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Abstract

Two areas of scholarship on asylum seekers and detention camps rarely consider the position of LGBTI asylum seekers: the first is legal scholarship on asylum seeker non-entr e regime policies of 'excision' and 'exile', and the second is scholarship theorising the 'bare life', or lack of political and legal rights, and related issues encountered by asylum seekers at the boundary of the nation. This article contributes to and extends these bodies of scholarship by reading LGBTI asylum seekers into Australia's recent asylum seeker non-entr e polices of 'excision' and 'exile'. Using scholarship and reports produced internationally, it raises issues for LGBTI asylum seekers in the implementation of these policies. These analyses highlight some of the different forms in which 'bare life' might be manifested in the space of inclusion/exclusion at the boundary of the nation: 'bare life' is not a monolithic category.

Keywords

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HAUNTING NATIONAL BOUNDARIES

LBGTI Asylum Seekers

*Nan Seuffert**

Two areas of scholarship on asylum seekers and detention camps rarely consider the position of LBGTI asylum seekers: the first is legal scholarship on asylum seeker non-entrée regime policies of ‘excision’ and ‘exile’, and the second is scholarship theorising the ‘bare life’, or lack of political and legal rights, and related issues encountered by asylum seekers at the boundary of the nation. This article contributes to and extends these bodies of scholarship by reading LBGTI asylum seekers into Australia’s recent asylum seeker non-entrée policies of ‘excision’ and ‘exile’. Using scholarship and reports produced internationally, it raises issues for LBGTI asylum seekers in the implementation of these policies. These analyses highlight some of the different forms in which ‘bare life’ might be manifested in the space of inclusion/exclusion at the boundary of the nation: ‘bare life’ is not a monolithic category.

Australia’s asylum seeker laws and policies over recent decades have been condemned by international human rights agencies and organisations,¹ critiqued by Australia’s own Human Rights Commission² and academic commentators,³ struck down by the High Court⁴ and triggered political

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¹ See, for example, UNHCR (2012a); UNHCR (2013b), para 9.8: ‘the combination of the arbitrary character of the authors’ detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them’; Amnesty International (2012a), p 1: ‘the indefinite and prolonged detention of asylum seekers in Australia is a failed policy that contravenes human rights standards’.

² See, for example, Australian Human Rights Commission (2013), p 5: ‘In the Commission’s view, the regional processing regime for asylum seekers arriving by boat on or after 13 August 2012, and the treatment of other asylum seekers detained or otherwise living in Australia, creates a significant risk that Australia may breach some of the human rights treaties with which it has agreed to comply.’

³ See, for example, Hathaway (2007); Edwards (2003), p 193: ‘Australia now has one of the most hostile asylum regimes among industrialised countries’; Pugliese (2011); Rajaram and Grundy-Warr (2004); McNevin (2011).

⁴ *M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

protests.⁵ Recent development in these policies provide that asylum seekers who arrive anywhere in Australia by any means of transportation other than aircraft may be forcibly transferred to detention camps in 'regional processing countries'; applications for refugee status made by these asylum seekers in Australia are presumptively invalid. These policies join a decades-long international trend that aims to stymie asylum seekers' entry into wealthy countries, often referred to as '*non-entrée*' regimes.

In July 2013, then Prime Minister Kevin Rudd announced what became known as the 'PNG Solution', which provided that any asylum seekers arriving by boat in Australia would be transferred to Papua New Guinea (PNG) as a designated regional processing country, where their refugee status would be determined; if successful, they would be resettled in PNG. Asylum seekers arriving in Australia by boat were to have no chance of settling in Australia as refugees.⁶ Reports of the rape and abuse of young male asylum seekers in the existing Manus Island Detention Centre in PNG followed quickly on the heels of the announcement of the PNG Solution.⁷ Attempts to identify the number of incidents of rape and abuse in detention camps suggested a lack of record-keeping.⁸ This lack of record-keeping represents just one way in which Australia's asylum seeker detention camps are places where asylum seekers lack legal rights and recognition and are in fact subjected to the direct and indirect violence of the state.⁹ Lengthy arbitrary detention in harsh prison-like conditions without any due process of law have been identified and critiqued. Scholars have analysed these camps as exceptional places where the rule of law does not apply and asylum seekers face political death (or bare life): a lack of legal and political rights.¹⁰

In the conceptually shadowy (ghostly) place of political death, which is also the physically harsh space of detention,¹¹ asylum seekers fleeing

⁵ See, for example, Gough (2013); Heasley (2002); *The Australian Online* (2011, 2013).

⁶ ABC News Online (2013a).

⁷ ABC News Online (2013b), reporting that rape victims 'are knowingly left in the same compound as their abusers because there are no facilities to separate them' and that: 'There 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': O'Brien (2013).

⁸ O'Brien (2013).

⁹ Pugliese (2011), pp 30–2.

¹⁰ Rajaram and Grundy-Warr (2004); McNevin (2011), pp 69–92; see Borren (2008), p 233.

¹¹ See Amnesty International (2012b), p 1 'Amnesty International has found a toxic mix of uncertainty, unlawful detention and inhumane conditions creating an increasingly volatile situation on Nauru, with the Australian Government spectacularly failing in its duty of care to asylum seekers' and 'The physical conditions are harsh and repressive ... The compound where the 386 asylum seekers are kept is approx 100 metres by 150 metres and there is simply ... no privacy for the men ... The temperature reaches over 40 degrees in the compound and 80 percent humidity ... The news that five years could be the wait time for these men under the Government's 'no advantage' policy added insult to injury, with one man attempting to take his life on Wednesday night ... Every tent observed had at least one leak, and bedding and clothing was soaked or at least damp. UNHCR (2013a),

persecution on the basis of membership of a particular social group of sexual minorities are all but invisible.¹² The recently reported rapes and abuse of young men raise questions that remain unanswered; who are these vulnerable young men, and who is raping them? Asking the question evokes a shadowy presence, a spectre or possibility, of young men who present as gender non-conforming, different, effeminate or as sexual minorities, vulnerable to sexual and other abuse in detention camps. This spectre reminds us that sexual minorities are everywhere, haunting the asylum seeker detention policies. Reports by international human rights agencies and lesbian, bisexual, gay, transgender and intersex (LBGTI) asylum seeker advocacy groups suggest that LBGTI asylum seekers face particular perils fleeing persecution, in transit to their desired country of asylum, and in detention camps,¹³ but we know little about sexual minorities sent to third countries or to detention camps by Australian authorities.¹⁴

Two areas of scholarship on asylum seekers and detention camps rarely consider the position of LBGTI asylum seekers: the first is legal scholarship on asylum seeker *non-entrée* regime policies of ‘excision’ and ‘exile’;¹⁵ the second is scholarship theorising the ‘bare life’, or lack of political and legal rights, and related issues encountered by asylum seekers at the boundary of the nation, in asylum seeker detention camps. This article contributes to and extends these bodies of scholarship by reading LBGTI asylum seekers into Australia’s recent asylum seeker *non-entrée* policies of ‘excision’ and ‘exile’.

pp 2, 14: ‘the temporary living conditions for most transferees at the closed detention setting remain harsh and, for some, inadequate’ and ‘During the mission UNHCR found the physical conditions of the Assessment Centre harsh’. Amnesty International (February 2012a), pp 1, 3, referring to the Christmas Island detention centre: ‘The facility is simply too harsh to house people who have not committed a crime’ and in general, ‘The most serious and damaging conditions faced by asylum seekers in immigration detention are the length of time and the indefinite nature of their imprisonment. Among the asylum seekers who had been in detention for extended periods, self harm and attempted suicides were talked about as a fact of life.’

¹² See Jansen and Spijkerboer (2011), p 15 ‘The great majority of EU member states does not collect statistical data about the number of LBGTI asylum applicants ... we see examples of LBGTI claimants ‘coming out’ to the asylum authorities only after their first application for asylum has been denied ... But undeniably, there will also be people who fled their country of origin on account of LBGTI based persecution, but tried to be granted asylum on other grounds.’

¹³ For example, Organization for Refuge, Asylum & Migration (2013); Jansen and Spijkerboer (2011); Portman and Weyl (2013); UNHCR (2010a, 2012b).

¹⁴ An Amnesty International Report released in December 2013, while this article was under review, discussed below, provides some limited and rare information on ‘gay’ asylum seekers at Manus Island (2013). Raj (2013) notes that little has been said about how LBGTI asylum seekers will fare in detention camps in PNG. See John-Brent (nd); Roden (2010).

¹⁵ Foster and Pobjoy (2011), p 586. I am indebted to Foster and Pobjoy for this useful characterisation. They note their indebtedness to David Manne of the Refugee Immigration and Legal Centre for this characterisation at p 586, n 9.

Using scholarship and reports produced internationally, it raises issues for LBGTI asylum seekers in the implementation of these policies. These analyses highlight some of the different forms in which ‘bare life’ might be manifested in the space of inclusion/exclusion at the boundary of the nation. For Giorgio Agamben, the dichotomy of political existence/bare life is fundamental to the political traditions of the modern West. In this dichotomy, all political beings must implicitly be defined in opposition to non-political beings, or bare life. This is not about the process of distinguishing within the nation between minority or otherwise differentiated groups: the capacity to perform this internal division of political subjects is predicated on an *a priori* division between ‘bare life’ and political life.¹⁶ At the boundaries of political life, bare life defines and shapes it; simultaneously, this process of mutual construction – ‘the process by which the exception [to political life in this case] everywhere becomes the rule’ – results in a blurring of boundaries, a zone of indistinction, or inclusion and exclusion, where appalling treatment of asylum seekers that breaches the rule of law becomes the norm.¹⁷ In Part II, the article provides a brief background analysis of asylum seeker *non-entrée* regimes of excision and exile. Part III turns to the implications of exile policies for LBGTI asylum seekers, and Part IV examines excision policies and regional processing countries, briefly analysing some of the most recent trends in Australia’s *non-entrée* regime. The implications of the PNG Solution for LBGTI asylum seekers are then considered, along with ideas about bare life, in Part V.

