interdisciplinary expertise across constitutional and criminal law, law and literature, critical legal

## **Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps**

studies, analyses of race and gender, colonial and postcolonial studies, and political economy, among other areas, a range matched by few scholars, is evident in even this brief sketch of her proposed book.

In much of her work on marginal subjects and national imaginaries Pether was concerned with tracing the material imprints and repetitions of colonial violence on and in narratives, images, practices and policies of the law. In her indefinite detention project she set out to trace its 'carceral economy', mapping the foundations of current practices in the violence of slavery and colonisation:

indefinite detention is a national trope, sourced in the violence of colonialism in two distinct ways. First, the black lifeblood that is crude oil has come to function more or less as did the foundational importing of black bodies reduced by law and much more intimate violence to the status of chattel. That legal violence made the building of a nation ... possible through a manufactured excess of agricultural production from land and climate that were too hard for the colonizers to make bear unsupported by those human chattel, first imported in conditions of horrifying inhumanity, later commercially bred in ways equally barbaric. Indeed, American slaves were referred to by traders as 'blackfish oil.' Both practices left their traces in contemporary communities living in third world hunger and poverty and hopelessness more or less invisible to the 'haves' in de facto apartheid enclaves in the richest country on earth, pockets of deprivation eating out the last empire's heart.<sup>2</sup> Next, indefinite detention is a practice begun by Britain in its colonizing of another inhospitable source of wealth where violence was needed to maintain hegemony and profit: India.

Pether argues that just as slaves, referred to as the 'blackfish oil' of the triangular slave trade by sailors,<sup>3</sup> were necessary to building the foundations for the United States, crude oil is now necessary to the maintenance of that national foundation. The Iraq war, she suggests, cannot be explained by a 'crude conspiracy theory' in which US interests gained direct access to Iraq's oil fields; rather, it was about establishing a democratic Iraq with post-Hussain oil output levels tripled, capable of challenging the oil duopoly of Saudi Arabia and Iran (Pether 2011-2012: 2549).<sup>4</sup> Supplies of cheap crude oil are necessary to the

maintenance of a nation that had been ‘nursed on cheap oil, ... [with] the idea that oil security is a right as well as a necessity’ becoming part of its DNA (Pether 2011-2012: 2549).<sup>5</sup> This linking of the indefinite detention of slavery, one violence of the foundation of the nation, with the violence of the Iraq war and its indefinite detentions, maintaining that nation, was crucial to her project mapping ‘genealogies’ of indefinite detention.

Focussing on the marginalised bodies and subjects of indefinite detention is a project of making visible and bringing into focus the ghostly, in Avery Gordon’s terms. Gordon’s articulation of the imperative for attention to the ghostly aspects of social life, to finding the shape described by an absence, to paying attention to the ‘traffic in domains of experience that are anything but transparent and referential’ is a call to beginning with the marginal, with those who are excluded or banished, absent or never even noticed (Gordon 1997: 24-25) in national narratives and in law. Asylum seekers are positioned at the physical and figurative margins of the nation-state and are seemingly absent from, or marginal to, national narratives.

Under Australia’s asylum law and policy regime, those asylum seekers who attempt to come to Australia by boat are banished to offshore ‘detention centres’ cloaked in secrecy and surrounded by allegations of extreme and arbitrary violence, including sexual violence and torture; the centres have been likened to the secretive United States ‘black sites’ operating during the ‘war on terror’ (Perera and Pugliese 2015; The Senate 2015). In Australia, it has been argued, the ‘war on terror’ has been brought home as a war on asylum seekers (Perera 2002). The title of Pether’s indefinite detention project, with its coupling of ‘perverts’ and ‘terrorists’ with ‘business as usual’ suggests inquiry into both the founding colonial violence of Australia, its relationships to the war on asylum seekers, and the production of the figure of the deviant terrorist in facilitating ‘war’ on some of the most vulnerable and traumatised people in the world.

The next part of this article highlights Pether’s concerns with the connections between Australia’s violent colonial foundations as a nation

## **Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps**

and its current asylum seeker detention policies. In Part three I analyse Australia's war on asylum seekers, and in particular the discourses deployed in that war that rely on homo-nationalism, the absorption of mostly white middle class sexual minorities who are willing to adopt neo-liberal politics into the nation, and the simultaneous production of deviant, racialised sexual minorities at its boundaries. The fourth part of this article considers the emerging visibility of asylum seekers who are sexual minorities in recent media and reports on Australia's asylum seeker detention camps, and the resistance of asylum seekers to their production as deviant. The fifth part of this article analyses two recent developments in the proliferation of law and policy contributing to Australia's war on asylum seekers, highlighting some implications of these developments for asylum seekers who are sexual minorities. Pether's call for ethical recognition is considered in the conclusion.

### **1 Australia's Founding Violence: Fissures and Repetitions**

Tony Abbott's quote above references and reiterates a statement in John Howard's Election Policy Speech in 2001, soon after the tragic events of 11 September, in which Howard states

we are a generous open hearted people taking more refugees on a per capita basis than any nation except Canada, we have a proud record of welcoming people from 140 different nations. But *we* will decide who comes to this country and the circumstances in which they come (Howard 2001, emphasis in speech).

Abbott's statement that '[t]his is our country', and Howard's emphasis on 'we', assert a colonial conception of sovereignty that relies on the founding colonial violence of the establishment of the nation-state of Australia on Aboriginal land. The legitimacy of these assertions of sovereignty has been continually challenged (Pether 1998: 116-117); it is only through the erasure of both the founding violence and the ongoing challenges to these assertions that Howard and Abbott's statements gain the appearance of legitimacy. Each time the assertion of sovereignty is made, the violence of that forgetting is repeated.

Pether analysed the founding violence of Australia's colonisation performed through the colonial assertion of sovereignty, and repeated in the High Court's unanimous statement in *Mabo* that the 'Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court' (Mabo 1992: 2; Pether 1998: 130). The refusal to recognise challenges to the Crown's assertion of sovereignty (repeated in the Prime Ministerial statements quoted) was, Pether argued, the 'High Court's protection of the source of its own (illegitimate?) power as the judicial arm of Australia's national government' (Pether 1998: 118). The assertion of this illegitimate colonial sovereignty to indefinitely detain Aboriginal people in Australia is an integral part of Pether's project

a former student showed me her grandfather's identity card, which he had been required to carry with him at all times to avoid being returned to the camps. ... In this instance the camps were located in Twentieth Century Australia, and they were not the World War II prisoner-of-war camps in which my maternal grandfather had served as a guard. Rather, they were camps where indigenous Australians were required to live, unless they had been granted the ticket-of-leave which enabled them to live beyond the camps in places of their own choosing, keep their wages, and send their children to school (Pether 2011).

Maria Giannacopoulos links the originary violence of Australian sovereignty and the erasure of Aboriginal self-determination to Australia's asylum seeker policies, focussing on Howard's assertion of absolute rights to decide 'who comes here' (Giannacopoulos 2013). She suggests that the hospitality of the nation today, with explicit reference to asylum seekers, is deeply affected by that assertion of colonial sovereignty

If Australian law is founded upon 'originary violence' then the possibilities for a state founded on that law to offer hospitality are at once extremely limited as well as abundant. My suggestion here is that hospitality is a synonym for the exercising of sovereignty, in particular a colonial form of sovereignty (2013: 164).

Limiting Australia's hospitality through the power to screen and

## Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps

filter 'who comes here' is an exercise of the same colonial sovereignty based on Australia's founding violence. At the same time, the establishment of offshore asylum seeker detention camps is a refusal to host asylum seekers in Australia, and an exercise of colonial power relations resulting in Papua New Guinea and Nauru hosting asylum seekers, 'the offering and refusal of hospitality was bound up in complex colonial relations of power' (Giannacopoulos 2013: 178).

