

A Matter of Time: Enacting the Exclusion of Onshore Refugee Applicants through the Reform and Acceleration of Refugee Determination Processes

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Abstract

State-based processes for determining refugee claims are crucial sites of inclusion or exclusion for onshore refugee applicants. This paper argues that cultures of disbelief and exclusion towards onshore refugee applicants are increasingly being enacted indirectly, via procedural reforms to Refugee Status Determination (RSD), which limit the ability of applicants to establish and articulate their claims. Focusing on Australia and Canada, this paper tracks the acceleration and truncation of RSD procedures, which first reflect and then frequently achieve the exclusion of onshore applicants. Two sets of reforms in particular have profoundly limited the terms on which applicants may present their claims. In Canada, this occurred as the result of a major overhaul of RSD that took place in December 2012. In Australia, the policy of 'enhanced screening' of applicants achieves the immediate screening-out of certain claims from the Australian determination system. Alongside analysing these reforms as a means of exclusion, this paper argues that the new procedures most disadvantage applicants making claims on the basis of gender-related persecution.

Key words

Migration; refugee law; gender; gender-based harm; border politics; Canada; Australia; refugee status determination

Resumen

Los procesos estatales para resolver las concesiones de asilo son situaciones cruciales para la inclusión o exclusión de los solicitantes de asilo una vez están en el territorio de acogida. Este artículo defiende que cada vez más, se está promulgando indirectamente la cultura de la desconfianza y exclusión hacia los solicitantes de asilo, a través de reformas procesuales de la Determinación del Estatus de Refugiado (DER), lo que limita la capacidad de los solicitantes para

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establecer y articular sus demandas de asilo. Centrándose en Australia y Canadá, este artículo realiza un seguimiento de la aceleración y el truncamiento de los procedimientos de DER que primero reflejan y después a menudo consiguen la exclusión de los solicitantes en el propio territorio de acogida. Dos grupos de reformas en particular han limitado profundamente las condiciones en las que los demandantes pueden presentar sus solicitudes. En Canadá esto ocurrió debido a una revisión importante de DER que se dio en diciembre de 2012. En Australia, la política de cribado mejorado de los solicitantes consigue la exclusión inmediata de determinadas solicitudes del sistema de determinación australiano. Además de analizar estas reformas como medio de exclusión, este artículo defiende que los nuevos procedimientos perjudican especialmente a los demandantes que realizan la solicitud en base a una persecución por motivos de género.

Palabras clave

Migración; derecho de refugiados; daño por cuestiones de género; política de frontera; Canadá; Australia; determinación del estatus de refugiado

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1. Introduction

State-based processes for determining refugee claims are crucial sites of inclusion or exclusion for onshore refugee applicants. The procedural details and content of refugee status determination (RSD) are the subject of an expanding literature, which deals with the legal, political and social context of how state institutions evaluate asylum claims. Such claims are generally made under the Convention Relating to the Status of Refugees (1951), and in most instances, a particular state's domestic enactment of this document. For at least 10 years now, academic commentators and advocates have realised the importance of procedural elements of RSD in determining who gets access to state protection and on what terms. As a consequence, refugee status determination processes in 'refugee-receiving' states have been the subject of closer scrutiny and critique. These critiques present status determination at the lower levels of decision-making as just as important, and in some cases more important than overall jurisprudence about who may access refugee protection and on what terms.

For the most part, these critiques of RSD have addressed the interpretation and assessment of claims and evidence once a refugee applicant has entered into the process. Such work has focused on the persistent problem of unfair or unduly sceptical credibility assessments. The identification of a 'culture of disbelief' in relation to refugee applicants and their evidence is a common feature across a significant number of refugee decision-making studies. The institutions responsible for refugee status determination have, for example, been described as characterised by 'adversarial posturing' (Kneebone 1998), a 'culture of disbelief' (Ensor *et al.* 2006, Millbank 2009, Sweeney 2009, Souter 2011), and a 'presumptive scepticism' (Byrne 2007). Significantly, scholars and advocates have argued that these cultures of disbelief reflect a view of RSD as performing a gate-keeping function, the ultimate aim of which is to ensure that 'fraudulent', 'opportunistic' or bogus claimants do not gain access to the state or to state protection (Kneebone 1998, Rousseau *et al.* 2002, Glass 2008).