Asylum Seeker Non-entrée Regimes: Excision and Exile

This section provides the context for the development of Australia’s asylum seeker *non-entrée* regimes and its current asylum seeker policies. After World War II, between 1947 and 1951 over one million Europeans were resettled by the International Refugee Organization (IRO) in the Americas, Oceania and elsewhere.¹⁸ The internationally funded IRO mandate ended in mid-1950; the subsequent approach involved greater individual state control over the process, combined with a high commissioner with the authority of agreed standards of conduct, and was implemented through the 1951 Convention Relating to the Status of Refugees (the Convention)¹⁹ and the establishment of the United Nations High Commissioner for Refugees.²⁰ The Convention was based on the premise that the willingness of World War II refugees to settle outside of Europe was contingent on the provision of basic entitlements. As well as providing humanitarian assistance to World War II

¹⁶ Bignall (2012), pp 276–7.

¹⁷ Agamben (1995), pp 6–12.

¹⁸ Hathaway (2005), p 91.

¹⁹ The Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

²⁰ Hathaway (2005), p 91.

asylum seekers, the Convention was motivated by the desire to provide for defectors from communist states,²¹ as these people had a particular geopolitical and ideological value.²² For example, Australia welcomed some 50,000 refugees from Vietnam during the 1970s and 1980s, in part as a way of ‘embarrassing Communist governments and provid[ing] moral justification for Cold War foreign policies’.²³

During the 1980s, arguments began to emerge in the international scholarship and other literature that asylum seeker flows had radically increased, and that the ‘new’, non-Western asylum seekers were not the subjects of political persecution, but rather were ‘economic migrants’ making ‘spurious’ claims to refugee status.²⁴ Further, the end of the Cold War meant that defectors from Soviet states no longer possessed the same ideological and geopolitical value.²⁵ Academic engagement in the area increased, and many states shifted to ‘*non-entrée*’ regimes, an array of policies – some of which may be enacted in legislation – that stymie access by asylum seekers to the territory of the state, or provide for the removal of those who reach the state.²⁶

Interestingly for this chronology, at the same time as states were beginning to develop *non-entrée* asylum seeker regimes, some state courts were also beginning to recognise persecution on the basis of sexual orientation under the Convention definition of refugee for those refugees who did reach the state and were able to make a claim. The Convention provides that a refugee is a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ...²⁷

²¹ Hathaway (2005), p 91

²² Chimni (1998), p 351.

²³ McNevin (2011), p 76.

²⁴ Chimni (1998), p 356.

²⁵ See, however, Luibheid (2002), p 152, noting that prior to 1994 in the US sexual minorities had a difficult time convincing judges that they were members of a social group for purposes of refugee status, but nevertheless, ‘One important exception was the case of Cuban-born Fidel Armando Toboso-Alfonso, who argued for withholding of deportation on the grounds that he would be persecuted for homosexuality if he were returned to Cuba. His claim succeeded in part because of the United States’ historic animosity toward Cuba. Granting asylum to Cubans – even gay ones – seemed to validate claims about the evils of communism under Castro.

²⁶ Hathaway (2005), pp 279–302; Hathaway (1992).

²⁷ The Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967, Art 1A(2). As the Convention is an international agreement, it is not directly enforceable in Australian courts, and must be implemented through Australian domestic law. Australian law provides in the *Migration Act 1958* (Cth), s 36(2) that

In Australia, the inclusion of sexual minorities as members in a ‘particular social group’ for purposes of meeting the Convention definition of refugee commenced in the 1990s.²⁸ However, as has been well documented, success in claims of persecution on this basis was, and still is, fraught with difficulty.²⁹ As will be discussed below, some of the same issues that arise in determinations of refugee status by those fortunate asylum seekers who are permitted to make claims in Australia also arise in relation to asylum seekers subjected to *non-entrée* policies of exile and excision.

Since many refugee rights in international and state law apply to those asylum seekers who reach, or arrive in a state’s territory,³⁰ which is generally coextensive with the state’s jurisdiction,³¹ as mentioned, *non-entrée* regimes are implemented through a variety of policies designed to keep asylum seekers out of a state’s territory or jurisdiction. Such policies may include imposing visa requirements on anyone travelling from states likely to have refugees, and not issuing visas for the purposes of seeking refugee protection³² Another set of policies involves sending asylum seekers who have reached the territory of a state to another country; this may include sending the asylum seeker back to

protection visas will be issued to those who meet the Convention definition of ‘refugee’. Generally, the Australian courts have indicated that they will interpret Australia’s legislative provisions consistent with the Convention protections and with the international jurisprudence on the Convention. See, for example, *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011). For example, the High Court has held that because section 36(2) of the *Migration Act* incorporates Article 1 of the Convention into Australian law, it can be assumed that the Parliament intended section 36(2) to be ‘construed in accordance with the meaning to be attributed to the treaty provision in international law’: *A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 239.

²⁸ *Appellant S395/2002 and S396/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 494: the Refugee Review Tribunal’s decision ‘would arguably have been perverse’ if it had found that homosexual men in Bangladesh did not constitute a ‘particular social group’ for purposes of the definition of refugee; *Gui v Minister of Immigration and Multicultural Affairs* S219/1999 [2000] HCA Trans 280 at line 365: ‘The Federal Court accepted, correctly in our view, that homosexuals, whether in China generally or in Shanghai, are a particular social group within the Convention definition of “refugees”’, at line 133–4 per Kirby: ‘I do not think anybody now disputes that homosexuals are members of a particular social group’; see *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 265, 293–4, 303–4; 142 ALR 331 at 359, 382–3, 390–1; *MMM v Minister for Immigration and Multicultural Affairs* (1998) 90 FRC 324 at 330; 170 ALR 411 at 416; *Ex parte Shah* [1999] 2 AC 629 at 652; [1999] 2 All ER 545 at 563; *Ward v Attorney General (Canada)* (1993) 2 SCR 689.

²⁹ See, for example, Millbank (2002, 2009, 2011–12); Berg and Millbank (2009); Kendall (2003); Johnson (2011).

³⁰ Hathaway (2005), p 161; Hathaway (2007), p 91: ‘refugees who arrive at a state’s territory ... are entitled to the benefit of the *Refugee Convention*.’

³¹ See, however, Hathaway (2005), pp 160–71, arguing that the underlying jurisdictional basis for state accountability should not, in certain circumstances, be limited to a narrow territorial basis.

³² Hathaway (2005), pp 291–2.

their country of origin where it is determined to be safe – asylum seekers may be required to rebut the presumption of safety.³³ The other country may also be identified as a ‘country of first asylum’ or a ‘safe third country’, including a country through which the asylum seeker has passed since leaving their country of origin which is considered ‘safe’.³⁴ More recently, this approach has included sending asylum seekers to third countries where they have never been.³⁵

Australia’s processes and policies, particularly for asylum seekers who arrive by boat, reflect these harsh *non-entrée* tactics, designed to keep certain asylum seekers out of the country.³⁶ The policies have been divided in two types: ‘exile’ and ‘excision.’³⁷ Policies of ‘excision’ generally involve states declaring that asylum seekers who arrive in part or all of their territory are either deemed not to have reached the state, or are (paradoxically) outside of the state, or outside of the so-called ‘migration zone’, or in a so-called ‘international zone’.³⁸ Asylum seekers who reach ‘excised’ areas of Australia are deemed not to have landed in Australia, and have been declared to be ‘offshore entry persons (OEPs),’³⁹ or more recently ‘unauthorised maritime arrivals’ (UMAs).⁴⁰ The purpose of ‘excising’ state territory from the state is to avoid national and international obligations to certain asylum seekers, sometimes including the obligation to provide legal processes to determine their status as refugees.⁴¹ The phrase ‘exile policies’ is used here to refer to policies involving removing asylum seekers to places outside of the state’s jurisdiction, including to another country determined to be ‘safe’. In Australia, OEPs were removed to ‘declared

³³ Hathaway (2005), pp 291–9.

³⁴ Foster (2007); Crock and Berg (2011), pp 407–19.

³⁵ Foster (2007), pp 224–5, the international law foundation for the third country policies is sometimes referred to as ‘protection elsewhere’; Foster’s analysis concludes that these policies are not prohibited by the Convention, that the sending state must ensure that the state to which the asylum seekers are sent will in fact respect all of the rights in the Convention, and that ‘it is likely that protection elsewhere schemes can be lawfully implemented only in very exceptional circumstances’: p 286.

³⁶ For an early article identifying the non-*entrée* regime trend, see Hathaway (1992).

³⁷ Foster and Pobjoy (2011), p 584.

