

***"Being Like a State": the narrative of refugee policy in Australia. Analysing legislation and policy confining refugees of the "Asylum Legacy Caseload"*¹**

Hanne Worsoe, PhD student, School of Social Science,
University of Queensland, St Lucia, Brisbane Australia.
Email: h.worsoe@ug.edu.au

Prologue: Confinement and birth²

After their child was born in an Australian hospital, a young couple was told by government authorities that their baby was an “illegal maritime arrival” and should be in detention. Because of her age, the government would “permit” the baby to stay with her parents. As new parents, far from family support and having been in two months of mandatory detention themselves upon arrival in Australia, this interaction heightened their anxiety about what the state could do with them and their child.

¹ This paper is an exploration of initial fieldwork findings, given on 15 August 2018 at the European Association of Social Anthropologists Conference (EASA 2018) in Stockholm, Sweden. I want to thank the convenors of the Confinement Panel at EASA 2018 for accepting my paper to present on the Confinement Panel – Carolina Boe, Aarhus University and Université Paris V; Ines Hasselberg, University of Oxford; and Ueli Hostettler, Institute for Penal Law and Criminology, University of Bern; as well as Julienne Weegels, University of Amsterdam, for convening the panel on the day.

I also want to acknowledge the generosity of the asylum seeker form-filling clinic where I volunteer in Brisbane, the people responsible for its founding, and most importantly, I want to acknowledge and thank the many people seeking safety in Australia, with whom I have spent hours talking to and working with. All errors in this paper are my responsibility.

² This prologue section is reproduced with permission.

Please note that all asylum-seeking people have had to sign behaviour contracts upon pain of *refoulement* if they speak about their situation (Barlow 2013). Therefore, *all* identities in this paper have been altered to reflect a general situation, rather than specific situations or people, unless the information has become part of the public domain through media reporting and specific campaigns to release specific people from detention.

Please also note that some agencies serving asylum seekers are reliant on federal government funding and so are unable to officially comment on the current asylum seeker situation in Australia – another form of confinement facing research and those supporting asylum seekers, as well as the confinement facing asylum-seeking people themselves. Interviews are thus conducted with agencies and individuals unreliant on government funding, across the eastern seaboard of Australia.

Some months later, this baby, and about 1500 others born in Australia (DIBP 2017a), were directed to attend an all-day period of detention in Immigration's offices. One mother relayed her experience by Facebook Messenger to me, including a photograph. Three armed "Border Force" guards stood by the one exit. Even bathroom visits required armed escort. She said later, "What do they think we were going to do, we are parents with babies! They had guns!"

After seven hours' detention, there were no birth certificates. A three-page letter was issued to each child informing them they were "illegal maritime arrivals" and expected to be compliant with temporary visa requirements. Through this brutalising *rite de passage* of ceremonial detention and subsequent release, each child was framed into a boat-arriving narrative of illegality; keeping parents ever-aware that their "sin" of asking for sanctuary was passed on to their progeny.

Introduction

In examining Australian policy towards boat-arriving refugees, state power reverberates through all dealings with them. Since 2011, over 36,000 boat-arriving asylum-seeking people have arrived in Australia by people-smuggling boat (Phillips 2017; DIBP 2017a; 2017b). Nine per cent are detained in the offshore detention centres of Manus, Nauru and Christmas Islands, and the many onshore facilities in Australia (DIBP 2017b). The majority of boat-arriving asylum-seekers however, live in Australian communities after a shorter period of detention, their ongoing confinement and temporary status largely invisible. They are all on temporary visas, renewable every few months, through contact with the Department of Immigration and Border Protection, where one is referred to by file number and boat number,

rather than by name (Fleay and Hartley 2013; 2014; 2016a; 2016b; 2017; Fleay, Ali Rezai and Hartley 2015; Proctor, Kenny and Grech 2017 and personal communication).

Playing on the title of James C. Scott's 1998 book, "Seeing like a State" (1998), this paper examines how the state *behaves*; how state processes *interact* with boat-arriving asylum-seekers to govern them as noncitizens (Bloom 2018). The state is thus viewed ethnographically through the intersection of policy and practice (Cunha 2014:219). While this is indeed Foucauldian power and surveillance (Foucault 1977), it is also part of a state project of confinement, beyond what may be considered normative expressions of state power towards its citizens. Detention is only one expression of confinement over those who have crossed state borders, unasked.

Definitions

Asylum-seekers in this paper refers to those whose refugee status has not yet been formally determined by a nation-state. The term *refugees* refers to asylum-seekers whose refugee claims have been considered and accepted by a nation-state.