Australia's current harsh non-entrée asylum seeker policies attempt, through a complex legality, to erase the existence of asylum seekers who arrive by boat, and make them disappear both figuratively and physically, aided by slogans such as 'stop the boats', 'keep them out' and 'send them back.' These frantic and costly attempts to keep asylum seekers out, attempts in effect to replicate the walls springing up globally to 'keep out' the undesirables, and the shrill reductionism of the slogans, reveals the instability in colonial sovereignty underlying assertions to determine 'who comes here'. In Wendy Brown's terms

like all hyperbole, they reveal a tremulousness, vulnerability, dubiousness, or instability at the core of what they aim to express—qualities that are themselves antithetical to sovereignty and thus elements of its undoing (Brown 2010: 24).

The same fissure that exists in relation to the assertion and affirmation of colonial sovereignty in *Mabo*, also exists in the assertions of (illegitimate?) sovereignty in Australia's hospitality towards asylum seekers (see Giannacopoulos 2013: 170-171; Pugliese 2011: 37-38).

Migration into settler colonial societies is also sometimes used as, in Leti Volpp's terms, the 'alibi' for the violent founding of these societies (Volpp 2015: 325). When America, or Australia, are characterised as 'nations of immigrants', welcoming with open arms the poor and dispossessed of the earth, the invocation of that generous spirit provides legitimisation of the existence of these settler societies, erasing the violence in the their founding. Howard's statement, with reference to Australians as 'generous open hearted people ... welcoming people from 140 different nations' performs this maneuver, justifying and legitimating the colonial settler society at the same time that it erases

its founding violence.

As the quotes at the beginning of this article suggest, international human rights organisations have been scathingly critical of Australia's non-entrée asylum seeker policies and its onshore and offshore detention regimes. Yet these critiques have had little, if any, impact. Pether and Giannacopoulos both highlight the complicity of international law, and international human rights laws, in colonial assertions of sovereignty, which are

authorised by contemporary theories of international law, themselves the self-serving creatures of Western European colonial powers in the eighteenth and nineteenth centuries (Pether 1998: 116-117).

Giannacopoulos argues that international human rights law is the 'competent partner' to Australia's asylum seeker laws and policies as its language is marshalled in support of those policies and its limits provide space for the exercise of colonial sovereignty against asylum seekers (Giannacopoulos 2013: 172). The complicity of the norms of international human rights laws in producing Australia's harsh asylum seeker policies highlight the potency of the repetition of imperial configurations in the war on terror brought home to asylum seekers.

In Pether's terms, the High Court's assertion of sovereignty in *Mabo* paradoxically makes imaginable that which it represses, the potential for recognition of Aboriginal self-determination (Pether 1998). The argument is that every repression is inevitably haunted, or in Brown's terms made vulnerable or unstable, by that which it attempts to repress or erase. Australian colonial sovereignty needs the non-sovereign 'other', which may at times include the figure of the asylum seeker, at its conceptual and geographical boundaries; national identity is 'quilted' in opposition to the characteristics projected onto the marginal other (Seuffert 2006; Fitzpatrick 2001). Repression of Aboriginal self-determination therefore always produces the 'ghostly matters' of Gordon's sociological thought, the potential for imagining possibilities for recognition of Aboriginal self-determination; assertions of colonial sovereignty to exclude, marginalise and erase 'outsiders' also paradoxically makes them visible.

## **Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps**

### **2 Australia's war on asylum seekers**

Australia's non-entrée asylum seeker policies and laws are increasingly conveyed and discussed in military terms, as, in effect, a 'war' on asylum seekers. The current military-lead asylum seeker strategy, focussed on 'stopping the boats', is labelled 'Operation Sovereign Borders' (OSB) (Coalition 2013). It is led by a 3- star commander recommended by the Chief of the Defence Force, who was tasked with recommending a 'command and control model' for this 'major operation' (Coalition 2013: 2).

The strategy includes: foci on deterrence and secrecy, including restoring the use of temporary protection visas (TPVs) for those found to be genuine refugees (TPVs deny access to family reunions, permanent residency and citizenship and are limited in time so that genuine refugees can be sent back to their countries 'when conditions in their home county change'); turning back asylum seeker boats, intercepting vessels travelling from Sri Lanka outside of Australia's 'sea borders' and returning passengers to Sri Lanka;<sup>6</sup> and establishing third country offshore processing on Nauru and Manus Island.

While most of these measures appear to be aimed at deterring asylum seekers, the policy states that they are intended to 'provide the maximum deterrence to people smugglers by denying them a product to sell to often vulnerable people' (Coalition 2013). A significant component of the 'product' which successive Australian governments are so intent on denying to people smugglers are the international human rights of the asylum seekers.<sup>7</sup> Yet the policies are justified in humanitarian terms, as necessary to protect the sanctity of life by rescuing asylum seekers from people smuggles and from potential death at sea (Giannacopoulos et al 2013: 566-567). This deployment of human rights discourses in the marshalling of military power results in producing even greater barriers and escalating levels of force at the border, all aimed at keeping asylum seekers who would arrive by boat, some of the most vulnerable people in the world, out. Framing the problem as one of deterring people smugglers erases the asylum seekers in the equation, linguistically and materially making the asylum seekers

‘disappear’; humanitarian language is incorporated into the ‘bending’ of legality—[l]egality is bent and reordered to undo the essence of human rights protections, so laws can function to serve securitising and militarising imperatives’ (Giannacopoulos et. al. 2013: 569).

Necessary to this project is the positioning of these particular asylum seekers, who arrive by boat, as ‘irregular’ and ‘illegal’, in opposition to the fantasy of an ideal asylum seeker who is figured as engaging (non-existent) ‘international protection arrangements’ and waiting in a queue in the first country to which they fled from persecution (86% of asylum seekers are hosted in developing nations), to be resettled through a United Nations process (a limited number of countries offer resettlement through the UN system), patiently (potentially for 117–170 years) to be chosen (the UN says fewer than 1% of refugees will ever get a resettlement place) to come to Australia (Refugee Council of Australia 2012: 3; Tickner 2015).<sup>8</sup> Asylum seekers who arrive by boat are constructed in opposition as strangers rather than victims, as deviant, and likely to be disrespectful of the rule of law (de Lint and Giannacopoulos 2013: 622–623).

Figuring asylum seekers who arrive by boat as ‘bad’, ‘deviant’ strangers to the rule of law, against whom a the ‘war on terror’ must be waged also involves deploying the racialised and sexualised image of the pervert, which is closely associated with the terrorist in post 9/11 discourses. Recent scholarship makes visible the racial and sexual co-production of terrorists in the politics of heteronormative nationalism, homonormativity and homonationalism—the argument is that the images and rhetoric that emerged post-September 11 encompassed a reinvigoration of white heterosexual norms through contrast with portrayals of terrorists as effeminate, emasculated and perversely racialised. Simultaneously progressive sexuality was positioned as integral to US modernity; tributes to ‘gay heroes’ of 9/11 were contrasted with the Taliban’s treatment of women and the treatment of sexual minorities in the ‘Middle East’. These politics were linked to the usual business of colonialism, foundational violence, neo-colonialism and neo-liberal empire building in immigration and asylum seeker policies

## **Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps**

(Duggan 2001; Puar 2007; Seuffert 2010; Morgensen 2010).

Jasbir Puar and Amir Rai argue that when colonial and imperial discourses and images are assembled to align racialised terrorists with sexual perversion the result is the production of an image of a terrorist monster who can be read as queer, which is necessary to propping up the heteronormativity of white citizenship and patriotism (2002). Neoliberal queer rights-based politics, such as claims for marriage, recognition in the military and other rights that recognise and assimilate mostly privileged white men into the nation, reinforce this dynamic; recognition of these rights produces a 'homonationalism' and facilitates the production of 'other' racialized queers as targets of state terror; 'the war on terror creates white heteronormative nationalism [and homonationalism] as not a target but the agent of terrorizing brutality' (Morgensen 2010: 106). As an integral part of the assemblages of the war on terror, the war on asylum seekers may facilitate a dynamic, in which those who are linked to terrorists are part of a 'necropolitics' – racialised and sexualised populations that are 'subjected to conditions of life conferring upon them the status of *living dead*' or are 'marked for death' (Mbembe 2003: 39-40; Morgensen 2010: 105; Pugliese 2009, 2011).