³⁸ Hathaway (2005), p 298: ‘A particularly invidious mechanism of non-*entrée* is the designation by some states of part of their airports as a so-called “international zone” in which neither domestic nor international law is said to apply ... the Australian government has sought to ‘excise’ more than 3,500 of its islands from Australia’s self-declared “migration zone”.’ For a discussion of the popular notion that territory may be excised from the ‘migration zone’, see Foster (2011), p 586 and note 11.

³⁹ *Migration Act 1958* (Cth), ss 198A(1), 198(2)(d) (repealed No 113, 2012).

⁴⁰ *Migration Act 1958* (Cth), s 5AA(1).

⁴¹ Hathaway (2007), p 91; Foster and Pobjoy (2011), pp 600–3 at 601. Asylum seekers who arrive in a state’s territory (including parts of the high seas over which a state has taken effective jurisdiction) are entitled to the benefit of the Convention, including ‘adequate legal and procedural safeguards ... to ensure claimants entitled to refugee status ... receive it.’

countries' using 'such force as ... [was] necessary and reasonable',⁴² as discussed below, current Australian legislation permits UMAs to be removed to regional processing countries, also by force.⁴³

Sexual minorities seeking asylum face a number of particular issues in relation to *non-entrée* policies of excision and exile. Before considering those issues, however, it is important to recognise the context in which sexual minorities seek asylum. While in-depth information on the situation of asylum seekers who are sexual minorities is still relatively scarce, and there is variation in experiences, both geographically and among different segments of sexual minorities, attempts to gather information in this area and to begin to provide appropriate services have increased over the last decade. This information suggests that persecution of LGBTI people may be on the basis of their sexual orientation as well as other bases, and may take multiple forms, coming from both public and private actors. The UNHCR has noted that 'LGBTI asylum seekers and refugees face multiple forms of discrimination not experienced by other refugee communities'.⁴⁴ The discrimination may include inappropriate treatment or denial of access to health care and other social services, including housing, education and employment, and they may also be arbitrarily detained.⁴⁵ They may also 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'.⁴⁶ 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. For these reasons, as discussed below, there have been calls for the UNHCR to develop its Heightened Risk Identification Tool, which is intended to assist with identifying persons whose present circumstances indicate that they are likely to face a serious protection problem in the immediate future if there is no appropriate intervention to

⁴² Foster and Pobjoy (2011), p 588, using the term 'exile' to refer to this core element of the Howard government's policies.

⁴³ Two well-publicised Australian examples of tactics attempting to keep asylum seekers out of the territory more generally are the diversion of an Australian troop ship from its course to intercept an Indonesian fishing boat carrying mostly Iraqi asylum seekers heading for Australian waters, taking the asylum seekers, along with those taken from the *Tampa*, to Nauru in 2001; and in 2003, ordering a boat within Australian territory near Melville Island towed back to Indonesia, a move for which Australia was chastised by the UNHCR. Hathaway (2005), pp 283, 290–1, 333–5 at 160–171 argues that 'there are some circumstances in which a refugee will be under the control and authority of a state party even though he or she is not physically present in, or at the border of, its territory ... [for example where a state exercises] effective or de facto jurisdiction outside their own territory.' See Foster (2007), p 225: 'the policies adopted and proposed to date are largely understood as an attempt to minimize state obligations to refugees'.

⁴⁴ UNHCR (2010a). pp 5, 6

⁴⁵ UNHCR (2010a). p 5.

⁴⁶ UNHCR (2010a). p 5; see, for example, Bondyopadhyay and Khan (2002), pp 6–7, 24–5.

protect them, for application to LBGTI asylum seekers.⁴⁷ With this brief context as background, the next section considers issues for LBGTI asylum seekers that arise under policies of exile.

Exile Policies and Sexual Minorities

Australia's exile policies are linked more generally to policies involving third countries considered safe, as mentioned above,⁴⁸ and closely align with the trend to label asylum seekers as economic migrants. The *Border Protection Legislation Amendment Act 1999* (Cth), which amended the *Migration Act 1958* (Cth),⁴⁹ stated that Australia did not owe 'protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter or reside in ... any country apart from Australia'.⁵⁰ The Federal Court in *V872/00A v Minister for Immigration and Multicultural Affairs* linked this provision to the current politics labelling certain asylum seekers as economic migrants, stating:

The policy also is well known to any reader of current political news. It is alleged to have been the case that persons who came to Australia, claimed to be refugees and sought protection visas, often either had previously resided in a third country where they had no fear of persecution or alternatively travelled via safe third countries en route to Australia but preferred to travel on and not remain in the safe third country *because the economic conditions in Australia would provide better living standards* than those available there.⁵¹

This statement of Australian policy clearly reflects the international *non-entrée* regime trend, particularly the assumption that asylum seekers are

⁴⁷ UNHCR (2007) p 2; UNHCR (2010c).

⁴⁸ Foster (2007), p 230: 'whether the specific practice is termed "country of first arrival", "safe third country", or "country which offers effective protection", there is no principled reason why the legal analysis should change. In each case the question is whether a state party to the Refugee Convention can, consistently with its Convention obligations, transfer a refugee to another state.'

⁴⁹ See McAdam and Purcell (2008), pp 104–5 for a discussion of these provisions in relation to safe third country principles.

⁵⁰ *Migration Act 1958* (Cth), s 36(3) provides that 'Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.' Section 36(4) provides for circumstances in which subsection (3) does not apply, including where the 'the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'; it is not required that the third country have ratified the Convention: Hathaway (2005), pp 295–6; see Vrachnas et al (2008), pp 292–6.

⁵¹ *V872/00A v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 185 (Aus. FFC, 18 June 2002) [21], emphasis added. In one study, more than half of Australians surveyed thought that asylum seekers came to Australia 'for a better life', while only one quarter thought they came because they were fleeing persecution: McKay et al (2011), pp 120–9.

economic migrants seeking better living standards. There is no requirement in international law that asylum seekers must stay in the first country or the first safe country that they reach outside of their country of origin; indeed, it has been argued that deference should be accorded to asylum seekers' choice of the country in which they seek asylum.⁵²

Policies sending asylum seekers to third countries may hold particular perils for sexual minorities. The determination of whether the third country is 'safe' may be cursory, and there is considerable critique of the politics and policies of such determinations.⁵³ Specifically, no attempt may have been made to determine whether the country is safe for LBGTI asylum seekers: 'The assessment of the safety of these countries [of origin] does not appear to take the specific situation of LGBTI people into account.'⁵⁴

Further, attempts made to determine the safety of countries of origin or third countries for LBGTI asylum seekers may be hampered in a number of manners and may result in what has been termed 'deportation to danger'.⁵⁵ For example, the UNHCR Guidelines on claims to refugee status based on sexual orientation, published in 2012, state that:

The extent to which international organizations and other groups are able to monitor and document abuses against LBGTI individuals remain limited in many countries. Increased activism has often been met with attacks on human rights defenders, which impede their ability to document violations. Stigma attached to issues surrounding sexual orientation and/or gender identity also contributes to incidents going unreported. Information can be especially scarce for certain groups, in particular bisexual, lesbian, transgender and intersex people.⁵⁶

⁵² Hathaway (2007), pp 90–1: 'there is no duty whatsoever on a refugee to seek protection either in the first country where he or she arrives, or more generally within his or her region of origins ... present standards actually require deference to the refugee regarding where to take his or her chances ...'

⁵³ Hathaway (2005), pp 327–35, noting at 331 that under Australia's 'Pacific Solution' 'refugees removed from Australia to Nauru – which was not a party to the Refugee Convention – effectively lost the rights which they had acquired by virtue of their former presence in areas under the jurisdiction of (and subsequently within the territory of) Australia' and at p 333 with respect to 'safe country of origin' policies: 'this approach conflicts with the highly individuated focus required by the Convention: even if nearly all persons from a given country cannot qualify for refugee status, this fact ought not to impede recognition of refugee status to the small minority who are in fact Convention refugees'; McAdam and Purcell (2008) p 104: 'Concerns about the due diligence with which states carry out assessments of 'safety' in order to rid themselves of certain asylum seekers or refugees have been the subject of extensive discussion by scholars and international institutions alike.'

⁵⁴ de Jong (2003), p 25, analysing the designation of 'White List' states presumed to be safe in the UK in 2003, states: 'Asylum applications from nationals of these countries will be certified as 'clearly unfounded', which has severe consequences for the assessment of their case and their appeal rights.'

⁵⁵ See generally Glendenning et al (2006).

⁵⁶ UNHCR (2012b), p 17, para 66.