In this paper, my aim is to examine how these cultures of disbelief, persistently identified as structuring the interpretation and determination of claims, are currently being enacted via procedural reforms to the RSD process. I argue that the acceleration and truncation of RSD processes both reflect and then achieve the exclusion and disbelief that characterise refugee decision-making. That is, the culture of disbelief identified as being present in the institutional culture of RSD bodies, is increasingly being achieved via procedural limits on refugee applicants' ability to speak and to be heard.

In both Australia and Canada, significant procedural reforms have so limited RSD timelines and the terms on which refugee applicants may have their claims heard and reviewed, that the notion that a refugee applicant has the opportunity to present a claim and to be heard in good faith comes close to existing as a conceit only. The context and details of the reforms in each country differ significantly. Their result, however, is to limit the capacity for refugees to speak, and to present their claims. Consequently, certain applicants achieve their own exclusion when their claims are rejected. That is, although refugees are given the opportunity to access status determination processes, because of procedural barriers to making a successful claim in the first instance, they fail. Applicants are both excluded from the status of refugee and confirmed as 'illegitimate' refugee applicants.

In this paper I explore the procedural barriers to refugee applicants articulating a claim as a result of these recent reforms in Australia and Canada, with a particular focus on the timing of RSD. In section two, I sketch the broader context in which these reforms have taken place, including significant reforms in other jurisdictions, 'speeding up' of the asylum process and some of the implications of these reforms for female applicants and those making gender-based claims. Section three explores the major overhaul of Canadian RSD that took place in December 2012.

The reforms, under Bill C-31 entitled the '*Protecting Canada's Immigration System Act*', introduced a system of determination whereby claimants with the most comprehensive access to the RSD system will have their claim determined within two months of initiating an application. Section four examines the policy of 'enhanced screening' introduced in Australia in late 2012, and a 2014 policy proposal of fast-tracking certain protection applications through the Australian determination system.

I argue that procedural reforms and acceleration of determination processes are significant features of contemporary onshore asylum seeking for two reasons. First, as a consequence of accelerated and truncated processes, the applicant's own narrative is limited or excluded. The stories of onshore asylum seekers - even as mediated by the RSD processes - do not come to exist as a counter-point to official discourses about onshore asylum seekers. Exclusion is achieved at a procedural, substantive and rhetorical level. Second, over the last 15 years, as a result of advocacy and critique, the experiences of female applicants, those making claims on the basis of gender-related persecution, and applicants with trauma-related mental illnesses have led to significant reforms of RSD. The procedural reforms in Australia and Canada, which focus on speed, efficiency and 'excluding' unfounded claims, will undermine these reforms and most disadvantage those classes of applicants already identified as facing difficulty in articulating their claims.

Literature addressing story telling and the law has shown how the law's refusal to hear or sanction the stories of marginalised groups renders them and their accounts invisible and silent (Papke 1991). The exclusion of certain groups' narratives allows the law's own narratives and stereotypes to prevail over the accounts of those raced, gendered or classed as 'other' (Matsuda 1987, Delgado 1989, Ewick and Silbey 1995). Citing the imperatives of time, speed and efficiency, the procedural reforms of RSD processes exclude certain stories from being articulated fully, if at all. Those who cannot tell their stories quickly or provide evidence fast enough will fail in their applications for protection. Their failures confirm the justifications for the reforms, which are explored throughout this piece, that asylum seekers are bogus and 'abuse' the system. This is not to argue that merely letting the stories be heard will lead to greater justice for those entering refugee status determination procedures. Rather, this piece aims to highlight how procedural barriers to RSD mechanisms work to enact a rhetorical and substantive exclusion of onshore refugee applicants.

Finally, it is worth noting at the outset that distinctions between 'procedural' and 'substantive' law and legal reforms are not fixed or settled. I focus here on 'procedural' reforms as rules relating to how a claim is lodged and presented, rather than the content of refugee law and jurisprudence, or the assessment of particular applicants' claims. This distinction is useful because while the Australian and Canadian Governments both presented the reforms discussed here as achieving 'good' procedural goals, such as speed and efficiency, the reforms have a substantive impact on access to protection. This is not to deny that speed and efficiency are important components of procedural justice, and that refugee applicants may benefit from faster determinations of their claims. Rather, it is to argue that these procedural reforms have substantive effects; they should be placed within the political context of contemporary refugee policy and existing cultures of exclusion and deterrence of onshore refugee applicants.

