HIDING THE BOATS: AUSTRALIA'S CLASSIFICATION OF INFORMATION RELATING TO SMUGGLED PERSONS

Samuel C White*

For those who've come across the seas
We've boundless plains to share;
With courage let us all combine
To Advance Australia Fair …

– *Peter Dodds McCormick, Advance Australia Fair (1878)*.

Within Western democracies, transparency and accountability are — subject to few exceptions — the cornerstones of effective government. National security has historically been the basis for one of those exceptions and has been used to validate a suite of actions and rhetoric, from abuses of human rights and restrictions on civil liberties[1] to violations of international treaties[2] and the implementation of immigration policies.

The arrival of irregular migrants[3] by boats has engendered extraordinary responses from Australians[4] and, consequently, Australian politics, with increasingly harsh government policies since 1989.[5] The latest — Operation Sovereign Borders (OSB) — has developed and modified previous border security and immigration control policies in a way that has increasingly offered[6] and been accepted[7] as a model for global replication.

This article is underpinned by the premise that halting irregular maritime migration to Australia is the correct policy objective of the government due to the potential risks associated with entrances without proper character checks, the attempt to halt the multi-billion dollar transnational people smuggling industry[8] and the need to prevent the deaths of irregular migrants at sea. However, among the measures implemented under the current border protection policy, the coalition government has classified information relating to smuggling of migrants to Australia under a veil of national security. It is this policy of classification that is contentious.

The full scope and effect of the classification of information relating to people smugglers is difficult to quantify. At the inaugural meeting for OSB, then Minister for Immigration and Border Protection, the Hon Scott Morrison MP, highlighted the expansive and flexible nature of the restriction on information, noting that:

> operational and tactical issues that relate to current or prospective operations, whether it's the maritime environment, whether it's in the land environment, offshore or anywhere else, will not be the subject of public commentary from these podiums.[9]

* *Samuel White (BA/LLB) (UQ) is a Master of Laws candidate at the University of Melbourne and current Associate to the Hon Justice JA Logan RFD. The views expressed herein are solely those of the author and do not reflect the views or opinions of the University of Melbourne Law School or the Federal Court of Australia.*

But what exactly does 'operational, tactical and on-water' mean? While covering matters such as pre-deployment training,[10] 'radar surveillance, vessel speed, communication between vessels, identity of vessels, the timing of operations, authorisations and turn backs'[11] and on-water tactics, techniques and procedures (TTPs), the notion of operational matters has been additionally expanded to include information around the number of suspected illegal entry vessels (SIEVs) intercepted;[12] any information regarding the persons on board, including their nationality;[13] and the method by which their vessels are returned: towing, transfer or lifeboat.[14] Incidents at sea, which were previously reported through government publications, have been removed from public discussion.

Importantly, the restriction on information has also been extended to the process by which information is classified.[15] The inherent issue with this is that it is nearly impossible to provide a comprehensive catalogue of all information that is and is not accessible, especially information which is held to be restricted from the public but is simultaneously publicly accessible in alternative forums. Information surrounding the cost of the operation, incidents that occur at sea, violations of international or domestic law and memorandums between regional allies surrounding return of irregular migrants fall under the notion of 'land environment' and thus are restricted. Despite the classification of documents, all information used throughout this article is publicly sourced. Primarily this involved government statements, newspaper reports, publicly available Defence publications, ministerial statements and parliamentary debates. Reports and papers by non-government organisations were also used.

The objective of this article is threefold: to examine the government's purpose in and justification for classifying information relating to people smuggling; to critically assess and observe the implications, concerns and dangers of the policy of information classification; and to suggest solutions to mitigate any concerns. The classification of information concerning Australian offshore detention or detainees will not be covered in depth.[16]

Australian border control: past and present

Historical background

In order to understand Australia's current border protection policy, it is instructive to first analyse its historical, political and operational predecessors. Irregular migrants historically have remained easy targets for wider socio-economic concerns: national security, unemployment, and demographic and ethnic compositions.[17] As an island nation, Australia's fear of maritime invasion has characterised its border control policies since Federation, from the early threat of the 'Mongolian Octopus'[18] to current issues of refugees-turned-Islamic-terrorists attempting to enter through maritime back doors.[19]

Subsequent to the attacks on the United States in September 2001, the then Liberal government exploited fears of terrorism and lone-wolf attacks for political gain through demonstrations of national strength in tougher border protection. This was justified by playing 'the idea of the "good refugee" (who waits in a camp to be resettled) against the "bad refugee" (who jumps the queue by coming by boat)'.[20]

The relationship between boat arrivals and changes in Australian border protection policies is cyclical. On 21 August 2001, 433 irregular migrants were rescued at sea by a Norwegian freighter (the MV *Tampa*) that subsequently attempted to make port at Christmas Island due to the medical needs of persons onboard.[21] The Australian Government refused entry and the incident culminated in the boarding of the vessel by Australian special forces, indicative of growing public support for harsher border control.[22] One such policy was the Pacific Solution, of which Operation Relex constituted a significant role, implemented under the then

Liberal Prime Minister John Howard on 3 September 2001. The Pacific Solution was a policy developed to 'deny asylum seekers arriving by boat entry into Australia and to deter others from making the same journey'.[23]

Operations Relex and Relex II

The first border protection operation — Operation Relex — involved, inter alia, the active return of SIEVs to Indonesia by the Royal Australian Navy and various Commonwealth agencies.[24] The aim of the operation was to deny entry and thereby deter irregular migrants from crossing via boats into Australian waters. Through maritime patrols, SIEVs would be interdicted[25] at Australia's contiguous zone and, through active steering or towing, returned to the edge of Indonesian waters.[26] The towing of a vessel was only authorised when safe to do so, assessed in light of seaworthiness, onboard navigation and radio equipment, the ability and skill of the crew and the state of the vessel's engine.[27] This was due to the inherent safety issues surrounding the towing of a vessel with personnel onboard — yet during the operation, in which 12 vessels were intercepted and four returned to Indonesia,[28] three vessels sank, with the loss of two lives.[29]