In the Australian context these analyses have been linked to recent immigration reforms recognising same sex relationships and asylum seeker policies recognising persecution on the basis of membership in the social group of sexual minorities, with the argument that liberal recognition of same sex relationships reinforces the production of 'progressive' modern Western democracies in opposition to the fetishisation of the 'racialized Islamic national other', the 'evil' states that persecute sexual minorities (Morgensen 2010; Yue 2012). As part of this dynamic, the recognition of asylum seeker claims on the basis of persecution due to membership in a particular social group of sexual minorities operates to reinforce the differences between 'progressive' liberal democracies and backwards, barbaric Islamic states, and is likely to happen only in a few high profile instances (Seuffert 2009:131-136).

The most recent version of this racialised dynamic in Australia

## Seuffert

emerged as a result of remarkable pressure from a shift in public sentiment towards Syrian asylum seekers after the publication of a photo of three year old Syrian boy Aylan Kurdi, lying face down on a Turkish beach after drowning in an attempt to flee Syria, went viral. At the time Prime Minister Tony Abbott stated that Australia would not increase its refugee intake, reiterating his claim that Australia was already a 'generous' country (although when his government took power they cut the refugee intake from 20,000 to 13,750). A week later, under increasing pressure due to a shift in public sentiment demonstrated by tens of thousands people attending pro-refugee rallies around the country, combined with low polling results, Abbott announced that Australia would accept an emergency intake of 12,000 Syrian refugees in addition to its established quota.

This sudden change of policy, an assertion of colonial sovereignty to determine 'who comes here', demonstrates a potential abundance of hospitality. However, those admitted will be carefully 'screened and filtered'. Prior to the announcement government members sent the Prime Minister the message 'No Muslim men' (Henderson and Uhlmann 8 Sept 2015). In the announcement Abbott stated that there would be a very strong focus on persecuted minorities, 'we are gonna focus on persecuted minorities, on women, children and families who are in refuges on the borders of Syria' in countries such as Turkey, Lebanon and Jordan (ABC 7:30 2015). The priority given to women, children and families conforms to a heteronormative framework. The focus on persecuted *minorities* meant that no Sunni Muslims (who make up the majority of the population in Syria, and the majority of those fleeing Syria)<sup>9</sup> would be accepted. Further, it was reported that no single men at all would be accepted as they 'are considered best able to look after themselves' (Henderson and Uhlmann 9 Sept 2015). It was also repeatedly suggested that Christian asylum seekers would be prioritised.

While this policy focus was controversial, and the United Nations expressed concern that it conflicted with its prioritisation on the basis of need, the Minister of Social Services confirmed that only 25% of

## **Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps**

Australia's refugee and humanitarian intake from Iraq and Syria in the previous two years were Muslim, and that the focus has always been on 'persecuted minorities' in those regions (Hasham 2015).<sup>10</sup> This configuration of hospitality valorises heteronormative Christian families, and leaves non-Christian single men, in particular, in the shadows. This combination of shunning Muslim men while valorising heteronormative Christian families implicitly reproduces the 'perverts' and 'terrorist' link. At the same time, the Abbott government refused to consider offering hospitality to those Syrian refugees already in its own offshore detention camps. The focus on countries bordering Syria was intended to highlight the requirement that 'deserving' asylum seekers do not travel beyond the first country of asylum. This (illegitimate?) exercise of sovereignty allows Australia's Prime Minister to filter hospitality in a struggle to maintain Australia's alibi as generous and humanitarian, with a limited exception to its harsh non-entrée regime that simultaneously reinforces its more general militarised response, and buttresses the image of single male asylum seekers as potential deviant terrorists.

### **3 Sexual Minority Asylum Seekers**

Pether's interests in the legitimacy of colonial sovereignty, her focus on marginalised subjects and bodies of indefinite detention in Australia, and her recognition of the importance of the images of 'perverts' and 'terrorists' to contemporary politics might have led her to the story of Leela, a 'gay' Tamil asylum seeker who had been a journalist in Colombo and who was held at the detention camp at Villawood Immigration Detention Centre outside of Sydney in 2010. Leela left Sri Lanka, where he was both ethnically and sexually marginalised, and where he experienced police abuse, physical violence, torture, intimidation, and arbitrary detainment. He reported that the Sri Lankan police threatened to place a video of him, naked and beaten, on the internet in order to 'shame' him. Leela disclosed his sexuality to authorities at Villawood; he stated that he was 'forced to disclose very intimate details about his sexual history and identity to immigration officials'

## Seuffert

(John-Brent). Further, after he made this disclosure he ‘was the target for almost continual abuse and harassment’ (id). He experienced homophobic and sexual harassment, bullying and physical assault; he was confined and isolated in ‘maximum security’, a prison unit where ex-prisoners are held prior to deportation, as a result, and physically assaulted there (Roden 2010). He attempted suicide several times. He was reportedly held in detention for five months after his refugee claim was accepted on the basis that a ‘security check’ was in process (Roden 2010).

Information on the experiences of asylum seekers who are sexual minorities in Australia’s refugee detention camps has been sparse until recently. I previously wrote about the whistle-blower, Rod St George, a former senior manager with the security firm G4S, a global contractor which ran one of Australia’s ‘offshore’ regional processing centres for asylum seekers, the Manus Island detention centre in Papua New Guinea (PNG), at the time (Seuffert 2013).<sup>11</sup> St George reported repeated instances of sexual abuse between asylum seekers in the single male compound; victims were knowingly left in the same compound as their attackers because there were no facilities for separating them. He stated, ‘[t]here was nothing that could be done for these young men who were considered vulnerable, which in many cases is just a euphemism for men who have been raped’ (ABC News Online 2013). The most heavily redacted documents obtained under a subsequent freedom of information request related to incidents on Manus island concerned a number of ‘serious assaults’ in April of 2013, apparently the sexual assaults reported by St George (Laughland 2014). I argued that the redactions in the documents symbolised the absence of representation of sexual minorities in the asylum seeker detention system – St George’s use of the term ‘vulnerable’ may have been a reference to men who were gender non-conforming, and we did not know how many of those assaulted were sexual minorities (Seuffert 2013: 770-774).

More recent reports on the Manus Island camp and research and reports from international agencies suggest that Leela’s story, and the types of incidents reported by St George, are not unusual. Asylum

## **Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps**

seekers who are sexual minorities face multiple challenges in their search for a safe country or place. They may, like Leela, have experienced persecution on two grounds; on the basis of their sexual orientation as well as other bases, and the persecution may take multiple forms, coming from both public and private actors. The United Nations High Commissioner for Refugees (UNHCR) has noted that 'LGBTI asylum seekers and refugees [also] face multiple forms of discrimination not experienced by other refugee communities' (UNHCR 2010: 5, 6). This may include inappropriate treatment or denial of access to health care and other social services, including housing, education and employment. They may be arbitrarily detained. They may have been subjected to blackmail, extortion and physical and sexual violence 'including rape, torture, honour crimes and murder at the hands of authorities and private actors' (UNHCR 2010:5). The persecution may 'often include torture, rape, serious psychological, physical or sexual violence, possibly leading to post-traumatic disorders' (Jansen and Spijkerboer 2011: 77).

This abuse and discrimination may continue during the period of flight from their country of origin, and the result may be fear of disclosure of the reasons for flight, fear of authorities in countries of first arrival, and the perception that authorities or other actors are unable or unwilling to help. Leela chose to reveal his sexual identity at Villawood although he thought it might have lessened his chances of being accepted as a refugee (John-Brent). However, many asylum seekers who are sexual minorities, as the result of intense persecution, combined with the harsh conditions and potential harassment and abuse in detention camps, may have a heightened level of vulnerability upon arrival in a detention camp, and a heightened reluctance to reveal their sexual identity.