2. Speeding up asylum: the broader context of acceleration and the implications for gender-related claims

The reforms discussed in this piece are best understood in the broader context of actions taken by wealthy, Global North states to prevent the arrival of onshore asylum seekers and to restrict their access to state-based rights to apply for refugee status. Nation states' attempts to exclude and deter onshore asylum

seekers have frequently taken the form of physical barriers, put in place to impede or prevent the arrival of persons seeking protection. Such means have included the tightening of border controls, the expansion of the infrastructure of border protection, and implementing immigration controls beyond the borders of the territorial state (Edwards 2005, Macklin 2005, Gammeltoft-Hansen 2011). Governments have also sought to deter onshore refugee applicants through the redefinition of sovereign territory as 'outside' of the nation state, or by requiring refugee applicants to be returned to 'safe third countries' (Hyndman and Mountz 2008). Exclusion via the procedural reform of determination processes should be understood as another dimension of these deterrence policies.

The Australian and Canadian reforms analysed in this piece, shortening refugee status determination timelines and limiting the capacity of applicants to present their claims, are not new in their approach to RSD procedure. Since the 1990s, other jurisdictions have adopted similar reforms. In 2005, Thomas Spijkerboer identified what he called the 'massive acceleration' of refugee determination procedures in the Netherlands and argued that these accelerations exacerbated the existing problems of racial and gender stereotyping that commonly frame decision-makers' assessments of refugee applicants' evidence (Spijkerboer 2005). While the Netherlands was not the first jurisdiction to accelerate RSD processes (Human Rights Watch 2010), Spijkerboer's work was important as it recognised that these temporal reforms would intensify the barriers and stereotyping already experienced by applicants, particularly those making claims on the basis of gender-related persecution.

There are also earlier examples of the use of preliminary screening procedures in Australia. A 2000 Senate Report into the operation of Australia's Refugee and Humanitarian Program documented a category of 'removals' from Australia known as 'turnarounds' (Senate Standing Committee on Legal and Constitutional Affairs 2000, p. 301-302). These were defined as 'people who arrive at airports, sometimes without the required papers', who were given the opportunity of identifying a need for protection under the Refugees Convention. Where no claim was identified, 'turnarounds' were generally removed within 72 hours and no detailed records were kept of those returned in this manner (Commonwealth of Australia 2000, p. 302).¹

One of the most notable policies of procedural acceleration in RSD is the United Kingdom's Detained Fast-Track (DFT) program, which was introduced in 2007. The UK Government implemented the DFT as part of the UK's New Asylum Model, which in turn implemented the Home Office's five-year immigration strategy, "Controlling our borders: Making migration work for Britain" (Secretary of State for the Home Department 2005).² The strategy aimed to introduce a 'faster, more tightly managed asylum process' (Human Rights Watch 2010, p. 10).³ Under the DFT, where 'it appears that a quick decision is possible' an applicant may be 'detained for a short period, to make a quick decision, which if refused, will ordinarily be subject to quick appeal time scales' (United Kingdom Border Agency (UKBA 2013a). DFT asylum applicants are generally interviewed within a day of their detention and are

¹ In contrast to existing enhanced screening procedures, which apply predominantly to boat arrivals, 'turnarounds' generally only took place at airports, because the then Department of Immigration and Multicultural Affairs deemed it too difficult to enforce the immediate return of those arriving by sea. Arrivals were generally sent back with the carrier that brought them to Australia (Commonwealth of Australia 2000, p. 302).

² Note, since the time of writing the UK High Court found that the DFT appeal process was ultra vires as a result of its structural unfairness, and the Court of Appeal rejected the government's appeal of the decision, describing the system as 'systematically unfair and unjust' (*Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber) and Lord Chancellor* [2015] EWC 1689; and [2014] EWCA Civ 1634).

³ The UK introduced more limited fast track processes in 2000 and 2003, that applied to those applicants who were detained and who were single, male and 'from countries which are believed by the [Home Office] to be those where in general there is no serious risk of persecution' (HRW 20).

provided with a decision one day after their initial interview (UKBA 2013b, para 2.1). While an appeal of negative decisions is possible, applicants must file for appeal within 2 days of receiving the first instance determination (UKBA 2013b, para 2.1). The UK Government designed the entire process to be completed within 21 days. While there are a number of exceptions in relation to whom may be considered for the DFT,⁴ the assessment of suitability for the entry into the process is undertaken by a Border Officer at a screening interview where no substantive questions about the claim or the claimant are asked (UKBA 2013a). The reforms in both Canada and Australia have been linked to and compared with the UK model (Liberal Party of Australia and National Party of Australia 2013, p. 7, Macklin 2013, p. 102).