After a vessel *SIEV X* reportedly sank in international waters off Indonesia with the loss of 353 lives,[30] the operation was terminated on 13 March 2002, so as to be able to give evidence to the Senate Select Committee on a Certain Maritime Incident. The committee brought to light the internal mechanics of Operation Relex, including how it introduced a novel 'public affairs plan' which established what images could be collected and what images could be provided to the public.[31] All media releases were centralised by the defence minister, who in turn required approval for any transmission of images outside the ministry.[32] All comment and media responses/inquiries were to be referred to the defence minister's media advisor.[33] More significant was the effect of the centralisation of information — no public correction could be made to information given by the government, unless the government through the defence minister agreed to those misrepresentations being corrected.[34]

The plan was noted for being unusual at the time, as it was inconsistent with the overarching Defence Organisational Communication Strategy. The committee concluded that:

> On the evidence available, however, it seems to the Committee that the public affairs plan for Operation Relex imposed upon the Department of Defence by the Minister's Office had two clear objectives. The first was to ensure that the Minister retained absolute control over the facts which could and could not become public during the Operation. The second was to ensure that no imagery that could conceivably garner sympathy or cause misgivings about the aggressive new border protection regime would find its way into the public domain.[35]

Operation Relex II,[36] a scaled-back but essentially identical operation, succeeded Operation Relex until 16 July 2006.[37] Both operations were characterised by classified information, justified under a veil of operational security.

Labor government policy

In November 2007 a new Labor government, led by Prime Minister Kevin Rudd, was elected, and the prior deterrent policy was discontinued in favour of a more open-border policy.[38] One reason for this policy change was an attempted increase in transparency and flow of information to the public relating to irregular migrants. The confusing balance between humanitarian assistance and strict border control is best highlighted by the newly elected Prime Minister himself, who noted:

> Our job — and I make no apology for it — is to take a hardline approach in dealing with illegal immigration. I make no apology whatsoever for adopting a hardline approach when it comes to illegal immigration activity, and I make no apology whatsoever having a hardline and humane approach to dealing with asylum-seekers. No apologies whatsoever in dealing with the vermin who are people-smugglers. We will take the harshest and hardest measures possible in dealing with that.[39]

Despite the rhetoric, these harsh and hard measures were transparent, implementing regular reports on fatal incidents at sea and mandated internal reviews within the Department of Customs and Border Protection. This was complemented by publicly accessible reports on the numbers of boat arrivals, personnel and crew and the nationality of irregular migrants.[40]

As part of their commitment to government accountability, the Labor government established an independent office in 2010 to promote open government, to the approval of then leader of the opposition, the Hon Tony Abbott MP.[41] The Office of the Australian Information Commissioner (OAIC) was established to provide, inter alia, an oversight of the *Freedom of Information Act 1982* (Cth) (FOI Act) through review mechanisms. The position — an evolution on the Freedom of Information Commissioner — was based on the proposition that 'information held by the Government is to be managed for public purposes, and is a national resource'.[42] The scope of the FOI Act allowed for public access to a suite of documents, including information relating to government decisions surrounding border protection.

Operation Sovereign Borders

In September 2013 a new government under Liberal Prime Minister Tony Abbott was elected and, upholding its election promise of stricter border protection policies,[43] immediately implemented OSB in order to halt irregular migrants entering the country. This was justified through citing the success of the Liberals' earlier Operation Relex and Operation Relex II: '[t]he Navy has done it safely before. [There is] no reason why they cannot do it again'.[44]

Officially described as a 'military-led, border security operation supported and assisted by a wide range of federal government agencies',[45] the operation has many striking similarities with earlier policies. However, there remain a few striking differences.

Similarities to previous operations

Primarily, the operational objectives have remained consistent: the use of the Navy to interdict irregular migrants at sea, as well as their return when safe to do so. There have remained issues, however, where towing as an operational procedure has been implemented. Towing has been controversial due to the associated risks and deaths at sea, causing the coalition government to simultaneously confirm and deny its use;[46] this has led to a situation similar to a modern Schrödinger's boat and its search for the ultimate reality.

Nonetheless, the substantial aim and methodology of the current operation remains the same, with interdicted vessels being returned to Indonesian waters.[47]

Differences from previous operations

The expansion of the scope of the operation is of particular importance, with OSB from its inception aiming to fall under a 'single operational command and a single ministerial responsibility'.[48] The newly established chain of command was purported to be required in order to cut through the different priorities of government agencies and streamline the government's political and military aims.[49] This is arguably a development on the earlier political input of Operation Relex, although that earlier operation was not mandated or officially unified.

Further, a set 48-hour turnaround objective (being 48 hours from the moment a vessel was interdicted to when its occupants were detained) was implemented to increase the efficiency of naval operations.[50] Under this banner of operational efficiency, new equipment (being single-use, unsinkable lifeboats) has been purchased and used in order to counter situations where irregular migrants may have scuttled or disabled their vessel in an attempt to be brought to shore by the Navy or where the SIEV is assessed as unseaworthy by Australian crew. This equipment consists of one-use, unsinkable lifeboats designed to have irregular migrants placed inside and returned to Indonesian waters.