Sexual minorities are unsafe throughout the asylum process, and may be attacked and harassed by local people and by other asylum seekers and refugees both in and out of detention camps (UNHCR 2010a: 10-13). In the second half of 2013, as part of a harsh bi-partisan response to asylum seekers arriving by boat, which included OSB,

asylum seekers were transferred from detention centres in Australia to the Manus Island detention camp. The deplorable carceral conditions at Australian detention camps generally, and the high rates of physical, sexual and mental abuse, accompanied by high rates of self-harm and suicide as a result, are well documented.<sup>12</sup> The success rate of the refugee claims of asylum seekers who arrive in Australia by boat (and are transferred to detention camps) has been over 85% in recent years (while success rates for those arriving by air are lower) (Phillips 2015: 9); this means that the vast majority of asylum seekers at the camps are likely to have fled persecution in their countries of origin.

Asylum seekers who are sexual minorities are at heightened risk in these carceral conditions, particularly in Papua New Guinea. At the end of 2013 Amnesty International released a report including information gained from interviewing several gay men at Australia's Manus Island detention camp in Papua New Guinea; one reported that 'though most of the men are ok with [homosexuality]' some of the gay men suffered bullying and harassment from other detainees and staff, and that this included physical and verbal abuse and attempted molestation (Amnesty 2013: 73). The international reports also suggest sexual harassment, bullying and other forms of abuse and violence may be prevalent for asylum seekers who are sexual minorities in detention camps (Jansen and Spijkerboer 2011:10).

Papua New Guinea's laws criminalise sexual conduct between men, whether consensual or not,<sup>13</sup> and including all non-penetrative sexual acts,<sup>14</sup> with a prison penalty of up to 14 years. PNG police and service providers participate in stigmatisation, harassment, violence and discrimination against sexual minorities (Amnesty 2013: 73).<sup>15</sup> It has been reported that there are between 36 and 50 gay asylum seekers among the single men at the Manus Island detention camp, but there is likely to be underreporting due to fear (Doherty 2014; Laugland 2014). Criminalisation, combined with the detention centre policy forbidding same sex sexual conduct and information provided to detainees stating that staff would report any such conduct to the PNG police, resulted in high levels of stress, anxiety and insomnia in

## **Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps**

many of the gay men (Amnesty 2013: 74; Doherty 2014).<sup>16</sup> The men were fearful of being identified by staff as gay and being turned in to PNG police, and therefore did not report abuse, attempted molestation and harassment to staff.

The Amnesty report also stated that sexual minorities were apprehensive about their sexual orientation even when it was the basis for their claim (Amnesty International 2013: 7); international reports similarly have found that 'many LGBTI asylum-seekers have difficulty revealing their true sexual orientation or gender identity when lodging an asylum claim' (UNHCR 2010: 7; Millo 2013: 1). They may not be aware that persecution on the basis of sexual orientation is a ground for seeking asylum, and may not have adequate access to information about making claims for asylum based on sexual orientation (Organization for Refuge, Asylum & Migration 2013: 4).<sup>17</sup> Several of the gay men at Manus were considering changing the basis for their claims, to either another ground on which they had been persecuted, or a false ground, although they feared that any change would make the claim less likely to succeed (Amnesty 2013: 74). Further, a second Amnesty International report on Manus Island detention in 2014 noted that 'asylum seekers who are lesbian, gay, bisexual, or transgender have no real options for resettlement, because Papua New Guinea criminalizes same-sex activity between consenting adults' (Amnesty 2014: 8).

An investigation by *The Guardian Australia* in 2014 reported on the letters of four gay asylum seekers detailing assaults by fellow detainees and guards and reporting on their own suicide attempts (Doherty 2014). Farhad (his real name was not used), who is from Iran, wrote his letter in English

15 month ago because of being gay and fear of persecution I fled Iran and I sought Asylum from Australian government which claims to respect the human rights has exiled my friends and I to a very remote Island called Manus in Papua New Guinea. ... when I arrived here in Manus the service providers in here told me that if they find out any kind of homosexual activity from or any other person they will report that to the PNG police and they will be charged under the PNG government up to 14 years jail.... In here ... there are many

## Seuffert

people who are insulting or forcing my friends and I to have sex with them. Every moment of this place is suffering for me and there is no one to help. I am broke physically and mentally. I am really seeking help from whoever is caring about homosexuals. I really help in this prison in the remote Island (Laughland 2014).

*The Guardian* spoke with seven people who worked at or had worked at the camp on Manus, who all independently confirmed that rape and sexual assault were common in the camp; the report stated, 'It is understood three gay asylum seekers on Manus have recently been placed on watch for self-harm and suicide' (Laughland 2014).

The most recent report, in July of 2015, from Human Rights Watch and the Human Rights Law Centre, is consistent with the letters written by these men, reporting that

All those interviewed, including those who are not gay, said that gay men had a particularly difficult time on Manus Island. Asylum seekers said gay men are either shunned or sexually abused or assaulted and used by the other men. The gay men said they had frequent nightmares, were extremely depressed, and isolated themselves, often not leaving their rooms (HRW 2015).

It also stated with respect to conditions generally that 'the tragic reality is that more asylum seekers sent to Manus have died than have been resettled' (HRW 2015). It is in this context that reference to the '*particularly* difficult time' that sexual minorities experience has to be interpreted. The suicide attempts, sexual assaults and deaths in the camps result, as far as can be discerned, in little, if anything changing, escaping discernable legal repercussions. These men are the racialised and sexualised populations who are subjected to necropolitics, conditions of life which are marked for death. Pugliese has discussed the serial deaths generated by forces of institutionalised violence in immigration detention as 'invisibilised by the forces of vernacular [ordinary, everyday] violence' (Pugliese 2011: 25).

Recent reports also state that Australia is paying asylum seekers to return to their country of origin:

## **Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps**

fears about personal safety, harsh detention conditions, lengthy delays in refugee processing, the absence of a clear pathway to resettlement or integration, and large financial incentives from the Australian Department of Immigration and Border Protection create significant pressures to return to their country of origin (HRW 2015).

Men who are sexual minorities are among those 'choosing' to return to persecution, sometimes even after they have been determined to be genuine refugees

Gay men were among those who have returned to their countries before finalizing their refugee status. Some have refused to participate in the refugee status determination process or to move to the transit center because they do not believe they can be integrated in PNG and are concerned for their safety. One gay man who had received a positive refugee status determination refused to leave detention and reportedly destroyed his positive determination document and opted to return home (HRW 2015).

The Amnesty report in 2013 also found that some men had chosen to return to their countries of origin despite the persecution they would face there (Amnesty 2013: 75). One gay asylum seeker stated, 'If I wanted to live like this I would have stayed in Iran and gone to prison, been released, and then sent to prison again' (HRW 2015).

This section has detailed the sparse information available on sexual minority asylum seekers in Australian detention camps, highlighting their particular vulnerabilities fleeing persecution on the basis of sexual orientation, in detention camps, and in the process of applying for refugee status, and providing some individual experiences and responses to the harsh incarceration that they face. In response to these vulnerabilities there have been calls for the UNHCR to 'better apply' and 'expand' its *Heightened Risk Identification Tool* (HRIT) in order to identify sexual minorities in need of expedited processes and rapid resettlement in key countries that are considered safe, including (ironically) Australia, Canada and the US. For its part, Australia instead insists on incarcerating sexual minority asylum seekers in unsafe detention camps. This incarceration is facilitated by images of

‘perverts’ and ‘terrorists’ threatening Australia’s borders. This section has attempted to provide a corrective to those imagined figures with the information and stories available on the realities of detention camps. The next section considers recent legislative initiatives that are likely to, and may be designed to, add to the incentives for asylum seekers to return to their countries of origin and face continued persecution there.

#### **4 Escalating Australia’s war on asylum seekers: recent initiatives in secrecy and punishment**

Technologies of militarisation and secrecy are integral to the forms of power and control exerted in the war on asylum seekers. For example, in early 2014, when the Minister of Immigration and Border Protection stopped providing weekly briefings on the implementation of the OSB policy, including information on boat arrivals and interceptions, Prime Minister Tony Abbott invoked the war metaphor to justify the secrecy

If we were at war we wouldn’t be giving out information that is of use to the enemy just because we might have an idle curiosity about it ourselves (Swan 2014).