Even if the safety of LBGTI groups is taken into account in determinations with respect to safe third countries, a lack of information on abuses and persecution against these groups may result in flawed determinations. This statement is made in relation to country of origin information available to decision-makers on specific refugee status determinations made regarding LBGTI asylum seekers; there is a wealth of scholarship problematising the determinations by the Refugee Review Tribunal in Australia of whether these applicants have a well-founded fear of persecution in their country of origin.⁵⁷ This scholarship suggests that the danger to LBGTI asylum seekers in their countries of origin may be downplayed or trivialised, that it may be assumed that they can avoid persecution by acting 'discretely' or by moving locations, and that assumptions may be made that lack of enforcement of criminal prohibitions on same-sex intimate conduct means that persecution does not exist. These errors may also arise in relation to individual determinations on the safety of third countries, or determinations classifying certain countries as 'safe countries of origin'.⁵⁸

There are also particular problems for LBGTI asylum seekers where assumptions are made that they should remain in, or be transported back to, countries of first asylum, another third country policy. The justifications for these policies often refer to 'regional solutions', with the suggestion that asylum seekers from certain regions of the world should be provided with asylum in those same regions. Problems with countries of first asylum for LBGTI asylum seekers include that such countries may not accept cases of persecution on the basis of sexual orientation, or may punish same-sex relationships by law.⁵⁹ Further, support services and medical assistance for LBGTI asylum seekers may be inappropriate or nonexistent.⁶⁰ People may also be inappropriately 'resettled' in 'satellite cities' or remote or country areas where intolerance of LBGTI people may be high.⁶¹ A UNHCR Discussion Paper on the protection of LBGTI refugees and asylum seekers in 2010 emphasised the 'protection gaps' for LBGTI people in countries of first asylum:

Respondents raised at length the protection gaps for LGBTI asylum-seekers and refugees in countries of first asylum, showing the limited availability of local integration in many cases. *Resettlement in a third*

⁵⁷ See, for example, Millbank (2002, 2009, 2011–12); Berg and Millbank (2009); Kendall (2003); Johnson (2011).

⁵⁸ With respect to the determination of the safety of countries of origin more generally, see Crock and Berg (2011), p 409: 'The strength of political influences on decision-makers was apparent when Australian officials began rejecting asylum seekers from Afghanistan in late 2001 following early reports that the coalition bombing offensive had defeated the Taliban. In virtually no other asylum-receiving country was Afghanistan assessed so promptly as being "safe" for returning refugees.'

⁵⁹ UNHCR (2010a), p 13, para 46.

⁶⁰ UNHCR (2010b), para 27: 'States and UNHCR need to take care to place LGBTI refugees in supportive environments with the help of sensitized NGOs and other service providers.'

⁶¹ UNHCR (2010a), para 37.

*country may be the most likely scenario for many LGBTI refugees who have sought protection. Further efforts are needed to identify and address the risk factors that could potentially indicate resettlement as the only viable option for some LGBTI refugees.*⁶²

Policies that return refugees to countries of first asylum may be returning LGBTI people to countries in which they are not safe, or where there is no effective protection.

A recent report prepared for the US Department of State notes with respect to the idea of ‘regional solutions’ and requirements that asylum seekers remain in the country first asylum that:

Sexual minority refugees and asylum seekers are often forcibly displaced to neighboring countries where similar attitudes and practices prevail. They therefore tend not to disclose socially stigmatizing information pertaining to their sexual orientation or gender identity, fearing a repeated experience of rejection and discrimination by asylum authorities.⁶³

The ‘neighboring countries’ referred to in this quote are likely to be the countries of first asylum. Further, LGBTI asylum seekers may prefer not to disclose their sexual orientation, even if they eventually arrive in a more progressive country (even though the progressive country may have been attractive for that reason), and instead rely on other grounds of persecution.⁶⁴ 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,⁶⁵ this ground may never be revealed. In the United States, there is analysis suggesting that LGBT refugees benefit from resettlement in areas with an established LGBT community, a positive legal environment and a critical mass of other LGBT refugees.⁶⁶

Excision Policies and Regional Processing Countries

This section focuses on Australia’s most recent excision policies, contained in a raft of legislation passed in 2012 and 2013, and the potential implications of those policies for LGBTI asylum seekers. Australia has progressively excised territory from the protections of the Convention and the related domestic legislation, including by at times creating ‘zones of exception’, where legal procedural safeguards, and the right to judicial review for asylum seekers, are not available.⁶⁷ Its excision policies have been subjected to repeated critiques that they are inconsistent with its voluntarily

⁶² UNHCR (2010a), p 13, para 45. Emphasis added.

⁶³ Millo (2013), p 1.

⁶⁴ Millo (2013), p 2.

⁶⁵ UNHCR (2012b), paras 58-60.

⁶⁶ Portman and Weyl (2013).

⁶⁷ Foster and Pobjoy (2011), p 584; Wood and McAdam (2012), p 277.

assumed international human rights obligations, including this one from leading international refugee law scholar James Hathaway:

Neither refugee law nor international law more generally allow a state to avoid its freely assumed refugee law obligations by the disingenuous manoeuvre of purporting to declare any portion of its territory to be non-territory for refugee law purposes. Tactics of this sort are not only legally unviable, but are simply unworthy of states committed to human rights, and more generally to the rule of law.⁶⁸

Hathaway's reference to non-territory and the absence of the rule of law are, combined, evocative of Agamben's idea of a 'state of exception', which he uses to refer to places where the rule of law is suspended by the sovereign. In democracies, suspension of the rule of law is often referred to as justified only by military emergencies or other exceptional threats to national security; the current government's 'Operation Sovereign Borders'⁶⁹ and the focus on 'national interest' in the provisions discussed below eerily echo Agamben's analysis, which argues that states of exception, once created, tend to become the norm.⁷⁰ The exercise of unlimited sovereign power is discussed further below in relation to detention in PNG.

This section provides a brief analysis of the most recent relevant developments (at the time of this writing) in Australia's excision policies, including the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013 (UMA Act)*⁷¹ and related provisions, as well as amendments to the designation of 'regional processing centres' under which the PNG Solution was declared.⁷² This analysis provides the background for

⁶⁸ Hathaway (2007), pp 100–1; Wood and McAdam (2012), p 291: 'Australia alone bears responsibility for the fulfilment of its international obligations, notwithstanding any bilateral arrangement with Malaysia.'

⁶⁹ Coalition (2013).

⁷⁰ Agamben (1995).

⁷¹ 65SLI No 95 of 2013.

⁷² Section 198A of the *Migration Act 1958* (Cth) was repealed and replaced with section 198AA in response to *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011), to provide much broader discretion in the minister in designating 'regional processing countries', and fewer opportunities for court challenges: *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (No. 113 of 2012), effective 18 August 2012. See Parliament of the Commonwealth of Australia (2012), p 2: 'The purpose of the amendments in this Bill is to address that High Court decision in order to allow for regional processing of claims of offshore entry persons to be refugees. The amendments will ensure that the Government is able to implement the regional processing arrangements that are now envisaged. The amendments will ensure that the government of the day can determine the border protection policy that it believes is in the national interest. It will also allow for the regional cooperation framework envisaged in the Expert Panel's report to be implemented.' PNG was designated a regional processing centre in October 2012: Commonwealth of Australia (2012a); see Wood and McAdam (2012) p 275. Nauru was designated a regional processing centre in September 2012: Commonwealth of Australia (2012b).

the consideration of issues related to the detention of sexual minorities in detention camps in regional processing countries.

The Hathaway quote above regarding Australia's international law obligations refers generally to its excision policies over recent years. The most recent laws and policies, including the *UMA Act*, have come under particular attack, with the UNHCR stating in 2012 that 'under international law any excision of territory for a specific purpose has no bearing on the obligation of a country to abide by its international treaty obligations which apply to all of its territory'.⁷³ The president of the Australian Human Rights Commission (AHRC), Professor Gillian Triggs, stated in November 2012 that detaining people on the remote island of Nauru, and delaying their processing by six months, as well as advising them that they would be held in detention for five years, was 'an egregious breach of international human rights law'.⁷⁴

Australia's current policies with respect to asylum seekers who arrive by any means of transportation other than aircraft involve the excision of the entire country from the so-called migration zone,⁷⁵ which paves the way for the transfer of asylum seekers to a third country designated a 'regional processing country',⁷⁶ and further provides that successful asylum seekers will be settled in countries other than Australia. The new statutory provisions for designation of a regional processing country provide for only minimal procedural attention to the safety of asylum seekers in that country.⁷⁷

Under the new provisions, 'unauthorised maritime arrivals' (UMA) include anyone who has entered the 'migration zone' in any manner except on an aircraft.⁷⁸ UMAs must be taken to a 'regional processing country' as

⁷³ UNHCR (2012a).

⁷⁴ Hall and Doherty (2012); see also Glendenning et al (2006).

⁷⁵ See Parliamentary Joint Committee on Human Rights (2013), p 7: 'The *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*, which commenced on 1 June 2013, amended the *Migration Act 1958* to extend the current excision provisions to the whole country. This means that irregular maritime arrivals who arrive anywhere in Australia are subject to the same regional processing arrangements as those who arrive at a previously excised offshore place.'

⁷⁶ *Migration Act 1958*, s 198AB. It has been argued that previous attempts to extend transfer of all asylum seekers arriving by boat to third countries, intended to close Australia down to asylum seekers arriving by boat, 'contravened the very foundation of the international protection regime' McAdam and Purcell (2008), p 106.

⁷⁷ *Migration Act 1958*, s 198AB (2)-(7); previous Australian policies for extraterritorial processing have been said to 'essentially' rely on a 'particularly extreme version of the 'safe third country' notion'. See McAdam and Purcell (2008), p 104; Foster (2007).