There have been additional changes to departments and roles. The government has progressively underfunded the aforementioned OAIC — whose role is to oversee government action and review decisions on freedom of information requests — despite approving its creation in 2010.[51] This has led to a reduction of capability in the office and less oversight of government actions. Perhaps most pertinent is the amalgamation of various departments progressively after the initiation of OSB. The Department of Immigration and Citizenship was renamed the Department of Immigration and Border Protection,[52] indicative of a clear policy change aimed at highlighting irregular migrants as a security emergency rather than a humanitarian issue; as of 2018 it is now the Department of Home Affairs. The Department has increasingly used Orwellian language:[53] department employees were mandated to prefix 'maritime arrivals' with 'illegal',[54] reflecting the notion that irregular migrants are somehow 'queue jumpers' going against the 'Australian sense of fair play'.[55]

While OSB has built upon the earlier centralisation of information developed by Operation Relex, the scope and justifications surrounding the secrecy has set the current border security operation apart.[56]

Government justification for classification

The lack of transparency has been justified through government policy statements and political rhetoric, which can be summarised as the following: the overarching operational security requirements; the need to halt people smugglers; and regional relationships. This is not intended to be exhaustive, merely reflective of the three key propositions forwarded.

Justification: operational security

The first limb of the government's justification can be divided equally into three considerations: the need for operational effectiveness; Australia's alleged wartime status; and the overarching safety of Australian troops.

Operational effectiveness

Primarily, the coalition government has attempted to justify its classifications as necessary to preserve operational effectiveness. This is twofold: to reduce information on the capabilities of equipment and number of troops deployed under the operation and to prevent information updates on evolving tactics, techniques and procedures used by the military and civilian forces.[57]

Lieutenant-General Angus Campbell (as he then was), who was the inaugural commander of the forces on OSB and has subsequently progressed to become the Chief of the Defence Force, justified the restriction as follows:

> [There is an] absolute respect for the need for the Australian people to be aware of what is occurring through regular periodic briefings to the media. But there is also a balance that is struck operationally, which might send a message to the people smugglers of how we intend to conduct our business.[58]

This respect was facilitated through initial weekly meetings aimed at providing a forum of public discourse around the border protection policy, which quickly evolved. One month after OSB's inception, the weekly meetings were moved to Sydney for efficiency reasons,[59] which, incidentally, served to further limit exposure of the government to the Canberra press gallery. However, in January 2014 — merely three months after the operation began — the weekly meetings were cancelled and replaced by an online monthly statement by the Department of Immigration and Border Protection.[60] It was noted that the flow of information to the public would continue by virtue of the media and their reporting.[61]

Wartime status rhetoric

Secondly, the operational status of Australia's policy of border protection against irregular migrants is grounded upon the assumption that 'if we were at war, we would not be giving out information that is of use to the enemy'.[62] This is compounded by the coalition government's stance that smuggling of migrants into Australia has 'become a challenge to our national security. A country that can't control its borders sooner or later loses control of its future'.[63] By this definition, Australia's so-called 'war' will continue so long as irregular migrants attempt to enter into Australia by air, land or sea.

Safety of Australian Defence Force troops

A final consideration relating to the operational side of OSB is the safety of Australian Defence Force (ADF) troops currently deployed on Transit Security Element (TSE) rotations.[64] At this stage, however, no official examples have been offered regarding the correlation between information classification and personnel safety — merely that it is necessary.[65] The failure to denote any factual basis for how classifying information surrounding government decisions serves to protect the safety of ADF troops will be covered below.

Justification: halting people smugglers

Further, the justification of halting people smugglers has been threefold: in the reduction of information available to people smugglers; to deter irregular migrants from making the journey by vessel; and to prevent deaths by drowning at sea.

Reduction of information to people smugglers

The overall aim of denying people smugglers the 'oxygen of publicity'[66] has been used to justify the significant restrictions of information and accountability surrounding both the policy and the operation. This information includes the number of irregular migrant vessels arriving in Australia and their distance from Australian territorial waters before interception.[67] The restrictions are viewed as necessary to reduce the ability of smugglers to 'sell their services more efficiently to people desperate to get out of the situations in which they find themselves'.[68] The prior policy by the Labor government has been sold as a strong pull factor,[69] leading the coalition government to reiterate its position that it is not its 'job to run a shipping news service for the people smugglers'.[70]

Deterrence and stopping deaths at sea

Another consideration is restricting information in order to deter the journey by sea of irregular migrants and indirectly reduce deaths on the voyage. On OSB's initiation, the immigration minister noted that harsher measures were necessary in light of the 1100 deaths at sea under the previous government.[71] To this end, the coalition government held it to be prudent for irregular migrants to be 'met by a broad chain of measures end to end that are

designed to deter, to disrupt, to prevent their entry from Australia and certainly to ensure they're not settled'.[72]

These measures include — but are not limited to — the current and continuing offshore processing and detention centres on Nauru and formerly on Manus Island, education programs attempting to dissuade irregular migration, the possible payment of people smugglers to return their vessels to Indonesia,[73] and the classification of information surrounding the operation.

Justification: regional relationships

A final justification by the government used to classify information is the necessity for secrecy to preserve regional relationships, particularly the bilateral agreements between Australia and its offshore detention centre host countries (Papua New Guinea and the Republic of Nauru), as well as transit countries and various military operations,[74] secondments and covert operations.[75]

Assessment and observations

While the coalition government has been quick to declare OSB safe, effective and sustainable,[76] the viability and associated costs of the classification of information must be critically assessed. The observations will be in accordance with the government's summarised justification, followed by wider implications and concerns about the classification of information.

