Immigration Detention Centres, Human Rights and Criminology in Australia

Watching the various inquiries and reports into the operation of Immigration Detention Centres roll out is a little like watching Humphrey B Bear in time delay. The mute character at the centre of the show never gets a voice and has to always talk through the presenter. The presenter is always a caricature of emotions and is regularly axed when he or she is found to be a ratings flop and does not have resonance with the controlling interests of the station. Meanwhile Humphrey remains mute wearing inappropriate clothes for a bear[1] and left wondering who is to be her next voice. You have a deep sense that there's something important Humphrey wants to say, you strain to listen, but she still can't speak. While some parents may clutch their children close grabbing for the remote control and quickly changing channels when Humphrey finally goes feral, many of us stand on our seats and applaud and some even give refuge.

The lives and futures of 8000 asylum seekers per year who experience immigration detention in Australia challenge all of us to consider and respond to what is happening to one of the most silenced and at risk groups within Australian society. At risk of invoking the words of Winston Chuurchill, such consideration has the potential to say as much about ourselves as individuals and as a society as it does about those successive Australian governments who have insisted on detaining asylum seekers.

A series of inquiries and reports in response to significant media coverage and lobbying by refugee advocates has seen four major reports on Immigration Detention Centres (IDC) released in the past year: the Joint Standing Committee on Foreign Affairs, Defence and Trade *Visits to Immigration Detention Centres* (JSCFADT); the Ombudsman's Report of an Own Motion Investigation into Immigration Detainees held in State Correctional Facilities; the Ombudsman's Report of an Own Motion Investigation into the Department of Immigration and Multicultural Affairs' Immigration Detention Centres; and the Flood Report of Inquiry into Immigration Detention Procedures. In addition to these, the Senate and Legal Constitutional References Committee released *A Sanctuary under Review* report in June 2000 and the Human Rights and Equal Opportunity Commission inquiry *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals* was released in 1998.

This is a most unprecedented flurry of interest into the practice of mandatory detention that has been in place for almost a decade. In many ways it is heartening that immigration detention is now an issue on the national agenda. It also has been significant that the various reports have helped to question the relationship of Department of Immigration and Multicultural Affairs (DIMA) and Australian Correctional Management (ACM), the increasing powers of ACM and DIMA to physically and chemically restrain asylum seekers in custody, questionable labour practices and duty of care arrangements between the private contractor and the government. It is not my purpose here to go into detail about the substance of these reports or the viability of their recommendations individually but rather first, to consider the context into which these reports have been born and why their impact will be severely limited and second, to examine the potential for criminological contributions to this debate.

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1 Detainees often only have one set of clothes that they have to wash out each night. Clothes distributed to detainees were considered by detainees as ill fitting and inappropriate for the conditions. See Chapter 4 of the Report of the JSCFADT (2001).

The human rights vacuum

The mandatory detention of 'unauthorised arrivals' is arbitrary (in that those people who become unauthorised by overstaying their visas are often not detained) and goes against the spirit of the Refugee Convention that clearly states that people will not be penalised for trying to seek the protection of a country. Consequently Australia can be considered in breach of a range of its international obligations (Taylor 2000, Amnesty International 2000, Piotrowicz 1998). Interestingly, all of the reports into IDCs talk about human rights but not in terms of Australia being in breach of these obligations. Moreover, all of the reports fail to pin down what such references to human rights mean structurally and individually for those people in immigration detention. For example, the recent JSCFADT inquiry outlined the principles and standards of human rights in a range of United Nations international instruments dealing with issues relating to international detention arrangements as well as relevant non binding international instruments. The Committee then went to the trouble of clearly stating what these principles mean in terms of the basic human rights detainees can expect. However, neither the recommendations of the report nor the public discussion surrounding its release, were couched within such human rights discourse. Moreover, when challenged by the Minister that the report was naïve, the majority of members of the Committee quickly retreated[2] from much of the substance of the report. While such retreats may have been primarily fuelled by party political affiliations, they were also enabled by the ways that such recommendations were not put forward as clear expressions of individual and collective human rights and were not understood as such by their fellow parliamentarians, media throng and the public in general.

In an environment which has rejected the role of the UN Committee system and questioned the validity of the UN Treaty system, the lack of an established national framework for talking about, asserting and challenging rights meant there was little recourse for those who felt they could not refer to the international framework of rights to articulate the work of the inquiry. Without a national framework appeals to human rights and assertions of human rights violations slip without foundation. Such a call to national governance is at odds with many current approaches to, and evaluations of, global governance (from above or from below) and serves to reinforce the centrality of the nation state as the unit of negotiation (not to negate the role of International Non Governmental Organisations, individuals, technology etc) when it comes to immigration. While we may debate the desirability of such appeals, as current arrangements stand the sovereignty of the nation state in relation to onshore asylum seekers is firming rather than weakening. Without an entrenched human rights framework in Australia the various inquiries into IDCs, regardless of unanimous positions, quality of investigation or clarity and timeliness of reporting, will remain impotent. While a fully independent judicial inquiry into IDCs is required, considering the lack of a responsive rights context to position the report within, and considering the difficulties encountered in implementing the recommendations of the Royal Commission Into Aboriginal Deaths in Custody, the potential of any such inquiries remains slim. The power of international human rights discourse is when it is given domestic expression. We need a human rights framework that recognises these international human rights that the report sets out and clearly provides for their implementation including mechanisms for adjudication and provisions of remedy and redress in cases where rights have been found to be breached. While we would never discount the importance of an international legal and moral regime around rights, it remains pointless without domestic enforcement and adjudication.