This section focusses on the implications of just two aspects of two very recent pieces of legislation, the *Border Force Act 2015* (BFA) and the *Migration Amendment Bill 2015* (the Bill), the former passed and the latter proposed, which increase secrecy and decrease accountability and due process for asylum seekers, and have the potential to significantly negatively affect the safety and deepen the invisibility of sexual minority asylum seekers.

In response to increasing requirements for secrecy in relation to asylum seekers and detention camps even prior to the introduction of these two pieces of legislation, it has been reported that detention camp workers like Rod St George increasingly feel obligated to speak out about conditions in the camps. Particularly subsequent to violence, including the death by beating of Reza Barati, on Manus Island in February 2014 (see Senate Dec 2014).

## **Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps**

Increasing numbers of workers from Manus Island and Nauru detention centres are contacting lawyers, human rights groups and professional medical bodies wanting to share information about conditions at the facilities and incidents they have witnessed (Zajec 2015).

The workers include current and former security guards, caseworkers and medical staff, who are hindered in speaking out by the strict confidentiality agreements they are required to sign.<sup>18</sup> Recently the Department of Immigration and Border Protection revealed to a Senate inquiry that there had been fifteen allegations of sexual assault and 270 reports of other types of assaults in immigration detention centres onshore and offshore in the three months to mid-2015 (Griffiths 2015). In the 10 month period to mid-2015 there had been hundreds of instances of self-harm, including 48 cases involving children in onshore centres and 26 involving children at the Nauru Regional Processing [offshore detention] Centre (Griffiths 2015).<sup>19</sup> These incidents and others may be the bases for the impulse of detention camp workers to speak out about the conditions in the camps.

Would-be whistle blowers may have been deterred, however, by a series of events in late 2014 and early 2015. In September 2014, the Australian media reported on a number of allegations of 'alleged sexual assault, trading of sexual favours for marijuana, and acts of self-harm' at Nauru, followed by a report from Wilson Security, a private contractor service provider at the Centre, of possible misconduct by staff of another service provider (The Senate August 2015: 90). One month later, 10 staff members of *Save the Children*, an Australian service provider at Nauru which is an aid and development agency dedicated to helping children, were removed from the Centre and referred to the Australian Police Force (AFP) for investigation under section 70 of the *Crimes Act 1914* (Cth), 'Disclosure of information by Commonwealth officers' (the 'anti-whistleblowing provision')<sup>20</sup> (The Senate Aug 2015: 90; Doherty 2015).<sup>21</sup> An inquiry into the allegations related to the *Save the Children* staff did not find any information substantiating the claims (Moss Report 2015: 6).<sup>22</sup>

The bipartisan-supported BFA, which became effective on 1 July

2015, may have been in part a response to the increasing impulse to disclose information about the physical and sexual abuse and generally harsh conditions in Nauru and on Manus Island. The Act, coupled with other legislation, merges the Australian Customs and Border Protection Service with the Department of Immigration and Border Protection (DIBP) into a new Immigration and Border Protection Department (IBPD) and provides for the establishment of the Australian Border Force (ABF) as the IBPD's enforcement arm. The 'Secrecy and disclosure provisions' in Part 6 of the BFA have been controversial in the context of whistle-blowing. These provisions apply to any Immigration and Border Protection (IBP) worker, which is broadly defined (s 4),<sup>23</sup> and includes doctors, teachers, social workers and others working for, consulting for or contracted to work by the new IBPD, or the private service providers, in detention camps.

Currently, Transfield Services provides garrison and welfare services in the Manus Island and Nauru detention camps under a contract with the Commonwealth (represented by the DIBP), and subcontracts security services to Wilson Security; medical and counselling services are the responsibility of International Health and Medical Services through a contract between it and the Commonwealth (represented by the DIBP) (The Senate 2014: 23, 26). IBP workers are prohibited from making a record of or disclosing any information obtained in their capacity as IBP workers (s 42).<sup>24</sup> Recording or disclosing any such information is an offense punishable by two years' imprisonment (s 42). The prohibition on *recording* information extends previous prohibitions, such as the 'anti-whistle-blower' provision discussed above, which have focussed on the *disclosure* of information.<sup>25</sup>

These provisions are concerning in the light of the recent Senate Report on its inquiry into 'Recent Allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru' in which it found a 'pervasive culture of secrecy which cloaks most of the department's activities in relation to the Nauru RPC' and called for 'a far greater level of scrutiny, transparency and accountability' (The Senate 2015: 124). The Senate report concluded that

## Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps

the Regional Processing Centre on Nauru is not run well, nor are Wilson Security and Transfield Services properly accountable to the Commonwealth despite the significant investment in their services. The committee has found that the Department of Immigration and Border Protection does not have full knowledge of incidents occurring on Nauru, owing to their inability to scrutinise their contracted service providers (The Senate 2015: 125).

The Senate inquiry spanned the period in which the BFA was enacted. It is difficult not to see the BFA as a response to attempts by detention centre workers and others, including the Senate, to obtain information about what is happening in the camps.

There are some exemptions from the provisions of the BFA which allow *disclosure* if the IBP worker 'reasonably believes that the disclosure is necessary to prevent or lessen a serious threat to the life or health of an individual' and the disclosure is for the purposes of lessening that threat (s 48). The section does not mention whether IBP workers may *make records* under this exception although the Explanatory Memorandum to the Act includes the 'making of a record' (49 [239]). However, if information is disclosed, the whistle blower bears the burden of proving, as part of their defense to the prohibition on disclosure, that there was a threat to the life or health of the individual and that it was 'serious', and that the disclosure was for the purposes of lessening that threat (s42(2); *Criminal Code* 1995 s 13.3). Disclosure to the media, it might be argued, is not directly related to lessening such threats.

The Law Council of Australia (LCA), in its submission on the BFA, argued that there should be an exception to the secrecy provisions where the disclosure would, on balance, be in the public interest (ALC 2015b: 13-14). The LCA argued further that the offence of unauthorised disclosure should include an element requiring proof that the disclosure caused, or was likely to cause, 'harm to an identified essential public interest'(LCA 2015b:13).<sup>26</sup>

In response to the LCA's call for a public interest exception the Senate Legal and Constitutional Affairs Committee noted that disclosure is also permitted if authorised by other acts (S42(2)(c)), which

would include the *Public Interest Disclosure Act 2013* (PIDA)(Senate 2015: 14-16). However, the scope of people to whom the PIDA applies may be narrower than the definition of IBP workers; disclosures under the PIDA must be reported internally first, and disclosure to outside parties can only be made if the whistle-blower believes on reasonable grounds that the internal investigation was inadequate or delayed; the disclosure must not be about 'sensitive law enforcement information' and disclosures are not permitted where a Minister has taken action or proposes to take action (Roberts 2015; PIDA s 26(2A), 31(b)). Further, research demonstrates that whistle-blowers who make disclosures may face retaliation (Roberts 2015). The PIDA has had little testing in court, and the BFA increases the risk of whistle-blowers getting it wrong under the PIDA by providing for criminal liability if they do not come under the protection of those provisions (Zajec 2015). At a minimum, careful consideration of the decision to disclose, independent legal advice, and ensuring that disclosure meets the particular requirements of the PIDA is recommended (Roberts 2015).

Further, the increasing militarisation of the response to asylum seekers, combined with the recent referral of the Save the Children staff to the Australian Federal Police, suggest that the government may argue that any information about detention camps falls into the category of 'sensitive law enforcement information' (see Hoang 2015). The BFA combined with the 'anti-whistle blowing provision', already engaged against the Save the Children staff, and the requirements for workers at detention camps to sign onerous confidentiality agreements, all contribute to the increasing secrecy surrounding Australia's asylum seeker policies and to the potential for civil liability and criminal prosecution as a result of speaking out. It has been reported that the Australian Federal Police were regularly asked to investigate 'leaks' or disclosure of information by the former DIBP, and that almost every referral in recent months has been directly related to journalists reporting on asylum seekers and immigration (Doherty 2015). Reports suggest not only that the media is being denied access to detention camps in PNG and Nauru, but that media, visitors and others (including lawyers with court orders)<sup>27</sup> are also being denied access to

## Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps

detention camps in Australia, with the DIBP confirming that 'every application completed by a journalist to visit the detention centres in Australia this financial year had ... been denied' on the basis of 'security concerns' (Whyte 2015).