⁷⁸ *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (No 35 of 2013), Sch 1, item [8], s 5AA(1) inserted into the *Migration Act 1958* (Cth) (effective 1 June 2013). The amendments were to ensure that arrival anywhere in Australia by irregular maritime means would not provide individuals with a different lawful status than those arriving at an excised offshore place (Explanatory Memorandum, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, p 1); See Australian Government (2012), Recommendation 14, p 17: 'The Panel recommends that the *Migration Act 1958* (Cth) be amended so that arrival anywhere on

soon as practicable, and such force as is necessary and reasonable may be used in the transfer.⁷⁹ A visa application made by UMAs is not valid⁸⁰ unless the minister determines that the restrictions do not apply because it is not in the public interest.⁸¹ This power may only be exercised by the minister personally, and each time a determination is made the minister must provide each house of parliament with a statement setting out the determination and the reasons for it.⁸² Under no circumstances, including a request by a UMA, does the minister have a duty to consider whether to exercise this power.⁸³ Clearly, it is not envisioned that the minister's powers will be exercised regularly, often or even at all.⁸⁴

Under the new provisions, the designation of 'regional processing countries' need not be made by reference to the international obligations or domestic law of that country; the only condition on the exercise of power is that the minister thinks 'that it is in the national interest to designate the country to be a regional processing country'.⁸⁵ In considering whether such determination is in the national interest, the minister must *have regard to* whether or not the country has given Australia *assurances* that it 'will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion', and whether or not an assessment of whether the person is covered by the definition of 'refugee' in the Convention will be made.⁸⁶

The criteria require only that the minister *have regard to* whether the country has given *assurances* about these matters as part of the overall determination of whether it is in the national interest to designate a regional

Australia by irregular maritime means will not provide individuals with a different lawful status than those who arrive in an excised offshore place.' (paragraphs 3.72–3.73)

⁷⁹ *Migration Act 1958* (Cth), s 198AD(2), (3).

⁸⁰ *Migration Act 1958* (Cth), s 46A(1) and 46B(1).

⁸¹ *Migration Act 1958* (Cth), s 46A(2)–(7) and 46B(2)–(7). The Australian Department of Immigration and Border Protection states that under the provisions in the new Act, 'an unauthorised maritime arrival cannot make a valid application for a visa unless the Minister personally thinks it is in the public interest to do so. Unauthorised maritime arrivals are also subject to mandatory immigration detention (as they would be unlawful non-citizens), are to be taken to a designated regional processing country and cannot institute or continue certain legal proceedings.' See www.immi.gov.au/legislation/amendments/2013/130601/lc01062013-04.htm.

⁸² *Migration Act 1958* (Cth), s 46A(1)–(6) and 46B(1); see Refugee Review Tribunal (2013), pp 1-3, 1-8.

⁸³ *Migration Act 1958* (Cth), s 46A(7).

⁸⁴ It has been argued that ministerial discretion to admit certain asylum seekers to processing on the mainland would be insufficient to overcome the breaches of international law in a general policy of third state processing. McAdam and Purcell (2008), p 106.

⁸⁵ *Migration Act 1958* (Cth), s 198AB(2). Sub-section (7) provides that the rules of natural justice do not apply to the exercise of the minister's power to so designate a country.

⁸⁶ *Migration Act 1958* (Cth), s 198AB(3). Sub-section (4) provides that the assurances given to the Minister need not be legally binding.

processing country. The provisions do not require any written undertaking by the regional processing country, do not require that the country be a signatory to the Convention, or any assessment of the credibility of the assurance, or the likelihood that the country will actually not expel a person or will actually make the assessment. The provision also does not require the minister to obtain any assurances about the treatment of the asylum seeker in the country until or during the assessment process, or about the quality of the process employed to make the assessment of whether the person is a refugee. Importantly for LBGTI asylum seekers, the assurances that an assessment will be made of whether people transferred to the regional processing country meet the Convention definition of ‘refugee’ make no reference to whether sexual minorities will be covered under the ‘membership of a particular social group’ language of the definition. The implications of lack of specificity are discussed below.

The dominant consideration in these regional processing provisions is Australia’s national interest. The legislative history states that ‘national interest’ has a broad meaning and includes matters relating to Australia’s standing, security and interests, which may include public safety, border protection, Australia’s economic interests, its ‘international obligations’ and other matters.⁸⁷ The reference to ‘international obligations’ is only one of a list of matters that *may* be included in the determination of national interest. The provisions appear to be intended to provide the minister with the broadest possible discretion, with minimal review by courts.⁸⁸

Three points that have previously been articulated in relation to previous policies need to be briefly reiterated in relation to these policies. First, the category of ‘unauthorised maritime arrivals’ is implicitly opposed to ‘authorised arrivals’ or ‘authorised maritime arrivals’. It suggests that there are other types or categories of refugees who are more legitimate than

⁸⁷ The Parliament of the Commonwealth of Australia (2012), pp 2–3 provides with respect to ‘national Interest’ that ‘The term “national interest” has a broad meaning and refers to matters that relate to Australia’s standing, security and interests. For example, these matters may include governmental concerns related to such matters as public safety, border protection, national security, defence, Australia’s economic interests, Australia’s international obligations and its relations with other countries. Measures for effective border management and migration controls are in the national interest. Measures to develop an effective functioning regional cooperation framework and associated processing arrangements to better manage the flows of irregular migrants in our region are also in Australia’s national interest.’

⁸⁸ *Migration Act 1958* (Cth), s 198AB(7) provides that the rules of natural justice do not apply to the exercise of the Minister’s power to designate a regional processing country. A High Court challenge to the PNG Solution has been launched, but the bases of the challenge are unclear at this writing. See ‘Chief Justice Queries PNG Challenge’ (2013), reporting that the Chief Justice of the High Court stated at a directions hearing: ‘There’s a lot more work to be done to achieve clarity on precisely what you are seeking and what is relevant to it.’ See also Owens (2013): ‘University of Sydney constitutional law expert George Williams said last night the constitutional challenge had “limited prospects of success”’.

those who arrive by boat. Yet the processes set out by international human rights law provide for people fleeing persecution to arrive in countries without ‘documentation’ or ‘authorisation’ such as crucial documents such as passports may be left behind for various reasons: ‘It is completely inappropriate to stigmatise refugees arriving without visas as law breakers when a treaty ... [that Australia has] freely signed provides exactly the contrary.’⁸⁹ There is nothing ‘unauthorised’ or ‘irregular’ about arrival by boat without a visa; the provisions anticipate exactly this type of situation.

Second, Australia’s current policies create a two-tier categorisation of asylum seekers: those who arrive by aircraft, who may apply for protection visas under the *Migration Act 1958* (Cth),⁹⁰ and if successful will be settled in Australia, and those who arrive by boat, who will be transferred – forcibly if necessary – to a third country for processing and resettlement. It has been argued that this two-tier system, where either those who arrive by boat at offshore excised places are treated differently than those who arrived by boat on the mainland,⁹¹ or where those who arrive by boat are treated differently than those who arrive by aircraft, violates international law provisions prohibiting unequal treatment of asylum seekers who are similarly situated.⁹²

Third, this differential treatment is sometimes justified on the basis that asylum seekers who arrive by boat are ‘queue jumpers’. In response to previous differential treatment of those who arrived at offshore excised places as opposed to those who arrived on the mainland, an Expert Panel on Asylum Seekers (Expert Panel), recommended that the government enact 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

⁸⁹ Hathaway (2007), p 92.

⁹⁰ *Migration Act 1958* (Cth), s 5AA: ‘unauthorised maritime arrivals’ include those who ‘entered the migration zone except on an aircraft that landed in the migration zone’, so those who arrive by aircraft are afforded higher procedural protections, including access to judicial review. See Parliamentary Joint Committee on Human Rights (2013), pp 16–19, Table 1.

⁹¹ Australian Human Rights Commission (2009), p 5. This policy was challenged in the High Court, which held that it violated procedural fairness requirements for offshore entry people, resulting in jurisdictional error: *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 272 ALR 14 (*M61*). The two-tier system was subsequently dismantled to some degree. Foster (2011), pp 606–16; Australian Government (2012) Recommendation 14, p 17, recommending that the entire country be ‘excised’ in order to avoid discrimination between those who arrived by boat at excised islands and coastal areas, and those who arrived by boat at other places. Nevertheless, the new provisions also implement a two-tier system, discriminating between those who arrive by any means other than aircraft, and those who arrive by air.

⁹² McAdam and Purcell (2008), pp 109–10.

Australia instead of pursuing regular migration pathways and international protection arrangements.⁹³

This statement suggests that asylum seekers who arrive by boat are really migrants, who have the option to follow ‘regular migration pathways’; on the contrary, asylum seekers leave their countries due to persecution, often in irregular and extraordinary circumstances. The Refugee Council of Australia argues that it is problematic that asylum seekers arriving in Australia by boat are being indefinitely detained in exile in offshore camps or third countries for ‘queue jumping’ a non-existent arrangement.⁹⁴ There are no ‘international protection arrangements’ that lead to durable solutions for asylum seekers in a reasonable amount of time.⁹⁵ The UNHCR has stated that the problem with the ‘no advantage’ principle is that it appears to be based on what is currently only a long-term aspiration – an assumption that regional processing arrangements, international protection arrangements or regular migration pathways are in existence when they are not.⁹⁶

The rhetoric of ‘queue jumpers’ and the ‘no advantage’ policy justify and legitimate the harsh policies of designating regional processing countries and the two-tier system of forcibly removing all asylum seekers who arrive by boat to detention camps in regional processing countries. These policies raise grave concerns for LBGTI asylum seekers. The explicit discounting of criteria such as whether the country has international obligations to protect refugees (that is, whether it has signed the Convention) and of provisions of domestic law, which relevantly might include whether same-sex sexual conduct is criminalised, and whether discrimination on the basis of sexual

⁹³ Australian Government (2012), pp 11, 14, 141. It should be noted that 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’: p 11. It further acknowledged the long wait and remoteness of resettlement for those in refugee camps all over the world, stating that: ‘Currently, at best, only one in 10 persons in need of resettlement will be provided with that outcome annually’: p 38. Finally, undermining its own position, it states 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’: p 28.