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2 See for example the Australian 19 June 2001, Article by Megan Saunders, "Detention Limit Naïve: Ruddock".

The potential of criminology

While there are of course great risks involved when criminologists turn their gaze to areas, issues and people who have not traditionally fallen within their discipline brief it is worth asking in what ways could the criminological gaze potentially reshape the debate around IDCs for the better? I believe many of the answers to that question are obvious, particularly around the investigation of the privatisation of justice. More broadly I am interested in asking what are the ways criminologists may say something constructive and important about the ways we understand the experiences, treatment and representation of asylum seekers and refugees? Potentially, I would suggest, such a focus may make an important contribution to the criminological study of state harm.

The study of criminology has much to enliven the debate around the routinely rehearsed rhetoric surrounding asylum seekers and refugees and Australia's vehement pursuit of increasingly tough enforcement measures. I have argued elsewhere that the mandatory detention of unauthorised arrivals is the backbone of strategies to criminalise people who seek Australia's protection. Routinely, asylum seekers have been represented as deviant particularly in relation to the integrity of the nation state, race and disease (Pickering 2001). The use of mandatory detention is often cited as a means to deter would be 'people smugglers' even though there is no research to suggest this is the case. During the past twelve months over $96 million Australian dollars was spent paying for IDCs, most to Australasian Correctional Management. The DIMA have put on the table a range of legislation that collectively puts forward the dramatic increase in the powers of IDC staff to use chemical restraint and other so called 'non-lethal' powers that have been seriously questioned in other fora. These are areas with which criminologists are well prepared to make timely and important contributions. They simply need to do so.

However, an area where criminologists may be less prepared to make a contribution is in relation to the condition of refugeehood in our society of late modernity.

Article 1 of the 1951 United Nations Convention Relating to the Status of Refugees defines a refugee as:

> . . .owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, outside the country of his nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it.

The definition of a refugee depends upon the failure of state protection. At the heart of the definition is that the country a person has fled has not operationalised an effective legal system, the rule of law has broken down or justice has been inaccessible. Individual and groups of refugees bring into sharp relief the engagement of states over issues of state harm (and indeed state crime) and state protection (asylum and refuge). Particularly, 'persecution' has been a site of significant jurisprudential debate as to what adequately meets the definition of persecution as opposed to discrimination as opposed to a criminal act that happens to you as an individual rather than as part of a systematic approach of states and state like entities. Further, the five enumerated grounds upon which you must demonstrate your experience of persecution (race, religion, nationality, political opinion or particular social group) have been significant sites of battle for those who have argued that the definition as stands has a very traditional view of political persecution and often fails to provide protection for experiences based upon gender and sexual orientation. While these issues remain distant to criminology's core project of '...the behaviour of poor people in rich countries' (Ward & Green 2000) they challenge us to investigate the diversity of ways that people engage with systems of justice in both refugee producing and refugee receiving

nations. Moreover, they suggest that criminology could have important things to say about the criminal victimisation experienced by those fleeing persecution both in their home countries and in places like Australia while at the same time being considered criminal offenders within home legal systems and Australia's dubiously developing system of refugee administration.

Conclusion

Importantly there have been some excellent recent criminological forays into the field of human rights (see e.g. Ward & Green 2000) which act as some redress for the limited engagement criminology has had historically with what international human rights discourse means for the ways we do the business of criminology. Human rights, and particularly the study of refugees and advocacy for and with asylum seekers, does not hold all the answers but it is a field into which we may cautiously deploy the criminologist. When we call for this deployment it is made as a call for work on social justice and human rights with two careful caveats. First, international human rights discourse often falls short of capturing the experiences of people fleeing persecution and as an empowering vocabulary it remains nuanced and difficult to negotiate. Moreover, it is non-essentialising work on human rights that is called for. Second, such a call is not made to enable criminologists participation in the moral panic that surrounds the current focus on 'people smuggling', and the associated development of criminalisation, 'deterrence' and interdiction, that are all untenable considering that over 80% of those people that 'people smugglers' bring to our shores and are consequently detained, meet the strict criteria of the refugee definition. To be co-opted by such blatant government propaganda would severely jeopardise the integrity of criminology's primary interest in explorations of justice and injustice as it operates in our society. As the Honourable Malcolm Fraser said at the recent celebration of International Refugee Day, if he were in Afghanistan with two daughters living through conditions of persecution with no other way out, he too, would engage the services of a 'people smuggler' and probably end up in one of Australia's Immigration Detention Centres.

Sharon Pickering and Caroline Lambert

Centre for Cultural Research into Risk, Charles Sturt University, Bathurst, NSW 2795.
All correspondence to spickering@csu.edu.au.

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