The creation of the BFA, with its secrecy and disclosure provisions and focus on *force* at the *border*, combined with the Prime Minister's justification of secrecy by analogy to war, the confidentiality agreements, refusal of access to detention centres and referrals to the Australian Police Force might be described as the 'culmination of the move towards militarised border security' that combines 'maximum power with maximum secrecy' for immigration matters (Taylor 2015). This militarised secrecy aligns with the increase in discretionary power exercised in the 'national interest' and 'national security' in amendments to the *Migration Act 1958* provisions on asylum seekers passed in recent years (Seuffert 2013: 764-770), in areas that have not traditionally been considered 'matters of national security' (Taylor 2015).

It may be argued that the combined effect of these policies of militarised secrecy is likely to be a significant 'chilling effect' on any attempts to report problems with harsh conditions, physical and sexual abuse, self-harm and suicide attempts at asylum seeker detention camps, as claimed by lawyers and asylum seeker advocates (Sedghi 2015).<sup>28</sup> The LCA states that *its* policy and procedures in relation to the detention of asylum seekers apply the rule of law and require that 'policy and practice in the detention of asylum seekers is accountable, transparent, and subject to independent monitoring' (LCA 2015a: 18-19). It has been argued with regard to the BFA both that there is a lack of justification for the switch from transparency to secrecy as the default position, and that 'neither the rule of law nor democracy can function properly in the absence of transparency' (Taylor 2015).

The focus on increasing force deployed at the border of the nation against individuals, combined with secrecy and lack of transparency and accountability, is also reflected in a recent proposal for amendments to the *Migration Act 1958* set out in the Bill. If passed, the Bill will contribute to the silencing and invisibilising of asylum seekers in

detention camps and is likely to have a disproportionately harsh impact on sexual minority asylum seekers. The provisions in the Bill permit ‘authorised officers’ (s 5(1)) of ‘immigration detention facilities’ (s 197BA(3))<sup>29</sup> to use ‘reasonable force against any person or thing’ as the officer ‘reasonably believes is necessary’ to protect the life, health or safety of any person or to ‘maintain the good order, peace or security of an immigration detention facility’ (s 197BA (1)). Officers are restricted from causing grievous bodily harm unless they believe that it is necessary to protect the life of, or prevent serious injury to another person (including the officer) (s 197BA5(b)). The explanatory memorandum to the Bill states that for the purposes of the Bill grievous bodily harm includes death and serious injury [52]. The phrase ‘good order, peace or security’ is not defined in the Bill. Submissions noted that it might be interpreted quite broadly to include ‘being uncooperative, or gathering in ... walkways or in eating areas’, or raising one’s voice, justifying the use of force in response (The Senate June 2015: 11). One of the reasons given for suppressing the documents attached to the Save the Children submission to the AHRC was that disclosure might ‘lead to incidents of protest’ and be used to the ‘detriment of the good order’ of the detention camps (Doherty 2015). The LCA notes that some immigration detention facilities have solitary confinement cells, and therefore that the Bill ‘would allow a detainee participating in a peaceful protest to be forcibly removed to solitary confinement’ (LCA 2015a: 16-17).

Submissions on the Bill critique its hybrid subjective and objective test for the use of ‘reasonable force’ based on the officer’s ‘reasonable belief’ that force is necessary rather than the common law test, and the test in a number of state Corrections Acts, which is whether the force was objectively necessary (Explanatory Memorandum 2015: 6-7; The Senate June 2015: 32-33; LCA 2015a: 2-3). The triggering events as to when force may be used are ‘ill-defined and extremely broad’ (McAdam 2015: 3; Parliamentary Joint Comm 2015: [1.72]). The Bill does not define ‘reasonable force’, it also does not meet the strict international human rights law tests of necessity and proportionality of the use of force, and does not address a pressing or substantial concern that would

## **Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps**

justify a limitation on human rights (McAdam 2015: 4; Parliamentary Joint Comm 2015:[1.62]).

The Bill does not specify the training level required for officers authorised to use force;<sup>30</sup> the LCA notes that the current training level is inadequate (LCA 2015b: 18). The DIBP, at hearings on the Bill, was unable to 'clarify the exact nature of the training, and officers of the department seemed to be at odds with what was currently required, what would be required into the future and how or who would deliver additional training' (The Senate June 2015: 36). Further, while the monitoring of force, and reporting on the use of force is legislatively prescribed for prisons, no monitoring or reporting requirements are set out in the Bill.<sup>31</sup> Not only does the range of powers in the Bill further the similarity of immigration detention centres, which hold innocent and traumatised asylum seekers, to jails, and place asylum seekers analogously in the position of convicted criminals in jails, it appears to authorise the use of force with less accountability than required in jails.

The only limits with respect to the indignity that an officer may subject a person to in the authorised use of force, as discussed above, is that they must not subject the person to any greater indignity than they 'reasonably think is necessary in the circumstances' (s 197BA(5)(a)). The LCA notes that this provision is

especially concerning in respect of asylum seekers who are likely to be particularly vulnerable. ... the prohibition against torture, cruel, inhuman and degrading conduct [in the Convention Against Torture (CAT)] is absolute, ... [and cannot be justified in any circumstance, regardless of the objective sought to be achieved] ... this provision therefore allows authorised officers the power to take actions, including actions against vulnerable people, which would constitute degrading conduct, contrary to Australia's obligations as party to the CAT (LCA 2015b:23).

Other submissions agreed that the powerlessness of detainees in detention makes them vulnerable to any type of physical or mental pressure, and therefore '*any* use of physical or mental force against a detainee with the purpose of humiliation will constitute degrading

## Seuffert

treatment or punishment' (McAdam 2015: 7).

Also of concern is the broad immunity from legal action provided for the Commonwealth and all authorised officers if the powers are used in 'good faith' (s 197BF(1), (4); Explanatory Memorandum 2015: 16). It was suggested that the hybrid test would result in uncertainty in the application of the provisions on the use of force and that the immunity provisions may protect any officer acting on good faith even if the actions were outside the scope of power conferred in the Bill (Senate 2015: 20). It was argued that

Since the officer does not have to report any use of force, and is exempt from suit, he or she is unlikely to be deterred by a fear of retribution for inappropriate acts (McAdam 2015: 2).

The combination of the 'ill-defined and extremely broad' authorisation of the use of force, the lack of requirements of necessity and for proportionality, the authorisation to subject asylum seekers to indignity and humiliation in breach of international prohibitions on torture, the lack of statutory monitoring and reporting requirements, and the broad immunity from legal action seriously heightens the risk of further violence, sexual assault and degradation in Australia's detention system.

The justification for the increase in prison-type powers in the Bill was by reference to increased numbers of 'high risk' detainees, convicted visa violators, being held in onshore detention centres (along with asylum seekers). This mixing of populations is also problematic, particularly for sexual minorities. Leela's experience of being placed in maximum security with high risk detainees as a result of the abuse he suffered, and his reports of further abuse in maximum security, suggest the dangers of mixing populations of detainees. Submissions on the Bill called for the separation of high risk offenders and people with criminal records from asylum seekers and other detainees, rather than the increase in powers to use force against all detainees (Senate 2015: 24).

Together the BFA and the proposed amendments to the *Migration Act 1958* will result in increasing the authority, power and discretion to

## **Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps**

use force and other mechanisms of humiliation of authorised officers against populations of highly vulnerable asylum seekers. Record-keeping and disclosure of instances of abuse of this power, force and humiliation is likely to be further curtailed by the 'chilling effect' of the BFA. The *particularly difficult time*, including being 'shunned, sexually abused or assaulted and used by the other men', experienced by asylum seekers who are sexual minorities, and recognised by other asylum seekers, is less likely to be reported outside of the detention centres. Further, gay asylum seekers already report that there are attempts to silence them from communicating directly with media or reporting the problems:

Mohammad said he was told by immigration department staff he should not tell anyone about the threats made against him, and said he was not allowed to speak to the media.