The UK DFT reforms and the analyses of them provide a perfect case study for the kinds of harms women and those making gender-based claims will face under 'accelerated' processes. Female applicants and those who have experienced gender-related violence frequently do not disclose incidents of gender-based persecution in the first instance, if at all. Researchers across jurisdictions have documented the difficulties women face in disclosing sexual harm, including high levels of trauma, shame and fear (Baillot *et al.* 2009, 2012, Berg and Millbank 2009, Herlihy and Turner 2007). A Human Rights Watch (2010, p. 10) report assessed the DFT process as inherently unsuitable for assessing the complex cases of both men and women. Human Rights Watch, in their study of the effects of the UK's DFT process on female asylum seekers, found that:

Once in the DFT procedure, women are on a fast-moving treadmill with structural features inhibiting or even preventing them from making their cases effectively. When women arrive ... they will often have their asylum interview the next day... There is little opportunity to build trust, and women, especially in cases involving rape or abuse, may only reveal relevant information late in the process, or not at all. There is limited opportunity to access expert evidence, such as medical reports (Human Rights Watch 2010, p. 3).

The UK reforms ignore research addressing the difficulties and delays that certain claimants experience in being able to articulate past harms, as well as reforms that suggest these difficulties should be taken into account when claims are assessed. Indeed, in the relatively short history of formal, adjudicated asylum determination, much work has been done to recognise and respond to the fact that certain claimants face more difficulty than others in presenting and explaining their claims and evidence. And at least in theory, if not in practice, states and institutions determining refugee status have attempted to address some of these challenges. The difficulty of disclosure and the common practice of delayed disclosure in claims involving sexual harms, for example, are recognised and accepted not only in the critical literature but also in State-produced literature and by State institutions responsible for RSD. As Baillot *et al.* (2009) note, the notion that gender is of importance in asylum determination processes has been recognised in several jurisdictions, through the introduction of 'relatively enlightened' guidelines on gender issues, as well as via UNHCR's own guidelines, published in 2002, on gender-related persecution and the application of the refugee definition (Baillot *et al.* 2009, p. 201).⁵ This is also evident in the introduction of institutional guidelines for the determination of claims made on the basis of sexual orientation (Anker 2002, LaViolette 2010).

⁴ A guidance note for the DFT process lists exceptional applicants who will not be considered for the DFT process. The list includes women who are more than 24 weeks pregnant, unaccompanied minors seeking asylum, those with *independent evidence* of having being tortured or trafficked and those with a disability or care need requiring 24 hour nursing or assistance (United Kingdom Border Agency 2013a).

⁵ There are guidelines at the UN level (UNHCR 2002), and in Canada (Immigration and Refugee Board of Canada 1996), Australia (Refugee and Migration Review Tribunal 2010) and the USA (US Department of State 1996).

While the reforms and guidelines addressing gender-related persecution have been far from perfect, and inconsistently and unevenly implemented (Black Women's Rape Action Project and Women Against Rape 2006, Ceneda and Palmer 2006, LaViolette 2007, 2010), they are significant insofar as they 'give not only legal but also procedural guidelines to decision-makers in relation to dealing sensitively and appropriately with women's narratives of persecution' (Baillot *et al.* 2009, p. 201).⁶ The guidelines recognise that the process of RSD is a barrier to certain classes of applicants and it should be these kinds of applicants who feature at the centre of discussions about 'accelerating' and 'enhancing' existing RSD processes. And yet, as a result of the reforms addressed below – governed by the rhetoric 'speeding up' determinations, process and efficiency – it is those who are already disadvantaged by RSD systems who will have the most difficulty meeting the new timelines.

Existing processes of RSD and the Refugees Convention's definition of a refugee already demand that asylum seekers articulate claims in a particular way and that they present evidence of certain kinds of harm over others. Robert Barsky argues that asylum seekers must not only meet the limited, legal definition of a refugee, but they must also perform a particular kind of 'refugee' subjectivity or indeed subjectivities, as determined by the receiving State. He argues it is not just the content of the refugee claim that is tested but also the claimant's competency in the requirements of the determination process and the style of speech and argumentation it demands (Barsky 1994). The remainder of this paper addresses how the demand that applicants meet the existing requirements of RSD with even less time or opportunity to speak than previously, acts as an indirect yet effective means of exclusion.