Operational security

Operational effectiveness

As with any military operation, it is necessary and proportionate to maintain secrecy and security of sensitive information. Accordingly, the primary justification of operational effectiveness is valid and extends to restricting information such as vessel capabilities, troop numbers, operational tempo, patrol routes and times, communication abilities and intelligence-gathering techniques. Moreover, such restrictions align with standard domestic law enforcement operating procedures.

The issue, however, lies in the publicly available nature of the supposedly classified information. While the coalition government has refused to comment on operational information, it is nonetheless available on both department websites[77] and defence media publications.[78] This includes details of boat locations, activities, patrol ranges and top speeds, personnel numbers and pre-deployment training, specific unit names and identities of individuals.[79] Logic dictates that, if information is publicly available, it is no longer covered under a 'veil of secrecy'.

Indeed, there are arguments to be made that easing the restrictions on information would allow for more robust and frank assessments to be made of the current operational tactics used by troops deployed on TSE rotations, which could lead to a more effective and efficient operation. One example is to publicly record the country of origin of irregular migrants as a way to combat the push factors and gain a more holistic understanding of who is attempting the maritime crossing and why.

Equally, by increasing transparency and discussion surrounding the decision-making process for maritime interdiction, the effectiveness of the operation could be improved. The current fusion of military and government has replaced the traditional chain of command with

political overtones and, as was experienced in early border protection operations with political oversight, is unresponsive to change and micromanaged from Canberra.[80] No information is available on the approval process for tow-backs, although it appears that political oversight and responsibility lies with the immigration minister.[81] The Australian Defence Association has voiced concerns over the militarisation of a civilian matter.[82]

Under OSB's predecessor, Operation Relex, ADF commanders were torn between their maritime obligations and the will of their political commanders. This was highlighted by the case of Vice-Admiral Shackleton (then Chief of Navy), whose account of the disintegration of *SIEV 4*[83] was in conflict with the official Howard government's report of children being thrown overboard.[84] While the truth eventually emerged in favour of Admiral Shackleton, under the current classification system any report conflicting with the government's would have to fight the chilling effects noted above, none less so than possible prosecution under the *Australian Border Force Act 2015* (Cth).

Wartime status rhetoric

In times of war, restrictions of civil liberties and the pre-eminence of government decisions are sometimes necessary for the greater good; this is recognised both within the *Australian Constitution*[85] and resoundingly in Australian common law.[86] The coalition government has been accused of using 'a cloak of a military campaign … as political camouflage to justify a cult of secrecy'.[87] War is historically an armed conflict between nation states or internal parties about the conquest of territory, or at least a dominant economic advantage. Under such a definition, the incursions on Australian territory in World War II — the bombings of Darwin, submarine incursions into Sydney Harbour and the defence of Port Moresby[88] — remain the last instances of Australia being under threat of attack. While the law has developed accordingly to meet the threats of lone-wolf attacks and terrorism,[89] this is not to say that the maintenance of secrecy through blanket classification of information is justifiable or achievable. To compare the current humanitarian crisis to war insults and belittles those who have fought and suffered for Australia in war and disregards the balance that the rule of law has with wartime powers.

Safety of Australian Defence Force troops

Finally, the safety of ADF troops has been used to classify their identities, although this is arguably to protect troops from being coerced into providing information to persons outside the military and government. If so, this is an indirect, ineffective and unnecessary means of protection operational information.

Historically the modus operandi of Australia's Special Air Service Regiment (SASR) has been to classify their identities, due to their performing sensitive strategic operations, reconnaissance and surveillance within enemy territory.[90] It is perhaps no coincidence that Lieutenant-General Campbell, as he then was, spent his career with the SASR. There are a few differences, however, between clandestine SASR operations and the troops deployed on border protection. OSB personnel do not intercept irregular migrants covertly or within enemy territory, or perform disruptive operations through infiltrating local populations.[91] Indeed, members of TSE have been publicly identified and photographed,[92] contrary to government rhetoric.

To use the safety of Australian troops on OSB as a justification for classifying their identity and information surrounding them ignores legislative developments to the contrary. The removal of the duty to take reasonable care of health and safety for themselves or other persons under the *Work Health and Safety Act 2011* (Cth) for service members on OSB is an unparalleled step. The identity of troops in Afghanistan, with the exception of the SASR

and other special forces for the reasons above, is not classified; nor is the identity of troops who conducted maritime operations against Somali pirates.[93] The interception of SIEVs poses risks of traumatic experiences through personal injury or by witnessing human degradation or misery on a large scale.[94] This has led to a post-traumatic stress disorder comparable to that of veterans returning from Timor-Leste, Iraq and Afghanistan. As one currently serving Navy officer noted:

> I would say that the secrecy surrounding the operation, and the fact that the public has very little information about what these people are actually doing — other than what they see as them failing to rescue people at sea, failing to take into account human rights — for the sailors to do these operations and then face that from the public, essentially they're the Vietnam veterans of our time.[95]

At any rate, the Navy has noted that the current turn-back policy is at risk of lowering morale and, accordingly, operational effectiveness in a broad sense.[96] By failing to acknowledge the need to discuss traumatic issues that arise in the course of duty, the gag orders of the Border Force Act (discussed later) put returned troops' health at risk.

Halting people smugglers

Reduction in flow of information to people smugglers and deterrence

'The boats have stopped' — so the coalition government reported.[97] Yet it is difficult to ascertain whether the classification of information had any effect on halting the smuggling of persons into Australia. While the government has noted that the policy has had a devastating impact on the people-smuggling trade (and also was popular with local voters)[98] this is not specifically attributable to the classification of information. Irregular migration to Australia had begun to lessen prior to the coalition government's election;[99] this is a complex issue involving a reduction of push factors in Afghanistan and Iraq and earlier government policies.[100] To claim that the classification of information has led to the reduction in irregular migration is unfounded — it is impossible to quantify the singular effect of the policy.