'But we don't have anything to defend ourselves with. Our only way to defend ourselves is to talk to the media and speak out' (Doherty 2014).

Attacks such as Leela reportedly experienced in an onshore centre, and discussed in the recent Human Rights Watch report in relation to Manus Island, may not be disclosed to the light of day. These provisions may further marginalise, make vulnerable, and 'disappear' innocent asylum seekers at Australia's boundaries.

### **Conclusion**

Scholars have analysed asylum seeker detention camps as exceptional spaces where the rule of law, including transparency and due process, does not apply and where asylum seekers lack legal and political rights; the industrial asylum complex positions them as 'politically and socially dead' rather than as full legal and political subjects, 'embodying the state's power to kill and let die' (Pugliese 2011: 30-31). In the war against asylum seekers images of 'terrorists' and 'perverts' participate in producing the conditions under which these detention camps are established and perpetuated; asylum seekers who are sexual minorities must contend with the material industrial asylum complex and the

discourses of terrorist perversion. The combination of the *Border Force Act 2015* and the proposed amendments to the *Migration Act 1958* further marginalise, or ‘disappear’ asylum seekers, in Gordon’s terms attempting to render them as ghosts, and to ensure their invisibility to the Australian body politic. This is not to suggest that asylum seekers lack agency or are actually rendered invisible by these laws and policies; the necessity of government and others’ ongoing and intensifying proliferation of law and policy in attempts to silence and erase asylum seekers attest to their continued agency, resistance and visibility (see Pugliese 2011).

The proliferation of law and policy aimed at further marginalising and invisibilising asylum seekers, and the simultaneous emerging recognition of sexual minorities in the asylum seeker population in recent years, suggests, in Pether’s terms, that the repression paradoxically makes imaginable the possibilities for hospitality, or an ethic of recognition, ‘an ethics of recognition not dependant on displacing or metamorphosing the other or imagining the other solely in terms of the self’ (1998: 118).

Pether invokes this ethics of recognition in relation to Indigenous Australians. An ethics of recognition for asylum seekers, and other possibilities for hospitality in Australia, requires attending to the originary violence of the nation with an ethics of recognition of Indigenous Australians that moves beyond colonial and orientalist logics that ‘quilt’ the ‘other’ in opposition to the ‘self’ of Australia as a settler colonial society, beyond imagining the other only in terms of oneself. This ethical recognition might start with a ‘triangulated relation of proximity’ between Indigenous peoples, non-Indigenous Australians and asylum seekers, as Pugliese suggests

my responsibility toward the asylum seeker is in no way curtailed or limited in this triangulated relation of proximity. Rather, my actions and my modalities are what must be modified in light of my deferring to Indigenous Australians’ precedence on questions of welcome and hospitality to country, to Australia (Pugliese, Levinas, 34).

This article suggests that the responsibility to asylum seekers in

## Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps

this triangulated relation should include a focus on the particular positioning, and vulnerability, of asylum seekers who are sexual minorities. Leela's commitment to revealing his sexual identity in the harsh conditions of a detention camp, in light of his anxiety that it might negatively impact on his chances for recognition of his claim, deploys visibility as resistance. His contact with people outside the camps, his refusal to 'disappear' despite high levels of violence and abuse in harsh conditions, assert political subjectivity within Australia.

### Notes

- \* Professor of Law and Director, Legal Intersections Research Centre, School of Law, University of Wollongong.
- 1 For a published essay introducing the work of the book see Pether 2012.
- 2 See Food Research and Action Center 2011; 2015.
- 3 See Dow 1927: 283. Blackfish oil was derived from pilot whales and used to oil clocks and watches. Whale oil was stored in the holds of ships on one leg of the triangular slave trade route, from the Americas to England, to be replaced by goods from England to Africa, such as textiles and other manufactured goods, which were then replaced by slaves brutally transported from Africa through the middle passage to the Americas. The crew referred to the slaves as 'blackfish oil' as they replaced the whale oil in the ships hold.
- 4 Pether quotes Hutchins 2009 'Iraqi Auction Disproves War-for-Oil Thesis' *The Australian* 19.
- 5 Citing Mufson 2008.
- 6 Making TPVs temporary on the assumption that the person seeking asylum can go back to their country of origin at some stage, and 'turning back the boats', and asylum seekers, to either their country of origin or the 'country of first asylum' or another interim country all pose particular perils for asylum seekers who are sexual minorities (Seuffert 2013).
- 7 The policy risks breaches of Australia's voluntarily assumed international human rights obligations to asylum seekers, especially the fundamental duty of *non-refoulement*, not to return or transfer a refugee to a state where the refugee has a well-founded fear of persecution or is not safe (Foster 2007: 244-250). Asylum seekers attempting to reach Australia by boat

have been 'sent back' to Indonesia, a non-signatory to the UN Refugee Convention, without Indonesia's consent (Giannacopoulos et. al. 2013: 566).

- 8 For facts on refugee resettlement in Australia see 'Refugee resettlement to Australia: what are the facts?' [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1415/RefugeeResettlement#\\_ftnref14](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/RefugeeResettlement#_ftnref14). The 'queue jumper' and 'no advantage' rhetoric was considered by an Expert Panel on Asylum Seekers appointed by the Australian Government, which reported in 2012, recommending a 'no advantage policy' to achieve an outcome that asylum seekers will not be advantaged if they pay people smugglers to attempt dangerous irregular entry into Australia instead of pursuing regular migration pathways and international protection arrangements (Australian Government 2012: 11, 14, 141). However, the Expert Panel effectively contradicted its own use of 'regular migration pathways' and 'established international protection arrangements' by acknowledging the 'risk of indefinite delay with inadequate protections and without any durable outcome' (11). It further acknowledged the long wait and remoteness of resettlement for those in refugee camps all over the world, stating that '[c]urrently, at best, only one in 10 persons in need of resettlement will be provided with that outcome annually' (emphasis added) (38). Finally, undermining its own position, it stated that, 'any of the regular pathways for international protection arrangements in Australia's region are failing to provide confidence and hope among claimants for protection that their cases will be processed within a reasonable time frame and that they will be provided with a durable outcome' (28).
- 9 An overwhelming majority of the displaced Syrians are Sunni Muslims. Although the United States had taken in only a 'paltry' 1519 Syrian refugees since 2011, 1415, about 93%, were Sunni Muslim (Bershidsky 2015).
- 10 '[T]he UN refugee agency, the UNHCR, is concerned Australia's intake may not be based purely on need, as questions persist over whether Christian minorities will be unfairly favoured when the government decides which refugees to accept' (Hasham 2015).
- 11 In 2014, Transfield Services signed a contract with the Department of Immigration and Border Protection to provide Garrison Support and Welfare Services for \$1.22 billion to the detention centres on Manus Island

## Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps

and at Nauru. (See <http://www.transfieldservices.com/BlogRetrieve.aspx?PostID=501542&A=SearchResult&SearchID=7230659&ObjectID=501542&ObjectType=55>). It has been argued that Australia leads the pack of countries turning over complex immigration policies and problems to large multinational firms (O'Flynn 2014).