International rights statutes including the Refugee Convention, are understood as the normative international rights frameworks that Australia ostensibly upholds as a "responsible global state." Under these statutes, an individual can exercise his or her right to seek asylum in another country, but it is *only through a nation-state's action* that an individual is released from the confinement of their temporary status, with a future beyond "refugee" or "asylum-seeker" (Feller: 2006). And not all states uphold international statutes to which they are a signatory, Australia chief among them.

The Asylum Legacy Caseload legislation

In December 2014 the *Asylum Legacy Caseload Act*³ came into force, outlining a new way of processing boat-arriving asylum-seekers. This law has been criticised for excising natural justice and key *Refugee Convention* (UNRC) guidelines (Burnside 2014; Goodwin-Gill 2014a; 2014b; Mathew and Harley 2016; UNRC 2007:31). Under this new “fast-track” processing, if recognised as refugees, boat-arriving asylum-seekers are not offered resettlement. Instead, they are offered slightly longer temporary visas: a three-year Temporary Protection Visa (TPV) (DIBP 2017c), or, a five-year Safe Haven Enterprise Visa (SHEV) stipulating regional residence (DIBP 2017d; RCOA 2017). With limited legal preparation, a two-hour “fast-track” interview with the department, and then one chance of appeal, final decision-making is transferred to the Minister for Immigration and Border Protection, minus normal judicial checks and balances (Kaldor Centre 2017:7; 2014; McAdam and Chong 2014:43-5). “Fast-track” processing of refugee claims is, ironically, a lengthy and difficult process, with a much-reduced success rate (Cuthbert and Song 2017:1). If unsuccessful, one remains on a short-term visa, knowing that at any time, one may be returned to one’s country of origin, or refusing return, put into indefinite detention.

³ The title of this legislation is more properly known by its lengthier title, the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act*. Better known as the *Asylum Legacy Caseload Act 2014*, (ASL 2014) it outlined a new way of processing boat-arriving asylum-seekers called “fast-track”.

Due to the limitations of this paper, I will not address the problematic nature of this legislation’s title with its omission of supporting humans seeking sanctuary as required by Australian’s mandated international human rights obligations, only to acknowledge that it is a highly politicised title, and refers to previous, opposing governments’ perceived “inability to deal with” boat-arriving asylum seekers – referring to them as an “asylum legacy caseload” rather than people seeking safety.

I will address the discursive framing (Yanow 1997) of Australian legislation towards asylum seekers in upcoming publications.

Asylum-seekers across Australia have been able to file for “fast-track” processing since 2015, when they were also granted work rights, so that they could earn money to pay for legal fees. The new laws deny free legal aid as stipulated in the Refugee Convention. Melbourne-based human rights lawyer David Manne refers to such legislation as “taking the law out of the law”. But what does this look like in practice? The following sections are extracts from fieldwork notes at an Unrepresented Asylum-Seekers Form-filling Clinic in Brisbane, which feeds into the two Brisbane community legal centres processing refugee claims. Through a selection of vignettes, this “ethnography of the state” shows how “Asylum Legacy Caseload” legislation manifests at the coalface of “fast-track” processing.

Doing “fast-track” – confinement through form-filling:

The Unrepresented Asylum-seekers Form-filling Clinic is a large room under a church, with plastic fold-out tables and chairs. A woman stands in the centre of the room with a clipboard: the “triage” point of the Clinic. Volunteers sit across from people of various nationalities, helping them fill out forms. There are babies on laps, old people rocking back and forth, young women sitting alone and silent, scarves pulled around their heads, young men in baseball caps and torn jeans, speaking in Tamil, Somali, Farsi, Dari, Hazaragi, Rohingya, Bengali, Urdu, Pashto, Arabic, Vietnamese. At the end of the hall, glass windows look out to a playground where children of all nationalities play a vigorous game of chasey. At the other end of the hall a woman in a community kitchen serves tea and coffee, freshly-baked goods on a platter. Another woman in a pro-refugee t/shirt stands beside a grocery-laden trolley, encouraging people to take what they need, quietly allocating cash-cards and transport passes, writing names and amounts on a clipboard. It is early 2017. While people were permitted work rights

in late 2015, many still don't have work, and exist on the 89% of an unemployment benefit. Known as the Status Resolution Support Service payment, or SRSS, this money is a lifeline for those with limited English, and limited employment opportunities. But it's not enough to feed a family and pay rent.