More important, however, is the viability of classifying documents as an integer of deterring irregular migrants from making the attempt to come to Australia by boat. Constituting a burden-shifting rather than burden-sharing measure, deterrence has been criticised and condemned by the United Nations High Commissioner for Refugees (UNHCR).[101] Subject to debate, it has emerged that the details of an individual country's asylum policy — including its deterrence mechanisms — have little significance in the decision-making process of irregular migrants.[102] Former Prime Minister of Australia Malcom Fraser commented that 'no amount of deterrence can match the terror from which those who are genuine refugees are fleeing'.[103]

Australia's deterrence policy merely forces people smugglers to evolve their practices through alternative maritime routes,[104] multi-buy deals and reduction in the price to journey to Australia,[105] as well as safe-arrival or money-back guarantees.[106] With potentially more people attempting the journey (due to cheaper costs) and alternative routes (with increased risk), the safety of persons at sea is jeopardised. However, due to the classification of information gained through border protection operations, there simply is not enough information available to know the extent to which irregular migrant safety is compromised.

Stopping deaths at sea

This lack of information also hinders assessment of the government's pledge to stop deaths at sea. Official reports from January 2015 claimed there were no known deaths in 2014 — a laudable achievement by any standard.[107] This fails to recognise the risks arising from

returning irregular migrants onboard unsinkable lifeboats that are deliberately fuelled to a level sufficient only to return to Indonesia.[108] As noted by Vice Admiral Tim Barrett (current Chief of Navy), once the passengers are adrift in Indonesian territorial waters, Australia cannot guarantee their safety.[109] There have been reports of the deaths of three irregular migrants, due to strong currents and lack of navigation skills, on a remote Indonesian island after their vessel was turned back with insufficient fuel to navigate out of the currents.[110]

One irregular migrant alleged that, when he expressed fears of dying on the lifeboats, he was informed by an Australian official:

> [T]hat's not our problem. That is yours. If you die in Indonesian waters, the Indonesian Government is in trouble and responsible. That is not our problem.[111]

Without access to the current government statistics, it is impossible to comment on whether there have been any deaths at sea or to assess the known risks resulting from the concurrently acknowledged and denied towing policy.[112] It is impossible to know whether any vessels have been broken or sunk by the Navy, as occurred under Operation Relex and Relex II. Unconfirmed reports state that on 15 January 2014 a Navy vessel fired shots across the bow of a SIEV to force it to halt.[113] On 28 September 2013 — 10 days after OSB's initiation — 44 irregular migrants allegedly drowned after the Navy ignored a distress call[114] — a clear breach of Australia's international legal obligations (discussed below) if true.[115] Information about these events cannot be accessed in public reports.

Regional relationships

The last justification by the coalition government to be discussed in this article is the alleged preservation of regional relationships.[116] This is in juxtaposition to the preliminary instructions given by the government to border protection agencies to 'stop the boats by all lawful means, notwithstanding fierce controversy at home and possible tensions abroad'.[117] While there are obvious sensitivities surrounding Australia's offshore processing centres (and relationships with Papua New Guinea and Nauru respectively), this justification fails to acknowledge or address the adverse impact the 'culture of secrecy' and classification of information has had on other neighbouring states.

The view of the United Nations

Australia's lack of transparency has led to commentary, criticism and condemnation by the United Nations.[118] Additionally, the United Nations Special Rapporteur on the Human Rights of Migrants has heavily criticised the debilitating effects of the Border Force Act on freedom of speech and whistleblower protection in Australia. Despite requests to the government for guarantees of protection from the maximum two-year sentencing under the Act, 'the threats of reprisals to persons who would want to cooperate with the UN is unacceptable'.[119] The Abbott government's reply was that Australians were 'sick of being lectured to by the United Nations, particularly given that we have stopped the boats'.[120]

Indonesia

It seems ironic, considering that the systematic turn-back of vessels into Indonesian territorial waters by the Australian Navy and consequent lack of transparency has been touted at promoting regional relationships, that this policy has resulted in a fractured relationship with Indonesia[121] and open condemnation by Indonesia's foreign minister, Retno Marsudi.[122] This has consequentially affected the necessary 'cooperation and commitment between countries of origin, transit and destination'.[123] The Australian Government, for its part, has denied that tough border policies have strained relations.[124] This stance is difficult

to maintain in the face of Indonesia deploying gunships and frigates to counteract Australia's incursions into its territorial waters.[125] Of more concern, however, are certain actions taken by former Prime Minister Tony Abbott to fix foreign relations. Surprisingly, he confessed that:

> as a very early sign of good faith to the Indonesians, I had West Papuan activists who'd arrived in the Torres Strait claiming asylum quietly returned to Papua New Guinea.[126]

As a party to the *Convention relating to the Status of Refugees*[127] and *Protocol relating to the Status of Refugees*,[128] Australia owes certain international obligations to persons seeking asylum, including non-refoulement.[129] This involves not expelling or returning refugees where their life or freedom would be threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion.[130] It has also been expanded to include risk of torture or cruel, inhumane or degrading treatment.[131] West Papua — a province of Indonesia seeking self-determination — has been subject to alleged crackdowns by Indonesian officials involving shootings, beatings and claims of torture.[132] To return persons claiming asylum for the purpose of 'good faith' both contravenes international law and serves to further damage other regional relationships.[133] Moreover, the extent of this 'good faith' is impossible to establish.