- 12 With respect to Manus Island, the UNHCR has reported the following: many asylum seekers expressed concerns about deteriorating physical and mental health; the conditions of detention were aggravating symptoms caused from pre-existing torture and trauma; that detention under the existing conditions amounted to 'arbitrary detention that is inconsistent with international human rights law'; that overall the harsh conditions, lack of clarity and timeframes for processes and durable solutions are 'punitive in nature' (UNHCR 2013b: 2, 20-23; UNHCR 2013a: 1).
- 13 *Papua New Guinea Criminal Code* 1974 s 210. Papua New Guinea Criminal Code 1974 s 210(2) makes an attempt to commit the offence of 'carnal knowledge of any person against the order of nature' an offence punishable by up to 7 years imprisonment.
- 14 *Papua New Guinea Criminal Code* 1974 s 212. The offence of 'Indecent practices between males', which includes acts of 'gross indecency with another male person' carries a penalty not exceeding three years imprisonment. The Amnesty report states that this offence applies to all non-penetrative sex (Amnesty 2013: 73).
- 15 A recent case of an LGBTI sex worker who was gang raped by police in PNG was brought to the attention of Amnesty.
- 16 A Salvation Army orientation presentation at Manus included a slide with a picture of two men kissing with a large red X through it accompanied by delivery notes stating 'Homosexuality is illegal in Papua New Guinea. People have been imprisoned or killed for performing homosexual acts' (Laughland 2014).
- 17 Unless positive steps are taken to provide appropriate services and information about asylum seeking on the basis of sexual orientation, and to ensure a supportive and safe environment for the making of claims without fear, this ground may never be revealed (UNHCR 2012: 58-60).
- 18 With respect to the confidentiality agreements, the Senate report on the inquiry into the February 2014 violence states: 'Contracted service providers were required to sign confidentiality deeds with the department

preventing them from disclosing information relating to their operations at the Manus Island RPC, and noting that such disclosure is punishable under the Crimes Act 1914. Service provider staff were also required to sign restrictive confidentiality agreements with both the department and their employer in relation to their employment at the centre. Several former employees at the centre stated that staff were continually warned that breaches of these confidentiality requirements was punishable, including by prosecution' (Senate Dec 2014: 25).

- 19 At the time of this writing there are two Senate inquiries into aspects of asylum seeker treatment, 'Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru' [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regional\\_processing\\_Nauru/Regional\\_processing\\_Nauru](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru) with a report due out on 31 July 2015, and 'Payment of cash or other inducements by the Commonwealth of Australia for the turn back of asylum seeker boats', referred to the Legal and Constitutional Affairs References Committee on 24 June 2015 [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Payments\\_for\\_turn\\_backs](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Payments_for_turn_backs).
- 20 *Crimes Act 1914* (Cth) ss 70(1)-(2). Section 70(1) provides that:

A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he or she is authorized to publish or communicate it, any fact or document which comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose, shall be guilty of an offence.

A 'Commonwealth Officer' includes a person who is appointed or engaged under the *Public Service Act 1999* (Cth), the Commissioners and employees of the Australian Federal Police and, for the purposes of section 70, any other person who 'performs services for or on behalf of' the Commonwealth government. *Crimes Act 1914* (Cth) s 3. The duty not to disclose may arise from a duty of confidentiality, a duty of loyalty and fidelity arising from the contract of employment or a fiduciary duty that may arise. (Hardy and Williams 2014: 799-800).
- 21 *The Guardian Australia* reported that the AFP was asked by the Department of Immigration and Border Protection to investigate Save the Children staff for disclosures in an anonymous submission to the Australian Human Rights Commission's National Inquiry into Children in Immigration

## **Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps**

Detention 2014 (see <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigration-detention-2014>) (Doherty 2015). The submission attached documents, including minutes of meetings, incident reports, intelligence notes and email correspondence, and detailed specific allegations of abuse, including sexual abuse, violence and bullying of children (Save the Children 2014). An inquiry into the allegations contained in the Save the Children submission to the AHRC found that 'there is a level of under-reporting of sexual and other physical assault' and that many asylum seekers living in the detention centre were apprehensive about their safety and had privacy concerns; it made a number of recommendations (Moss Report 2015: 4). Referral of the matter to the Australian Police Force under s 70 of the Crimes Act 1914 was labelled 'draconian' by a partner at law firm Minter Ellison; s 70 was characterised as a 'dangerous law' by human rights lawyer Julian Burnside (Whyte 2014). The Moss Review into the claims of sexual assault and other physical assault of asylum seekers and the conduct of staff members of service providers found, in relation to the allegations regarding the Save the Children staff, that there was not any information which substantiates the alleged misconduct in relation to the Save the Children staff members. Noting the current AFP investigation, the review concludes that the department should review its decision to have the Save the Children staff members removed (Moss Report 2015: 6).

- 22 It was reported that the 'allegations relating to Save the Children staff came from an intelligence report compiled from information gathered by Lee Mitchell, a senior intelligence analyst employed by Wilson Security on Nauru', who, in one instance, cited 'a tweet from journalist Daniel Pye as evidence Save the Children staff were leaking information to the media', stating that tweet referred to 'academics working with refugees confirmed seven suicide attempts yesterday to me' and the only 'academics that work inside the centre are employed by Save the Children'; however, the tweet actually referred to an article quoting Professor Suwendrini Perera, who had been in direct contract with refugees. Save the Children staff were not involved (Cannane 2015).
- 23 The definition of IBP workers includes Australian Public Service Workers who work for the Department of Immigration and Border Protection, any employee of an agency under the Public Service Act 1999, an

## Seuffert

officer or employee of a State or Territory or of an agency or authority of the Commonwealth, a State or Territory, officers or employees of the government, agency or authority of a foreign country, whose services are made available to the Department and people who are engaged as consultants or contractors to the Department, or employed by those consultants or contractors. This definition would include doctors, teachers, social workers and others employed or brought into detention camps by the Department.

- 24 The Law Council of Australia submission on the Bill states concerns with 'the heightened secrecy provisions, as well as the broader powers to dismiss staff and contractors, may discourage legitimate whistle-blowers from speaking out publicly. To aid transparency, there should, as noted by the Australian Law Reform Commission in its inquiry into Secrecy Laws and Open Government in Australia, be a public interest disclosure exception to the secrecy provisions where the disclosure would, on balance, be in the public interest' ( Law Council 2015b:13).
- 25 *Crimes Act 1914* (Cth) s 70(1) prohibits a Commonwealth Officer from publishing or communicating any fact or document which comes to his or her knowledge.
- 26 These recommendations drew on: Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).
- 27 The DIBP was reportedly ordered by the Supreme Court of Victoria to pay \$10,000 compensation to lawyers from Maurice Blackburn Law Firm who were denied access to the Christmas Island detention camp (despite the fact that they had a court order requiring access). The Court reportedly stated that detention centre staff behaved in a 'high handed' manner with an 'unacceptable disregard' for the rule of law (Whyte 2015).
- 28 Over 40 social workers, humanitarian workers, caseworkers and medical offices signed an 'Open Letter' regarding the Border Force Act 2015 on the day it became effective, stating 'there are currently many issues which constitute a serious threat to those in detention for whom we have a duty of care', acknowledging that publication of the letter could lead to prosecution under the BFA and stating that they challenge the Department to 'prosecute so that these issues may be disclosed in open court and in the full view of the Australian public' ('Open Letter').

## **Sexual Minorities and the Proliferation of Regulation in Australia's Asylum Seeker Detention Camps**

- 39 Immigration detention facilities under the current definition in the Migration Act 1958 do not include the offshore Regional Processing Centres at Manus Island and Nauru. As Leela's narrative indicates, problems for sexual minority asylum seekers are not limited to offshore centres. Statistics indicate that there were 2026 people held in immigration detention in May 2015; 1110 of these were asylum seekers who had arrived by boat and the others were overstayers, those who had visas cancelled, some who had arrived by air and had not been cleared by immigration and just a few others. (Department of Immigration and Border Protection 2015: 3-7). An increasing number of those held in immigration detention due to cancellation of their visas (from 1% in July 2013 to 8% in Jan 2015); cancellation is often due to 'convictions for drugs and other serious criminal offences' (Senate 2015: 2-3).
- 30 The Bill provides that an officer must not be authorised for purposes of maintaining the good order of immigration detention facilities unless that person satisfies the training and qualifications requirements established pursuant to the Bill by the Minister in writing (s 5(1), 197BA(7)). The LCA's submission on the Bill notes that there are no requirements in the Bill for training, that the current training requirements are insufficient for the powers conferred by the Bill (the level of security guards who do not possess a statutory use of force power), that minimal training requirements are problematic for private contractors, and that in any case, immigration officials and immigration detention service providers should not possess the range of associated powers that law enforcement officials possess as immigration detention centres 'hold a range of detainees, including asylum seekers awaiting the outcome of their protection status' and it would be inappropriate for immigration detention facilities to be operated as if they were prisons (LCA 2015: 17-18).
- 31 The LCA notes that the current Detention Services Manual contains some reporting requirements, but recommends that these requirements should be codified (LCA 2015b: 19).

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