The forms to apply for a TPV or SHEV are 42 pages long. Volunteers fill out the forms because the people who come to the clinic are not literate in English. The whole "fast-track" process and the avenues of appeal are a never-ending series of forms filled out by hand – from the ubiquitous "boat number", to date of arrival in Australia and release from detention. One must list all place of residence from birth, in every country one has lived in. One must list all of one's family, specifying who lives in Australia, and in other countries. One must list all of one's places of education from primary to tertiary level. One must list all of one's places of work. This must be done for every single family member. The clinic is open from 2-5pm on Thursdays and Saturdays; but volunteers and asylum-seekers are often still there at 6pm, trying to finalise the forms. There are usually no interpreters, unless someone can bring a friend or family member, often a teenage son or daughter. Where there isn't a translator, volunteers ring the telephone interpreter service (TIS). For quick instances, one relies on Google Translate. But this can be highly inappropriate. I recall a young male law student using Google Translate to decipher the term "sexual misconduct" to a middle-aged Iranian woman. Summarising these sections as "being a moral person" is the preferred translation.

There is so much in these forms about sexual misconduct, terrorism and violence: reminding me of Rimple Mehta's expression, "cartographic anxiety" (Mehta 2016) – such an apt description of state confinement policies, dog-whistling asylum-seekers into terrorists.

While most people are patient, there is also frustration and anger. Volunteers ironically become tools of state confinement, corralling asylum-seekers' personal details into these forms as they try to help them through this "fast-track" process.

After a brief visit to the community legal centre, the forms are finally finished; the on-duty migration agent double-checks them, then the justice-of-the-peace on duty verifies the form, ensuring each person knows what they're signing. Everything is scanned and filed by "Dianne-in-the-Hope-Room". We must track the confusing process of "fast-track" submissions and appeals for hundreds of families and individuals. These hand-written sheafs of "fast-track" documents are then posted to the Department.

SRSS payments and confinement through economic violence⁴

As 2018 begins, a new form of confinement starts to occur: what I shall call confinement through economic violence. Work rights and the limited SRSS government benefits are withdrawn once a person has been refused refugee recognition.

A single mother in her early forties comes into the clinic. Her husband died in a car bomb when Australia was part of the military invasion of Iraq. A male relative threatened to take her son to serve with DAESH, so they fled and came to Australia by boat. After five years of waiting, their refugee claims have been rejected. Her son's mild physical impairment means the Department has decided that she is lying, and he couldn't possibly be wanted for fighting. She's been cut from her benefits. She speaks little English; a friend interprets; a university-qualified professional with impeccable English. He and his family have been recognised as

⁴ Identities in this section have been altered to protect people, but reflect the situation experienced.

refugees; they are on the five-year SHEV. He works as a truck driver. As a boat-arrival, he can't afford the international student fees that he must pay to requalify in Australia. He has all the hallmarks of what could be recognised as class privilege. The woman sitting next to him does not. I explain how we are going to do a procedural appeal through the Federal Circuit Court. The woman is crying. I tell her she will be alright and hold her hand, but I don't know whether this is true. We give her food vouchers and refer her to an agency who will give her rent money.

Of the 13,400 people on SRSS payments, about 5,000 are expected to be left on it at the end of August (Doherty 2018a; RCOA 2018). This means 7,000 asylum-seekers across Australia will have no income: confinement ramped up to a new level. The consensus among many agencies is that this is designed to make people give up and "return home". I also wonder if it's a tactic to put further pressure on the refugee support sector, when I interview a man at an outer-suburban school in a major city.

His school community supports five Tamil families with children. All have received "double-negatives": from the "fast-track" process, and then the appeal process. They have also been unsuccessful in their appeal on procedural grounds through the Federal Circuit Court. Each family now owes \$7,000 in Federal Circuit Court Costs. With SRSS payments cut and no work rights, they can't repay this. Nor can they afford rent, food, clothing or medicines. The man says, "If the government changes, we know it's more likely these people will be allowed to stay. If there is an election late this year or early next year, we can manage." He sighs, "But beyond that, we can't afford to keep doing this."

Epilogue: Final words – confinement in dying

I'm discussing the withdrawal of SRSS payments with a member of a Muslim community. We've almost finished the interview. X tells me of a man who has finally been flown from Nauru to Australia, dying of cancer. I remember hearing about this man. There had been much lobbying and media attention to bring him to Australia to receive palliative care (Doherty 2018b; Baker 2018). The Shi'a community want to support this man as he dies. They have asked for him to be released into their care, but the answer is no. Despite being in hospital, dying, he's flanked by two, armed security guards. There is a multi-page form to fill out to apply to see this man in hospital – the same as if visiting a detention centre.

The man I am interviewing, calm and dignified, grows more distressed as he tells of trying to support this dying man. "What if this man dies soon, and thinks he is at fault? He might think God is punishing him! This is not good for him now, or in the afterlife! We must care for him, so he dies in a proper way." He is wiping tears from his eyes, and I am, too.

We both sit there, silently weeping.

When human rights and natural justice are taken out of the law for a group of people who have sought safety by crossing state boundaries without visas, anything can happen, and everything does happen.

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