Government accountability

There remains a further criticism of the coalition government's policy, particularly with regard to the need for government accountability across a wide spectrum of matters. The rule of law is based upon the fulfilment of the expectation that laws are applied uniformly. Indeed:

> secrecy is at odds with the principles of democratic governance and accountability, and highlights the erroneous portrayal by the government of asylum seekers being a national emergency.[134]

This accountability must be considered both domestically (with regard to the press, whistleblower protection, and economic accountability) and with regard to Australia's adherence to its international obligations.

Freedom of information and the press

The coalition government's legislative and procedural steps have led to a chilling effect in and outside of Canberra on the fourth estate. While restricting the ability for frontbenchers to be interviewed by the media,[135] additionally, the Abbott government increased filing fees for freedom of information requests in the Administrative Appeals Tribunal.[136] It is instructive to note British jurisprudence on increasing filing fees. In the recent UK Supreme Court decision of *R (UNISON) v Lord Chancellor*[137] a unanimous bench held that the right of access to justice and the courts was such a fundamental aspect of the rule of law that the imposition of fees could render laws 'liable to become a dead letter and the democratic election of Members of Parliament a meaningless charade'.[138] While no such case has been brought yet in Australia, it is an interesting concept on which to reflect. Ironically, with the reduction in the volume of freedom of information applications, when departments have granted requests the information is often 'stored, labelled, structured and formatted in a manner that makes analysis difficult'.[139]

More recently in the Administrative Appeals Tribunal, a freedom of information request surrounding text messages between the Chief of the Defence Force and the Vice Chief of the Defence Force was heard.[140] The matter, inter alia, explored the limiting nature that military information and military decisions have on the right to public transparency. The Tribunal emphasised the legitimate and valuable role of the media in the education and interrogation of government policies but eventually found that the need for candid, swift and

open discussion between members of the military (on military matters) was enough to satisfy the overwhelming public interest in refusing access. The matter of *Re Secretary, Department of Defence and Thomas*[141] is important to highlight the robustness of the current freedom of information system and the ability of the Administrative Appeals Tribunal to deal with such sensitive matters. Members of the Tribunal are not necessarily appointed based on understanding of law or experience as a legal practitioner — it is the practice of the Tribunal to appoint a member or senior member who 'in the opinion of the Governor-General has special knowledge or skills relevant'.[142] The Tribunal thus has heard and does regularly hear freedom of information requests dealing with sensitive military matters.

The current Public Service Commissioner, the Hon Mr John Lloyd, perhaps best summarises the current coalition government stance:

> [Our] Freedom of Information laws have gone beyond what they intended to do; they make us a bit over-cautious and make some of the advice more circumspect than it should be.[143]

Journalists who have revealed details of turn-backs have been investigated by the Australian Federal Police,[144] leading to allegations that 'Australians are getting more information from the Jakarta Post than from their own government'.[145]

Whistleblower protection and the Border Force Act

In situations where information is not readily accessible by valid procedure, there often remain options, when whistleblower protection is strong enough, for alternative paths to government accountability. The current government has attempted to impose a chilling effect on whistleblowers through provisions of the Border Force Act. Since its original implementation, legislative changes have been made to the Border Force Act which have rolled back certain penalties for healthcare workers.[146] Regardless of the consequent legislative developments, it is pertinent to note the original provisions in the Act — in particular, its criminalisation of recording or disclosing any 'protected information', defined as any information gained in the capacity of employment while on border protection, with a penalty of two years' imprisonment.[147] This is because, while certain concessions have been made for healthcare workers (general and specialist doctors, dentists, nurses, psychologists and health advisers[148]), other professions (lawyers, teachers and social workers) are still affected by the legislation. Indeed, the legislative developments merely attend to the criminal consequences of disclosure; employees still have the threat of civil legal action. It is interesting to note that the amendment regarding healthcare workers was made in light of a pending High Court challenge against the provisions.[149] In the meantime, the constitutionality of the secrecy provisions remains open for debate.[150]

Implemented under bipartisan approval, the Border Force Act allowed for disclosure of information surrounding the policy and operation only when 'necessary to prevent or lessen a serious threat to life or health'[151] or for public interest.[152] It is perhaps telling that organisational suitability assessments — explicitly noted by the Explanatory Memorandum as designed to screen prospective government employees who are less likely to adhere to or comply with non-disclosure requirements — act as an initial barrier to the flow of information that might be otherwise classified. The Act was effective in creating a complex and unclear labyrinth of definitions and threshold tests. Some defences are available to whistleblowers facing criminal prosecution through the *Public Interest Disclosure Act 2013* (Cth). Public interest is not a new concept,[153] although there remains a high degree of uncertainty as to when and whether these protections apply — in particular, whether information relating to border protection would prejudice international relations[154] or the security and defence of the Commonwealth.[155] National security is one such interest to be invoked under the Border Force Act, based on the notion of sensitive law enforcement information.[156] The legislation

places the evidentiary burden on the whistleblower — the effect of which is to make unclear the level of evidence required to enact any protection, especially for persons unsure of their legal or contractual rights. For a layperson considering whether to 'blow the whistle', the complexity of the legislative labyrinth might certainly deter them from doing so.

Perhaps most jarring of all is the way in which the Border Force Act affected the contractual rights and obligations of government employees. Under s 24 of the Act, an oath or affirmation must be made by an employee before the Border Force Commissioner to follow all undertakings. Failure to follow a direction can lead to an individual's dismissal.

Economic accountability

A further element of government accountability and transparency affected by the classification policy is its costs. Economic accountability, especially in times of war, has been of historic importance. Yet, increasingly, the umbrella term of 'military operations' has been used to provide carte blanche for spending. This is not merely limited to classifying information surrounding OSB. The recent military support by the Australian Government to the Government of the Philippines (under Operation Augury) has been obscured. The argument used by the Australian Government in both operations was summarised as: 'unlike all of the publicly costed military operations Australia has waged in the Middle-East, always in coalition with other countries, to publish the costs [of these operations] would give direct and unfiltered information to fighters about what is there'.[157] It seems unlikely that economic information publicly accessible to the Taliban or the Islamic State would not be used by the insurgency groups but would be by people smugglers. Equally, if the operation is placed in the budget then the matter is now public and is subject to public discussion.