⁹⁴ Refugee Council of Australia (2012), p 3: There are 8.39 million refugees currently outside of their countries of origin in refugee camps; resettlement at the current rate, in light of the lack of ‘regular pathways’ would take ‘117 years.’ Refugee Council of Australia (2013), quoting Refugee Council of Australia Chief Executive Officer Paul Power.

⁹⁵ Gillian Triggs, President of the Australian Human Rights Commission, before the Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 29 May 2013, *Committee Hansard*, p 50: ‘the difficulty with the no advantage principle is that it appears not to have legal content because it is very unclear what you are comparing it with – no advantage over what?’

⁹⁶ A Guterres, UNHCR, Letters to the Immigration Minister, 5 September 2012 and 9 October 2012, cited in Parliamentary Joint Committee on Human Rights, p 14.

orientation is prohibited, mean that LBGTI asylum seekers may be placed at risk at the most basic levels as a result of these policies. Further, the lack of attention to the quality of legal processes, and particularly to whether protections of the rule of law such as natural justice, judicial review and due process more generally will be applied, mean that all asylum seekers may be put at risk. LBGTI asylum seekers may be particularly at risk as the result of vulnerability due to multiple forms of discrimination in the past and due to well-documented difficulties in ‘coming out’ about their sexuality and the basis for their persecution in their country of origin. These issues are discussed in the next section.

LBGTI Asylum Seekers and the ‘PNG Solution’

This article started with references to reports of rape and abuse of young male asylum seekers in PNG detention camps. This section addresses this issue in the context of the ‘PNG Solution’⁹⁷ and reports on Australia’s detention camps more generally, and in light of international reports on the position of LBGTI asylum seekers in detention camps. More research, and the development of asylum seeker policies that address the position and needs of LBGTI asylum seekers in refugee camps, as well as in relation to other aspects of the journey of asylum seeking (as differentiated from individual determinations of refugee status in the Refugee Review Tribunal in Australia) are desperately needed.

Rod St George, a former senior manager with the security firm G4S, which runs the Manus Island detention centre, turned whistleblower in July 2013, reporting repeated instances of sexual abuse between asylum seekers in the single male compound. He also reported that victims were knowingly left in the same compound as their attackers because there were no facilities for separating them.⁹⁸ He stated: ‘There 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.’⁹⁹ Subsequent to these revelations, it was reported that the level of alleged gang rapes, sexual assaults and sexual harassment in Australian detention centres increased

⁹⁷ The arrangement between Australia and Papua New Guinea, known as the ‘PNG Solution’, includes the designation of PNG as a regional processing country in 2012, the Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia (6 August 2013) and the Regional Resettlement Arrangement between Australia and Papua New Guinea on Further Bilateral Cooperation to Combat People Smuggling (19 July 2013). Nauru was also designated a regional processing country under the new provisions, and has committed to settling an agreed number of those that it determines to be in need of international protection; reference will also be made to Nauru in this section: Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer and assessment of persons in Nauru, and related issues. (3 August 2013).

⁹⁸ ABC News Online (2013b).

⁹⁹ ABC News Online (2013b).

from one in the year ended June 2010 to 38 in the year ended June 2011.¹⁰⁰ When queried about subsequent years' figures in 2013, the Department of Immigration reportedly stated that it did not know whether incidents were increasing, as it was not keeping formal records.¹⁰¹

St George spoke out at a time, just prior to the 2013 federal elections, when the treatment of asylum seekers was a high-profile political issue, and political parties were promulgating policies to keep asylum seekers arriving in Australia's territory by boat out of the country. Prime Minister Kevin Rudd negotiated a deal with PNG on 19 July 2013 to transfer asylum seekers arriving 'irregularly by sea', or intercepted at sea by Australian authorities in the process of attempting to reach Australia by 'irregular means', to PNG.¹⁰² PNG is a signatory to the Convention, and assures the Australian government in the agreement that it will not expel or return such persons to a country where their 'life or freedom would be threatened on account of ... race, religion, nationality, membership of a particular social group or political opinion', and that it will make an assessment, or allow an assessment to be made, of whether or not the person is a refugee under the Convention.¹⁰³ PNG also undertakes to allow persons who it determines to be refugees to settle in PNG,¹⁰⁴ and to withdraw its reservations to the Convention with respect to such persons.¹⁰⁵ It was reported that the capacity of the detention camp at Manus Island would be boosted from about 600 to 3000 as part of this arrangement.¹⁰⁶

Subsequent to St George's reports of rape and abuse, the Attorney-General confirmed that LBGTI asylum seekers would be included in this

¹⁰⁰ O'Brien (2013).

¹⁰¹ O'Brien (2013). Yet more recently, in 2014, records revealed under freedom of information (FoI) requests documented 110 incidents in the four months in the first half of 2013: Laughland et al (2014). An inquiry into St George's allegations that reported to the Department of Immigration and Border Protection found that certain events did not occur, including 'Transferees being sexually abused, raped and tortured with full knowledge of staff'. The explanations of the findings were set out in the body of the review, which was not released. The review recommended that a separate area be established to accommodate vulnerable asylum seekers who need to be taken out of the single adult male compound for their safety: Cornell (2013). Comments by the Minister of Immigration in response to reports on another allegation of rape in November 2013 do not clarify whether this recommendation has been implemented: see Taylor (2013).

¹⁰² Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia (2013).

¹⁰³ Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia (2013), para [20].

¹⁰⁴ Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia (2013), para [13].

¹⁰⁵ Regional Resettlement Arrangement between Australia and Papua New Guinea on Further Bilateral Cooperation to Combat People Smuggling (2013), para [7]. It should be noted that the Government of PNG has previously made pledges to withdraw its reservations under the Convention, but has yet to complete this process. See UNHCR (2012c).

¹⁰⁶ ABC News Online (2013a).

process: 'Australia's Attorney-General has confirmed that genuine refugees who attempt to travel to Australia by boat will be resettled in Papua New Guinea, regardless of sexuality.'¹⁰⁷ After the 2013 election, the new Coalition government reiterated that asylum seekers arriving by boat would be transferred to PNG or Nauru, and would never be resettled in Australia.¹⁰⁸ While resettlement in PNG was possible, it was not politically acceptable on Nauru.¹⁰⁹ The Coalition government 'ramped up capacity on Nauru': 841 people were detained there in late 2013 and it acknowledged that increased capacity was needed for those who would be awaiting resettlement elsewhere after their claims had been determined.¹¹⁰ The numbers held on Manus Island increased from 302 to 1229 in late December 2013.¹¹¹ This section considers the potential implications for LBGTI asylum seekers of these arrangements.¹¹² It first considers the position of LBGTI asylum seekers in detention camps such as the ones at Manus Island in PNG and on Nauru. It then considers the implications for LBGTI asylum seekers of processes to assess their refugee status at these detention camps.

The PNG Solution provides for asylum seekers to be sent to a third country for determination of their status as refugees and for eventual resettlement; for LBGTI asylum seekers, it poses many of the problems discussed above in relation to policies of transfer to third countries more generally. These include problems with the assessment of safety for LBGTI asylum seekers, whether that assessment is made in relation to their country of origin, a processing country or a country of potential resettlement. While the Attorney-General confirmed that LBGTI asylum seekers would be transferred to PNG, there is no suggestion that any analysis of safety has been conducted, or will be conducted for individuals. As discussed below, it is also not clear how their claims in relation to persecution in their country of origin will be analysed, or whether there will be any analysis of safety in potential countries of resettlement. Lack of appropriate services to respond

¹⁰⁷ Potts (2013).

¹⁰⁸ See Whyte (2014a), reporting Immigration Minister Scott Morrison stating: 'It is our intention they [asylum seekers sent to Manus Island] will never be resettled in Australia'; Maley (2013), reporting Morrison stating that: 'No one who's sent to Nauru or Manus will be coming to Australia.'

¹⁰⁹ Maley (2013), reporting Morrison stating that: 'The suggestion of permanent resettlement on Nauru has already been effectively repudiated by both government and opposition on Nauru.'

¹¹⁰ Maley (2013), reporting the Coalition's focus remained on ramping up capacity on Nauru and ensuring there was sufficient accommodation for refugees whose claims have been processed and were facing a wait on Nauru before a resettlement destination could be found.

¹¹¹ Australian Government (2013).

¹¹² A challenge to the PNG regional processing country arrangement has been filed in the High Court of Australia. ABC News Online (2013c). This article does not consider possible challenges to the 'PNG Solution', but rather focuses on the implications of the arrangement for LBGTI asylum seekers.

to the potentially heightened trauma of LBGTI asylum seekers and to assist them to overcome obstacles to fully exercising their rights in relation to their claim may also be issues.

