Asia-Pacific Research

Australia's Actuarial Justice: Released Refugees and Secondary Punishment

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Asia-Pacific Research, December 07, 2023

Region: Oceania
Theme: Justice

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In most instances, the justice system of a liberal democracy presumes absence of arbitrary and cruel treatment by the State. Punishment, when levelled, is finite. It might see out the term of a convict's natural life, but that would only be for the most extreme cases. Even then, the whiff of parole, while far off, might still be possible.

On being released, the usual assumptions apply. Time served is time done. Past punishment will not be revisited upon you; the State will not send its hounds and officers of the thin blue line after you. This would only happen in instances of re-offending – recidivism remains a risky feature of the post-release citizen. But in Australia, a current hysteria, fed like a hungry gargoyle by politicians on both sides of the aisle, has come to roost over the federal Parliament.

The High Court of Australia, having had the good, just sense of finding the indefinite administrative detention of refugees an unwarranted excess of executive power, was always going to make matters challenging for the government. For one thing, few expected it. That same body had previously held in *Al-Kateb v Godwin* (2004) that such forms of indefinite confinement were perfectly legal, even if those refugees could never have a reasonable prospect of either settling in Australia or a third country. But in November, it all changed.

In the *NZYQ* case, the High Court affirmed the constitutional principle that detention is a form of punishment and is a judicial power exercisable once a person is found guilty of a crime. Laws authorising the administrative detention of non-citizens by the executive arm of government could only be constitutionally valid if reasonably necessary for a legitimate non-punitive purpose. The law authorising the detention of NZYQ, a stateless Rohingya man, was not appropriately adapted to the purpose of his removal, given that he had "no real prospect of removal from Australia becoming practicable in a reasonably foreseeable future".

Of particular concern to the Albanese government was the issue of what to do with those administrative detainees with convictions, but had, as such, done the time. On paper, it should not have been controversial. With their sentence served, they would surely be permitted their liberty subject to the usual caveats of forfeiture. But those in immigration detention were seen as exceptional, the undesirable, unconventional sort who had come by boat. Rather than being permitted to disappear into Australia's own version of legal purgatory, they were let out instead, posing an unacceptable risk. How that risk was unacceptable relative to that posed by other convicts was never explained.

Instead of finding a sober, mature approach to dealing with the matter, a quarry for hysterical rhetoric was opened. Heavy digging commenced with reports of a growing though small number of reoffenders, including an Afghan refugee who was charged with two counts of indecent assault in Adelaide.

The Liberal-National Coalition, led by the icy **Peter Dutton**, histrionically claimed that the released detainees posed exceptional risk. A media release from the Liberal Party wondered "why the Government panicked and urgently released in excess of 140 detainees when the [High Court] decision clearly applies to the single detainee NZYQ." The insinuation was clear: irrespective of the High Court's ruling, most of the detainees could still be confined, as long as the reason was sufficiently cooked.

Labor, historically vulnerable to the anti-refugee hysterics of the LNP, could only come up with a pale version of the same. It has attacked Dutton as a "protector of paedophiles" for opposing draft proposals for paedophile school ban zones.

> "They came here," raged **Home Affairs Minister Clare O'Neil,** "and instead of supporting Labor's attempts to criminalise paedophiles, who loiter near daycare centres and schools, the leader of the opposition came in here and played politics instead."

Immigration Minister Andrew Giles also lamented before his fellow parliamentarians that,

> "The government did not choose to be in this position. The situation was imposed on this parliament by the High Court."

Both sides of politics meet at a dubious apex: that refugees with convictions must be treated as a monstrous category. The important thing was identifying a suitable preventative regime to achieve that purpose.

The laws just rushed through parliament permit the immigration minister to seek a court order to detain individuals released from immigration detention. Two conditions must be met: that the person be convicted for a crime, be it in Australia or overseas, carrying a sentence of at least seven years' imprisonment; and the court's agreement that the person poses "an unacceptable risk of committing a serious violent or sexual offence" with "no less restrictive measure available" to maintain community safety.

Other impediments are also imposed upon those released into the community as part of what is known as the Bridging Visa R subclass. Many of these are repurposed from anti-terrorist legislation, with a focus on monitoring devices, regular reporting, curfews and restrictions on work and financial matters.

While the government has included the judiciary in the process of seeking re-detention, the process has a distinctly punitive flavour, constituting a form of secondary punishment. It is also especially discriminatory, applying to non-Australian citizens. Yet again, the non-citizen is being treated as a non-person. As Michelle Peterie and Amy Nethery pertinently observe, "Australians with the same criminal histories and risk profiles will not be subject to the preventative detention regime under this legislation." A potential legal challenge, for precisely that reason, may be in the offing.

The hideous spectacle leaves us a desperate, disturbing conclusion. Even after time is served behind bars, refugees will be subject to the very discriminatory and punitive regimes that the UN Refugee Convention guards against. The agenda here is to perpetrate a regime of permanent punishment and surveillance, using an actuarial model of justice. Released refugees are to be treated no less as potential terrorists, permanently menacing. And it is a conflation the government and the main opposition parties are willing to entertain.

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