Specifically, OSB was justified at its inception in part due to the costs of Labor's earlier operations and humanitarian relief given to irregular migrants,[158] amounting to an alleged $9 billion annually.[159] While the coalition government had assessed OSB costs as $262 million annually,[160] this fails to account for various classified factors including offshore detention (which was incorporated into Labor's costs). While the number of irregular migrants arriving by boat has lowered, the costs of maintaining operations have remained relatively untouched by commentary. Items such as the unsinkable lifeboats are defined as consumables and are thus 'not an asset required to be counted as assets in the inventory of the Commonwealth',[161] despite costing over $2.5 million.[162]

Economic accountability is necessary to assess the government's claim about the lower costs, especially considering that one estimate has the total annual cost of OSB amounting to an estimated $5.14 billion annually,[163] or a cost of over $400 000 per irregular migrant.[164] While this is less than Labor's alleged cost, the coalition should not aim to hide costs under a veil of operational security, and the economic facts should be open to the public.

Difficulty identifying compliance with international law

A final factor in favour of improving transparency and accountability for government actions is the difficulty in identifying any breaches of Australia's international obligations.

One such breach of international law relates to incursions into Indonesian territorial waters and whether or not such incursions are part of border protection tactics. The *United Nations Convention on the Law of the Sea* recognises the principle that every country is entitled to sovereignty and consequential respect of its maritime borders,[165] subject to the right of innocent passage.[166] While strong arguments can, and are, made both in favour of[167] and against[168] the concept of Westphalian sovereignty in the modern era, the principle has been used by Australia to justify its own border protection policy,[169] classified under operational

security and the need to protect operational effectiveness. It is unknown whether interdictions on the high seas, let alone incursions into Indonesian territorial waters, are condoned.[170]

On maritime obligations, the general principle of the law of the sea[171] extends to protect those in distress irrespective of their nationality, their status or the circumstances in which they are found.[172] The Australian Maritime Safety Authority (AMSA) currently is 'the main coordination body for search and rescue response arrangements in Australia'.[173] AMSA in recent years, however, has held that irregular migrants venturing in unseaworthy vessels are exploiting the international system for 'genuine distress'.[174] Despite the coalition government's rhetoric around stopping deaths at sea, OSB has failed to formally include search and rescue activities in its scope; there remains, nonetheless, an obligation to ensure assistance to any persons in distress.[175] Classification of information around the border protection policy makes it difficult to assess whether there have been instances of the Navy ignoring distress calls, as was alleged.[176]

A second issue is the allegation that Australian officials paid A$5000 to crew members to return a SIEV to Indonesia.[177] The crime of people smuggling is found in the *United Nations Convention against Transnational Organized Crime* and its *Protocol against the Smuggling of Migrants by Land, Sea and Air*.[178] Article 3 of the Protocol holds people smuggling as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'.

The coalition government has not denied allegations of payment, noting: '[We] will do whatever we need to do to keep this evil trade stopped … [We have been] incredibly creative in coming up with a whole range of strategies'.[179] Failing the threshold of financial or other benefits being procured by the Australian Government, additionally, the Protocol criminalises a variety of offences relating to the smuggling of people, including being an accomplice,[180] organising or directing another to commit an offence,[181] or endangering the lives of migrants affected by smuggling.[182] If payment is confirmed, Australia would be liable for any of these additional offences.

It is evident that a large range of measures restricting the flow of information from Canberra have been justified under the need for national security and effective border protection. Where that information is classified, correctly or not, there now exists under the Border Force Act complex complementary legislation that imposes a chilling effect of the layperson.

Proposed solutions

The coalition government thus has three main policy challenges: to maintain a border protection system that is transparent and publicly accountable; to clarify Australia's international obligations and rescue/response system; and to maintain no loss of life at sea. In light of these three policy concerns, certain short-, medium- and long-term solutions will be examined.

Short term

Resurrection of meetings, public reports and internal reviews

An obvious preliminary measure to return transparency and accountability to OSB is the resurrection of regular public, face-to-face media meetings. Whether these meetings occur in Sydney, Canberra or any other city is a non-issue. Alternatively, regular published reports on the number of boat interceptions, incidents of assistance and methods of return could be

reinstated.[183] Failing a desire for publicly acknowledged incidents, a return of the internal reviews system within the Department of Home Affairs when there are major fatal incidents at sea could serve to mitigate further maritime issues. A combination of these mechanisms would allow Australia to satisfy its international and moral obligations as well as policy objectives.

Changing the scope of classified information

Additionally, the government could simply change the scope of classified information. This could be achieved through declassifying the process currently used to restrict information or through narrowing the scope of information captured in the current rule of 'operational, tactical and on-water'.[184] The release of the process used would serve to improve accountability and enable the media, courts and public to hold the government to account. It is valid to maintain secrecy on tactics, techniques and procedures of any operation if a military is to maintain its capability and effectiveness. This can equally be validly extended to the number and location of SIEVs intercepted and the numbers of vessels and personnel deployed. But if operational effectiveness is to justify the restriction of information, it is not acceptable to have it publicly available albeit just not in one easy location.