3. The 'Protecting Canada's Immigration System Act': The Canadian fast-tracking reforms

In Canada, Bill C-31 entitled '*Protecting Canada's Immigration System Act*' enacted a major and controversial overhaul of RSD in Canada (Canadian Bar Association 2012, Canadian Civil Liberties Association 2012).⁷ The omnibus Bill came into force on 15 December 2012. The Bill amends a number of areas of Canadian refugee and migration law, including in relation to human smuggling offences, the mandatory detention of groups designated as 'mass arrivals', and limitations on the right to family reunion and access to permanent residency for accepted refugees (see Galloway 2014). However, the focus of this section is on the new series of timelines and procedural limits the reforms impose on refugee applicants making onshore claims. I analyse the new timelines as a means of excluding refugee applicants, as well as their evidence and stories, at the same time as preserving the formal right to make a protection claim. Although onshore claimants may still seek protection, the new timelines will have a profound effect on the ability of refugee applicants to present a claim, as well as place serious pressure on decision-makers to determine claims as quickly as possible.

A quick sketch of the details of the legislation gives a sense of just how quickly claims will be determined. Timelines apply differently depending on the applicant's country of origin and whether the applicant makes his or her claim at a port of entry (POE, such as at a land border or at an airport) or as an 'inland' claim, having already entered the country on another basis. POE claimants will be required to file their comprehensive application document, the Basis of Claim form (BOC), *in full* within 15 days of entering the country. Hearings will then be scheduled within 60 days of the deadline for returning the BOC, and all evidence must be filed at least

⁶ These concerns are galvanised in light of British research showing that between 50 and 80 per cent of female applicants have experienced some form of sexual violence (Refugee Council 2009, p. 4).

⁷ Bill C-31, *Protecting Canada's Immigration System Act*, 1st Sess., 41st Parl., 2012 (assented to 28 June 2012), SC 2012, c. 17. The Bill amended the *Balanced Refugee Reform Act* (BRRA), SC 2010, c. 8, which came into force with the passing of Bill C-31; and the *Immigration and Refugee Protection Act* (IRPA), SC 2001, c. 27.

10 days before the hearing date (Refugee Protection Division Rules SOR/2012-256 (RPD Rules), rule 34). For applicants making an inland claim, the BOC form must be returned at the time of the initial eligibility interview, which (circularly) will take place when the BOC is completed (Immigration and Refugee Protection Regulations SOR/2002-227 (IRPR), reg. 159.8). While on the face of it, this gives the applicant unlimited time to complete the BOC form, legal aid and full welfare entitlements will not be available until after the eligibility interview. As such, advocates assisting the claimant will not be able to confirm that funding for legal assistance is available until after the BOC has been submitted (Showler 2012). The hearing for inland applicants must also take place within 60 days of referral to the Immigration Review Board (IRB) (IRPR, reg. 159).

The reforms envisage that the applicant will set out the 'full story' in the initial application form and the applicant must verify the form is 'complete, true and correct' (Immigration and Refugee Board of Canada 2012). Completing the BOC form requires the applicant to set out 'everything that is important for your claim' and the applicant must highlight how every subsequent change to the BOC differs from the claim expressed in the original form (RPD Rules, rule 9). This is particularly significant as credibility assessment continues to turn, in part, upon the consistency of the applicant's account of his or her evidence (Millbank 2009, Sweeney 2009). Peter Showler notes that in the past, eliciting the applicant's narrative of events has required at least two meetings with counsel to interview the claimant, usually with an interpreter present and the use of translation services for important pieces of evidence (Showler 2012, p. 6). It is difficult to conceive how an applicant will have time to secure representation (and legal aid where necessary) and complete and return this form within two weeks of entry. The date for the hearing will be determined when the claimant enters the country or at the eligibility interview for inland claimants. In most instances this date may only be modified to another date within the existing 60-day limit (RPD Rules, rule 54(5)).