In addition, detention in camps poses particular problems for LBGTI asylum seekers who, as discussed below, may be particularly vulnerable. The dramatic health and wellbeing implications of arbitrary detention for all detainees in Australia's asylum seeker detention camps, including high levels of self-harm and physical and mental ailments, are well documented.¹¹³ These conditions continue. A UNHCR Mission to Manus Island in October 2013 found that: no refugee status determinations had been finalised since asylum seekers were first transferred to PNG in November of 2012; that many asylum seekers expressed concerns about deteriorating physical and mental health; that it was advised by some service providers that 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 was inconsistent with international human rights law;' and that overall, the harsh conditions, lack of clarity and timeframes for processes and durable solutions were 'punitive in nature'.¹¹⁴ Reports of information obtained under FoI requests on the Manus Island camp document 110 incidents in four months in 2013 (prior to the numbers at the camp quadrupling in late 2013), including 'a child asylum seeker threatening to hang himself, numerous riots and demonstrations, mass escape attempts and hunger strikes, numerous instances of self-harm, attempted suicides and assaults'.¹¹⁵ The most heavily redacted documents related to a number of 'serious assaults' in April of 2013, apparently the sexual assaults reported by St George.¹¹⁶ The conditions at Nauru are similar.¹¹⁷

Due to these harsh conditions and the vulnerability of asylum seekers generally, who may have long histories of persecution, high levels of self-harm and death in Australian detention camps, both onshore and offshore, have been high.¹¹⁸ The 'bare life' of asylum seekers 'unpeopled' at the

¹¹³ See, for example, Amnesty international (2012b) 'the combination of no refugee processing, implementation of the "no advantage rule" and harsh detention conditions, amounts to a clear penalty for seeking asylum by boat' and '[o]ffshore processing on Nauru and Manus Island will only serve to break vulnerable people in these ill-conceived limbo camps, who have fled unimaginable circumstances.'

¹¹⁴ UNHCR (2013d), pp 2, 20–3; UNHCR (2013a), p 1.

¹¹⁵ Laughland et al (2014).

¹¹⁶ Laughland et al (2014).

¹¹⁷ UNHCR (2013e) The UNHCR found that the current conditions at Nauru do not comply with international standards and constitute arbitrary and mandatory detention, do not provide a fair efficient and expeditious system for assessing claims, do not provide safe and humane conditions of treatment in detention and do not provide adequate and timely solutions for refugees.

¹¹⁸ Pugliese (2011), p 23, noting a DIAC report in 2010 revealed that self-harm in Australia's detention camps had quadrupled in the previous year. Pugliese argues that deaths and attempted suicides in Australia's 'immigration detention prisons' that are replicated in

boundary of the nation, is symbolised by the redacted documents; those lacking in political and legal rights, whose human suffering may not be seen or recognised, may also suffer the finality of death.¹¹⁹ We do not know how many of the assaulted and dead are LGBTI people.

LBGTI asylum seekers may be particularly vulnerable due to the nature of the persecution they have suffered in their country of origin, and due to the conditions in detention camps. An Amnesty International Report released in December 2013 (Amnesty Report), while this article was under review, perhaps prompted by St George's reports, provides some information regarding gay asylum seekers at the Manus Island detention centre.¹²⁰ Along with an individual report of a gay Tamil man, Leela, who disclosed his sexuality to authorities at Villawood Detention Centre in 2010, it provides some rare information on LBGTI asylum seekers in Australian detention camps. Leela reported that after he disclosed his sexual identity, he 'was the target for almost continual abuse and harassment'.¹²¹ In Sri Lanka, he had experienced abuse, physical violence, torture, intimidation, arbitrary detainment and threats of exposure, naked on the internet, by the police due to being both ethnically and sexually marginalised there. In disclosing his sexuality to authorities at Villawood, he was 'forced to disclose very intimate details about his sexual history and identity to immigration officials'.¹²² He was held in detention for five months after his refugee claim was accepted on the basis that a 'security check' was in process.¹²³ In detention, he experienced homophobic and sexual harassment, bullying and physical assault; he was confined and isolated in 'maximum security' as a result, and physically assaulted there.¹²⁴ He attempted suicide several times.¹²⁵

LBGTI asylum seekers may, like Leela, have experienced persecution on two grounds, and the persecution may, as noted above, 'often include torture, rape, serious psychological, physical or sexual violence, possibly leading to post-traumatic disorders'.¹²⁶ This may result in a heightened level of vulnerability upon arrival in a detention camp.¹²⁷ Leela chose to reveal his

almost identical manners represent 'serial death and self-harm' that 'reflects back to the nation the gestures of refusal and rejection that it violently deploys in the detention and expulsion of refugees and asylum seekers'.

¹¹⁹ Pugliese (2011), p 31, discussing Suvendrini (2002) attributing 'unpeopled' to Tony Birch.

¹²⁰ Amnesty International (2013).

¹²¹ John-Brent (nd).

¹²² John-Brent (nd).

¹²³ Roden (2010).

¹²⁴ Roden (2010).

¹²⁵ Roden (2010).

¹²⁶ Jansen and Spijkerboer(2011), p 77.

¹²⁷ Organization for Refuge, Asylum and Migration (2013), p 2, noting that LBGTI asylum seekers are a 'highly marginalized and vulnerable refugee population'.

sexual identity although he thought it might have lessened his chances of being accepted as a refugee.¹²⁸ For many LGBTI asylum seekers, the result of intensified persecution, combined with the harsh conditions and potential harassment and abuse in detention camps, may be a heightened reluctance to reveal their sexual identity. They may not have adequate access to information about making claims for asylum based on sexual orientation.¹²⁹ The UNHCR states that ‘many LGBTI asylum-seekers have difficulty revealing their true sexual orientation or gender identity when lodging an asylum claim’.¹³⁰ The Amnesty Report notes that gay asylum seekers at Manus Island were apprehensive about their sexual orientation, even when it was the basis for their claim.¹³¹ As a result, LGBTI asylum seekers may choose to pursue asylum on other grounds; the Amnesty Report states that several of the gay men on Manus Island are reportedly considering changing the basis for their claims, although they fear that any change will make the claim less likely to succeed.¹³² Those other grounds may be more or less compelling than the persecution they have suffered as sexual minorities; in any case, the result will be that the full story of their persecution will not be heard, which may jeopardise their chances of success, and contribute further to their silencing and marginalisation.¹³³

Where asylum seekers who are sexual minorities reveal their sexual identity upon arrival at the detention camp, like Leela, they may encounter a range of problems. Long waiting times for the completion of the asylum process, or in detention camps, result in heightened risk of further abuse, including sexual assault. Sexual minorities are unsafe during the asylum process, and may be attacked and harassed by local people and by other asylum seekers and refugees.¹³⁴ Leela’s experience and St George’s reports of rape and abuse may both be read in this context to indicate (whether the specific people to whom the latter referred were sexual minorities or not) that sexual minorities may not be safe at Manus Island whether or not they reveal their sexual orientation. The Amnesty Report quotes one gay man at Manus as stating that although most of the asylum seekers at Manus are ‘okay with homosexuality’, some of the gay men ‘suffer bullying and harassment from other detainees and staff’.¹³⁵ The international reports also

¹²⁸ John-Brent (nd).

¹²⁹ Organization for Refuge, Asylum and Migration (2013), p 4, noting that many LGBTI asylum seekers ‘are unaware that sexual orientation or gender identity based persecution can be grounds for protection’.

¹³⁰ UNHCR (2010a) p 7.

¹³¹ Amnesty International (2013), p 7.

¹³² Amnesty International (2013), p 74.

¹³³ See Johnson (2011) on the role of silence in refugee determinations.

¹³⁴ UNHCR (2010a), pp 10–13.

¹³⁵ Amnesty International (2013), p 74.

suggest that sexual harassment, bullying and other forms of abuse and violence may be prevalent for LBGTI asylum seekers in detention camps.¹³⁶

The vulnerability in detention camps in regional processing countries may be increased in countries where, as in PNG, same-sex sexual conduct is criminalised, particularly where there are prison terms, which in the case of PNG are for up to fourteen years.¹³⁷ In addressing the bases for persecution of LBG people the UNHCR Guidelines note that it is 'well established that such criminal laws are discriminatory and violate international human rights norms'.¹³⁸ Risk of punishment by imprisonment highlights the persecutory power of these laws: even where irregularly, rarely or never enforced, such laws can create or contribute to an oppressive atmosphere of intolerance and generate a threat of persecution. Such laws may provide the backdrop for blackmail, extortion and abuse by state or non-state actors, and may also hinder LBG people from seeking and obtaining police or other state protection in relation to a whole range of situations.¹³⁹ The Amnesty Report states that gay detainees at Manus fear identification of their sexual orientation because they are afraid of being turned in to the PNG police; they also do not report bullying and harassment for these reasons.¹⁴⁰ Further, the UNHCR guidelines note that even where information on the level of enforcement of such laws is not available, 'a pervading and generalized climate of homophobia in the country of origin could be evidence indicative that LBGTI persons are nevertheless being persecuted'.¹⁴¹ The Amnesty Report states that 'stigmatisation, harassment, violence and discrimination, including by service providers and the police' against LBGTI people in PNG is common.¹⁴² For these reasons, it has been recommended that refugee status should be granted to LBGTI people from countries 'where same-sex relations or conduct are criminalised, or where general provisions of criminal law are used to prosecute people on account of their sexual orientation and

¹³⁶ Jansen and Spijkerboer (2011), p 10 'in reception and detention centres in Europe, LBGTI asylum applicants are frequently confronted with homophobic and transphobic behaviour, ranging from discrimination to abuse and violence. This stems from other asylum applicants and, in some cases, from reception or asylum authorities.'