Information that is not validly classified — but currently is — surrounds the cost of the operation, failure to report incidents that occur at sea, and allegations of violations of international or domestic law. In no other current operational environment has a matter been explicitly listed in the budget but removed from public discussion, except with regard to Operation Augury. Equally, violations of domestic or international law in Iraq, Afghanistan or Timor-Leste have been able to be accounted for through transparency — not hidden behind a veil of secrecy.

Medium term

Law reform and whistleblower protection

Open government requires an indispensable check to be imposed on those entrusted with government power. In order to gain comprehensive access to information, and to facilitate transparency and accountability, the secrecy provisions of the Border Force Act will require further amendments. This can be achieved through a variety of means, although most easily by expanding on the exceptions granted to health workers or other professions. This solution, although failing to address the threat of civil litigation by employers, restores to those who work in border protection the same workplace rights as elsewhere.

By repealing pt 6 of the Border Force Act, the secrecy provisions would no longer act as a barrier to disclosure of valid information.[185] Under current Commonwealth law, the federal government already holds broad powers to prosecute departmental employees and contractors for the disclosure of unauthorised information.[186] In lieu of this, an exception could be made in the Border Force Act for public disclosure.

Increased use of the Administrative Appeals Tribunal

As noted, the current Freedom of Information Division of the Administrative Appeals Tribunal is well suited to dealing with requests of a sensitive military nature through the appointment of Senior Members and could even be expanded to include a 'Military Division' with respect to sensitive — either current or past — operational matters. While it is unlikely that the government would openly establish a separate division, there remains open the possibility of increasing its size or increasing the volume of requests it could accommodate. The Tribunal

could accordingly benefit from a reduction of the filing fees, allowing for further access to justice and information to the public.

Royal Commission into Operation Sovereign Borders

In Australia, the demand for a Royal Commission is often the first acknowledgement of a socially, economically or morally ambiguous issue. A Royal Commission is often the most appropriate body in situations where the government requires a disinterested person to ascertain facts from a series of disputed allegations. Yet, with the exception of mere fact-finding issues, Royal Commissions would appear a lengthy and expensive method of investigating a socio-economic issue.[187] As one critic noted:

> Almost all [members of a Royal Commission] have spent their entire working life at the Bar or on the Bench where they have developed the basically homogeneous set of values that any closed society acquires. Whatever the merit of these values, it is unsatisfactory that so small a group should have control of policy recommendations on important questions … that affect every person in the community.[188]

This homogeneity can be and often is mitigated through the inclusion of co-commissioners and the admission of amicus curiae reports. A Royal Commission into Operation Sovereign Borders would be unlikely to occur, given the federal nature of the operation and the embarrassment that may arise. Equally, in instances when a Royal Commission occurs, the recommendations are often not implemented in full, if at all. This has led to some describing them as 'a toothless tiger'.[189]

Long term

Establishment of an independent body to advise whistleblowers

An alternative to an ad hoc Royal Commission is the establishment of an independent federal body to provide confidential advice to would-be whistleblowers. The solution could be achieved through the expansion of the Office of the Australian Information Commissioner. This would serve the obvious purpose of further enforcing freedom of information requests by providing advice regarding confidentiality clauses in immigration-related employment contracts (failing any repeal of the Border Force Act), which would enable the aforementioned legal labyrinth to be navigated more easily. Financially, this is a relatively inexpensive solution in comparison to a Royal Commission and holds further tangible outcomes.

Regional and bilateral agreements

A final and more comprehensive solution to irregular migration into Australia, as Human Rights Watch has suggested, rather than 'a continued emphasis on punitive crackdowns on people smuggling',[190] is for Australia to do more to protect and promote the rights of people in South-East Asia. Through improving the human rights standards in transit countries, the incentive for irregular migrants to board vessels and take the dangerous northern maritime approach to Australia would be mitigated.

Such measures, facilitated through regional or bilateral agreements for reform, could include access to educational and basic health services; the granting of legal status to irregular migrants; protection for arbitrary arrest, detention and/or deportation; and the right to stay and seek gainful employment.[191] By shifting from attempting to deal with the pull factors (through interdiction, detention and deterrence) to aiming to address the push factors, Australia could easily achieve its goals of stopping the smuggling of persons by boat, stopping deaths at sea and preserving sovereign borders and regional relationships.

Conclusion

On balance, the disadvantages of classifying information relating to the smuggling of persons to Australia outweigh the benefits of operational effectiveness in the aforementioned policy objectives.

There always has been a need to classify sensitive military and law enforcement tactics, techniques and procedures. This need will remain. Equally, there can be and are situations where the equipment and number of personnel should validly be veiled in order to retain an advantage — either in surprise or in capability. But, if this information is to be restricted, it needs to be done comprehensively across government. As it stands, this information is publicly reported by both federal government and independent media. This is on a case-by-case, operation-by-operation basis and should require regular reassessments of the operational need.

There remain, however, fundamental and consequential issues with the government's current classification policy. Primarily, the justifications for the current border protection policy are either unfounded or not reflected in practice. Additionally, there remain various international, economic, political and foreign relations issues that require increased transparency. This is especially pertinent regarding allegations of potential breaches of international obligations.

While the above solutions are all viable, some are more urgently required than others. The re-establishment of the public meetings would reinitiate the flow of information to the public. Further, whistleblowers deserve the same protections guaranteed to those not subject to the Border Force Act. While progress has been made through lobby groups to exclude health workers, an effective humanitarian operation requires an environment where other professions can conduct their roles. Although a Royal Commission could serve to raise awareness surrounding the lack of government accountability, both domestically and internationally, it seems unviable and unlikely to be conducted. A comprehensive shift in how Australia and its politicians view irregular migrants attempting to enter Australia will allow a more effective border protection policy. As it stands, the current coalition government through its actions could be accused of hiding — rather than stopping — the boats.

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