However, by far the shortest time periods for filing and finalising a claim attach to applicants from a list of 'Designated Countries of Origin' (DCOs), a further major reform introduced by Bill C-31. Under the DCO reforms, the Minister may exercise a discretionary power to designate certain countries as 'safe'. Applicants from these states will be subject to even shorter determination timelines and very limited appeal mechanisms (*Bill C-31*, clause 58, *Immigration and Refugee Protection Act*, s. 109.1). Specifically, hearings for applicants from these countries will take place within 30 days (inland claimants) or within 45 days (POE claimants) of referral to the IRB (IRPR 159.9). Applicants from the DCO list, also known as the 'Safe Country of Origin' list, will have no access at all to an administrative appeal, which is ordinarily conducted on the papers by the Refugee Appeal Division (*Bill C-31*, clause 36(1), IRPA, s. 110(2)(d.1)).⁸ As such, for applicants from certain countries, all fact-finding will be finalised within six weeks.

The speed of status determination was at the centre of the Canadian Government's justifications for the introduction of the DCO list (CIC 2012b). The Citizenship and Immigration Canada (CIC) website declares that 'too much time and too many resources are spent reviewing these unfounded claims' (CIC 2012b). The site further explains that refugee claimants from these countries will have their claims 'processed fast' which will ensure that those who need it 'get protection fast' and those with unfounded claims 'are sent home quickly through expedited processing' (CIC 2012b). As noted, speed and efficiency are not, on their own, negative features of RSD. However, in the case of Bill C-31, fast processing times are deployed cynically. The need for speedy determinations is articulated alongside claims that refugee claims are unfounded. And, in the examples examined here,

⁸ The applicant may appeal to the Canadian Federal Court for judicial review, but there will be no automatic stay on removal of the applicant if an appeal is filed. The applicant must also apply to the Court for a stay to prevent removal before the appeal is heard (IRPR, regulation 231(2)).

efficiency-focused reforms are attended by expansions of executive discretion (such as Ministerial designations of DCOs) to counter the alleged abuse of RSD systems.

The new timelines will impede the ability of applicants to gather any necessary evidence and seek expert opinion or witnesses where necessary, in order to have the fairest and best possible chance at shaping their stories in a manner that accords with the demands of Canadian refugee law. This is particularly troubling in an area of decision-making that has already been identified as one of the most difficult, precisely as a result of the lack of other kinds of evidence available (Rousseau *et al.* 2002). Indeed, the pressure and strain on applicants giving oral testimony will necessarily be exacerbated by the reforms. As Catherine Dauvergne (2013) notes:

[T]hose seeking protection must now complete their initial paperwork within 15 days. This will not be possible. Forms will be incomplete and inaccurate ... Decision makers will have to rely on less information than ever before. This will lead to more mistakes. In refugee decision making, errors cost lives.

Critically, burdening applicants with tight timelines and procedural hurdles occurs while the substance of RSD law remains intact. The truncation and acceleration of RSD processes place great faith in Canadian status determination bodies, which are presented as reliable, efficient and effective. On the other hand, those making protection visa applications are presented as insincere, exploitative and burdensome. The RSD changes both reflect and create a culture of exclusion, and fit in neatly with previous observations about cultures of disbelief directed at status determination bodies. The reforms constrain the ability of applicants to speak, as well as how claims are received and heard when they are articulated. Claims must be made quickly, without basic procedural guarantees and in a context where applicants from DCOs are judged as wasting (Canadians') time when presenting their claims in full. According to the CIC, the aim of the DCO list is to deter the 'abuse of the refugee system by people who come from countries generally considered safe' (CIC 2012b). The text on the Canadian departmental site also argues that '[m]ost Canadians recognise that there are places in the world where it is less likely for a person to be persecuted compared to other areas. Yet many persons from these places try to claim asylum in Canada, but are later found not to need protection' (CIC 2012b).