¹³⁷ The *Criminal Code Act 1974* (PNG), s 210 provides that a person who 'sexually penetrates any person against the order of nature; or ... permits a male person to sexually penetrate him or her against the order of nature, is guilty of a crime' with a penalty of imprisonment not exceeding fourteen years. Section 212 provides that male persons who commit an 'act of gross indecency', whether in public or private, may be imprisoned for up to three years.

¹³⁸ UNHCR (2012b), p 8, para [26].

¹³⁹ UNHCR (2012b), p 8, paras [26–27].

¹⁴⁰ Amnesty International (2013), pp 74–5. The senior DIBP official at the detention centre informed Amnesty that it would be required to report any same-sex sexual activity between detainees, and that she did not know of any asylum claims being made on the basis of sexual orientation: pp 73–4.

¹⁴¹ UNHCR (2012b), p 9, para [29].

¹⁴² Amnesty International (2013), p 73: a recent case of an LGBTI sex worker who was gang raped by police in PNG was brought to the attention of Amnesty.

gender identity'.¹⁴³ The fact that same-sex sexual conduct is criminalised in PNG, combined with the violence, harassment and discrimination reported by Amnesty, may result in persecution of LGBTI people under the Convention. The Amnesty Report notes that some gay men have chosen to return to their home countries despite the risks that they face there.¹⁴⁴

Breaking news at the time of final revisions on this article reported incidents at the Manus Island detention camp, resulting in the shooting death of one asylum seeker and the serious injury of 77 others.¹⁴⁵ At issue was whether the violence occurred inside the camp or outside, and whether it was perpetrated by detention centre staff or PNG police. For the reasons discussed here, including fear of police, harassment, violence and abuse, LGBTI asylum seekers in these circumstances are invisible, or ghostly, unable to identify themselves or seek redress for their abuse, beyond the rule of law, in a state of exception, as bare life 'that is devoid of political identity and therefore is also stripped of power or political agency within the juridical system'.¹⁴⁶ In this space of exception, the detention camps operate as disciplinary strategies that leave asylum seekers to the goodwill of police or other agents of surveillance and discipline, including detention centre staff, with little recourse.¹⁴⁷

Ironically, Australia's arrangement with PNG for the resettlement of LGBTI people in PNG may place them in an environment of persecution, which is what they are fleeing. As discussed above, it is widely accepted that Australia's obligations under international law do not cease because it arranges to send those seeking asylum to another country. Sending LGBTI asylum seekers to PNG for possible resettlement there may well be in breach of Australia's international obligations to these people. At a minimum, processes should be put in place to support asylum seekers claiming persecution on the basis of sexual orientation to remain in Australia to make claims for refugee status rather than being transferred to PNG; the Amnesty Report states that one gay asylum seeker at Manus was transferred there from Christmas Island despite his protests on the basis of his sexual orientation.¹⁴⁸

Even if LGBTI asylum seekers are not resettled in PNG, but only sent there for the determination of their refugee status, they are likely to face significant problems. As PNG has only recently commenced making refugee determinations at Manus Island, we know little about how it treats or will treat LGBTI asylum seekers in this process, or whether it will recognise claims of persecution on the basis of sexual orientation. Further, recognition that criminalisation of same-sex sexual conduct may create an oppressive atmosphere of intolerance and generate a threat of persecution suggests, as set out in the

¹⁴³ International Association of Refugee Law Judges (2011), p 8, citing Jansen and Spijkerboer (2011), p 7.

¹⁴⁴ Amnesty International (2013), p 75.

¹⁴⁵ Whyte (2014b).

¹⁴⁶ Bignall (2012), pp 261, 267.

¹⁴⁷ Rajaram and Grundy-Warr (2004), p 40.

¹⁴⁸ Amnesty International (2013), p 74.

UNHCR Guidelines, that the refugee-determination process in PNG may well be problematic.

The UNHCR Mission to Manus Island also stated with respect to PNG's refugee status determination process that: 'Additional and specific support should be provided to vulnerable persons, including children, to ensure that they are able to fully understand and benefit from the RSD processes and procedures.'¹⁴⁹ Yet the new Australian Coalition government's policy states that it will no longer provide government-funded expert, independent advice to *any* asylum seekers, including those who are most vulnerable.¹⁵⁰ As noted above, LBGTI asylum seekers may be reluctant to claim asylum on the basis of their sexual orientation, even in progressive countries. Specialised training for those assisting asylum seekers, and a supportive environment, have been recommended. Without any independent advice or support at all, and in a country in which same-sex sexual conduct is criminalised, LBGTI asylum seekers are likely to be severely disadvantaged, and particularly vulnerable in what may be a hostile environment.

This section has argued that LBGTI asylum seekers may be particularly vulnerable, fleeing persecution on the basis of sexual orientation, in detention camps and in the process of applying for refugee status. For these reasons, there have been calls for the UNHCR to 'better apply' and 'expand' its Heightened Risk Identification Tool (HRIT) in order to identify LBGTI people in need of expedited processes and rapid resettlement.¹⁵¹ Further, certain 'key resettlement countries' have been identified as places of refuge for LBGTI people fleeing persecution; these include the United States, Canada and Australia.¹⁵² These countries are urged to increase the number of LBGTI asylum seekers accepted for resettlement, fast-track their applications for refugee status and resettle LBGTI refugees in unison in 'locations with established LGBTI communities'.¹⁵³ It is ironic that Australia is identified as a place of refuge for people fleeing persecution on the basis of sexual orientation when, in relation to asylum seekers who arrive by boat, it is actually sending them to a country where same-sex intimate conduct is criminalised.¹⁵⁴ These recommendations, combined with the concerns

¹⁴⁹ UNHCR (2013d), p. 13.

¹⁵⁰ The Coalition's Policy to Withdraw Taxpayer Funded Assistance to illegal Boat Arrivals, August 2013, p 2: 'we will withdraw taxpayer funded immigration assistance under the Immigration Advice and Application Assistance Scheme (IAAAS) for those who arrive illegally by boat, or illegally any other method, to prepare asylum claims and make appeals': Refugee Council of Australia (nd), p 4.

¹⁵¹ Millo (2013), pp 23-24; UNHCR (2010a), p 11, para [38]; Jansen and Spijkerboer (2011), p 77.

¹⁵² Organization for Refuge, Asylum and Migration (2013), p 19.

¹⁵³ Organization for Refuge, Asylum and Migration (2013), p 19.

¹⁵⁴ Amnesty International (2013) states that PNG 'has a poor track record of protecting the limited numbers of refugees it has received to date. The prospects of successfully integrating larger numbers of refugees from a greater variety of cultures and faiths are dim': p 3. The Australian Department of Foreign Affairs and Trade recommends that travellers to PNG 'exercise a high degree of caution', noting that 'Ethnic disputes continue

highlighted in this section, suggest that Australia should be recognising the particularly vulnerable status of LBGTI asylum seekers, and should not be sending them to PNG as part of the PNG Solution, but rather providing a process for determining their refugee status, and settling them in Australia.

Conclusion

Australia's *non-entrée* policies of 'excision' and 'exile' leave asylum seekers at the boundary of the state without political rights or political life, as 'bare life'.¹⁵⁵ Asylum seekers are poised in this zone, as they 'do not even notionally have the capacity to seek remedies at the polls' and are 'formally disenfranchised and cannot even claim the status of a minority member of the polity'.¹⁵⁶ Detention camps operate as disciplinary strategies at the boundary of the nation, where political life meets, and merges with, bare life, and the rule of law may be suspended as a matter of fact. Asylum seekers in detention camps are dependent on the goodwill of police or other agents of surveillance and discipline.¹⁵⁷ LBGTI asylum seekers are particularly vulnerable to state and non-state violence in this zone. Agamben's suggestion that states of exception have become the norm – which is illustrated by the persistence and recurrence of policies of forcible removal of asylum seekers to detention camps outside of Australia, where they are denied proper legal processes for determining their refugee status and where their human rights are infringed – should provoke outrage in civil society. The fact that, instead, these policies have been linked to success at the polls of political parties sends a chilling message. The ghostly figure of the LBGTI asylum seeker at the boundaries of political life, ignored and invisibilised in a zone of indistinction, and subjected to an inhumane process, defines who we are as a nation by what we are willing to tolerate, at the same time as it is normalised as the boundary of political life.

This article has argued that, in a context where little scholarly or official energy has addressed the plight and needs of LBGTI asylum seekers caught in Australia's policies of excision and exile, more attention, resources and research need to be directed to recognising the increasing calls from activists and international agencies for addressing the protection gap faced by LBGTI asylum seekers. These groups share many aspects of 'bare life' at the boundary of the nation in which they seek asylum with other asylum seekers,

to flare up around the country. Disputes can quickly escalate into violent clashes. Such clashes not only create danger within the immediate area but also promote a general atmosphere of lawlessness, with an associated increase in opportunistic crime', and 'There has been an increase in reported incidents of sexual assault, including gang rape, and foreigners have been targeted. These crimes are primarily opportunistic and occur without warning. We recommend you monitor your personal security, in both public and private surroundings, and ensure you have appropriate security measures in place.' See www.smarttraveller.gov.au.

¹⁵⁵ Agamben (1995), pp 1–12, 154–9.

¹⁵⁶ Macklin (2009), p 84.

¹⁵⁷ Rajaram and Grundy-Warr (2004), p 40.

and Australia must recognise and respond to the increasing national and international chorus calling it on its breaches of its international obligations to asylum seekers more generally.

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