The process of designating countries as safe is an entirely discretionary act, based on the Immigration Minister's view, once countries of origin meet rather slippery threshold criteria. This gives the Canadian State the power to decide (and revise at any point) which State nationals will be subject to the accelerated/truncated process. The Minister's non-reviewable designation may be applied if a State meets quantitative and qualitative criteria (*BRRRA* s. 12, *IRPA* s. 109.1). To trigger a quantitative designation, a country must meet the threshold of a combined rejection, withdrawal and abandonment rate of asylum claims at the IRB of 75 per cent or higher; or a combined withdrawal and abandonment rate of asylum claims at the IRB of 60 per cent or higher.⁹ Qualitative criteria apply to countries where, in all of the preceding three years, no more than 30 claims for Canadian asylum from that country were finalised. Countries must meet the qualitative criteria of the existence of an independent judicial system; and the recognition of basic democratic rights and freedoms, including mechanisms for redress; and the

⁹ In 2011 there were over 80 countries whose nationals lodged fewer than 30 claims in Canada (Puddicombe 2012, p. 4). Canadian lawyer and advocate, Warren Puddicombe's critique of the designation trigger criteria points to the arbitrariness and misleading nature of the numerical criteria, the vagueness of the qualitative criteria and the capacity for countries to be designated which might have overall 'good' records as rule of law and human rights respecting states but where certain minority groups still face serious and ongoing risk of persecution without state protection (Puddicombe 2012). For an analysis of the misleading nature of the Canadian Immigration and Review Board statistics representing abandoned or withdrawn claims in regards to Hungary in particular, see Macklin (2013, p. 115). See also Dauvergne (2012).

existence of civil society organisations, to be triggered for potential designation. In each instance, the Canadian Minister for Immigration has sole discretion to make the final decision regarding designation.

At the time of writing, 37 countries were on the 'safe' countries list (CIC 2012b). The designation of entire nations as safe for all persons raises major issues, including but not limited to the failure to analyse applicants' claims on a case-by-case basis; the apparent prejudgment of certain claims; and the potential marginalising of persecution of minority groups carried out by non-state actors (see further Costello 2005, Puddicombe 2012, Macklin 2013). Even though many of the States on the DCO list are generally understood as 'Western democracies', and so are attended by the assumption that they are not 'refugee producing', there are nominal democracies on the list that certainly do not fit this assumption. For example, the Canadian Minister for Immigration has designated Mexico, Chile and Hungary. North Korea is also on the list. Mexico and Hungary, in particular, are two of Canada's largest 'refugee-sending' states.¹⁰ Their inclusion on the list comes after attempts to limit Mexican and Czech applicants' ability to seek asylum in Canada by introducing new, harsher visa requirements for visitors from both countries in 2009 (Eggenschwiler 2010, Gilbert 2013). Audrey Macklin notes, the political context for the reforms' introduction also included the disproportionate representation of Hungarian Roma among asylum seekers in Canada and a desire to stem these arrivals (Macklin 2013, p. 101).

The Minister for Immigration said of Hungary that 98 per cent of Hungarian refugee claimants around the world choose to make their claims in Canada though they have unrestricted access to dozens of countries around the world and that 'virtually none of them turn out to be well-founded' (CBC News 2012).

The DCO list puts into effect the view that those seeking asylum lack credibility on a country-by-country basis. CIC do not mince words in relation to this view, claiming in support of the reforms that 'Canada is currently receiving a disproportionately high number of asylum claimants who come from countries that historically have very low acceptance rates at the independent Immigration and Refugee Board of Canada (IRB)' (CIC 2012a). Refugee applicants are presented as initiating unfounded claims as a means of gaining entry to Canada's sovereign territory. The time limits and procedural restrictions feed into constructions of onshore applicants as opportunistic but also as an economic drain on the state, and on those who are legitimately within the bounds of the state (Pratt and Valverde 2002).¹¹ In justification of the DCO reforms, the CIC departmental website states, 'too many tax dollars are spent on asylum claimants who are not in need of protection' (CIC 2012a). In this sense, the process must not just go faster because faster is better and cheaper (and cheaper is better), it must go faster because applicants are viewed to be abusing the system from the outset.

From the 1990s onwards, a host of European states introduced 'white lists', which functioned similarly to DCOs (Costello 2005, Macklin 2013, p. 103).¹² The Canadian Government cited these white lists as both a justification and a precedent for Canada's reforms (CIC 2012a).¹³ Notably, the most common reason for referring UK asylum claims to the DFT process is that applicants are from a country

¹⁰ Prior to the reforms, Hungary was Canada's 'highest' refugee sending country by a significant margin and Mexico was in the top five (CIC 2010).

¹¹ Another key aspect of the DCO reforms, not discussed in detail here, involves denying DCO applicants work permits for six months, access to public health care unless they pose a risk to public health (Puddicombe 2012)

¹² As Macklin notes, the EU Qualification Directive authorises Member States to use SCO lists in their national asylum regimes 'and contemplates the adoption of a common EU-level list of safe countries to which all Member states would subscribe.

¹³ The states mentioned on the Citizenship and Immigration Canada website as examples of other countries with safe country lists include the United Kingdom, Ireland, France, Germany, the Netherlands, Norway, Switzerland, Belgium and Finland (CIC 2012b).

designated as safe (Home Office Research and Statistics Directorate 2012). In open prejudice, these UK cases are deemed to be 'clearly unfounded' prior to assessment, unless it can be shown they are 'not clearly unfounded' (Nationality Immigration and Asylum Act 2002 (UK) s.94). In addition to their potential referral to the DFT process, UK asylum applicants from designated 'safe countries' may only appeal their asylum decision from outside the UK (Home Office Research and Statistics Directorate 2012).

Macklin argues that the 'logic animating [safe country of origin] lists is that asylum seekers from designated States are opportunistic migrants exploiting the refugee system (including its slow pace) to circumvent more restrictive regimes for non-citizens' (Macklin 2013, p. 102). What is significant here is that improving efficiency is synonymous with rejecting a greater number of claims, or preventing them from being initiated altogether, rather than the efficient determination of all lodged applications. Only five months after the reforms were introduced, the Canadian Immigration Minister stated in a press release that the new system had 'proven to be successful, as claims from designated countries of origin [had] decreased by 91 percent when compared to the same time period over the last six years' (CIC 2013).

The assumption that applicants from non-DCO countries are not genuine is subtler than the above statements. Nonetheless, the generally applicable tightening of RSD processes was justified as countering 'abuse of the system' (CIC 2013). Justification for the entire bundle of reforms was at once based on notions of economics and efficiency, and on discourses of asylum seekers as bogus and abusing the system. These factors work in tandem to create a system of processing that enacts and then, through an unfair process, excludes certain onshore claimants.

All of the timelines may only be varied in exceptional cases. While the hearing and return of BOC dates may be varied for 'reasons of fairness and natural justice' (IRPR, reg 159.9), there are no grounds for an extension due to the basis of the claim. The submission date of the BOC and the hearing may be extended for 'medical reasons' but the applicant must submit a medical certificate and/or evidence of a medical condition without delay and within the existing time limit (for the BOC, 15 days for POE claimants) (RPD Rules, rule 8). The new rules allow the date of the hearing to be changed and extended for up to ten days beyond the set date, where the applicant is a 'vulnerable person' and makes an application in writing at least three days prior to the set date (RPD Rules, rule 54(4)).

These exceptions raise a number of issues – and most significantly, they make no mention of gender, gender-based claims or the gender guidelines. The definition of a vulnerable person includes those 'who have suffered gender-related persecution'.¹⁴ However, vulnerable applicants can only apply for a hearing to be delayed by up to 10 days. The processes for a 'medical' extension will be difficult to complete without an advocate, and there is no guarantee the extension will be granted or that applicants will have an advocate at the early stages of their claim or in the first two weeks of entry. Even where an advocate is involved, there will be little time to gather evidence in support of claims that a client has a medical condition or is 'vulnerable', in order to achieve an extension.

¹⁴ 'Vulnerable person' means a person who has 'been identified as vulnerable under the *Chairperson Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB*' (RPD Rules, rule 1). Under the guideline vulnerable persons are 'individuals whose ability to present their cases before the IRB is severely impaired' and 'such persons may include, but would not be limited to, the mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, women who have suffered gender-related persecution, and individuals who have been victims of persecution based on sexual orientation and gender identity' (Guideline 8, section 1). Counsel for a person who wishes to be identified as a vulnerable person must make an application under the Rules, though the IRB will be sensitive to the difficulties faced by self-represented persons and will waive or modify the requirements as appropriate. The IRB may also act on its own initiative (Guideline 8, section 7).

The procedural limitations and timelines constrain, and in certain cases preclude, the ability for claims to be made. Like those applicants who are 'screened out' or fast-tracked through Australian processes, discussed in the next section, applicants from these countries will not be able to collect their thoughts or their evidence in order to articulate their claims in the manner required by Canadian RSD. As a result, their hastened and incomplete claims may come to act as proof that genuine and successful asylum seekers do not come from these States. The reforms communicate to individual decision-makers the 'executive's prejudgment of the merits of individual cases', compromising both the appearance and reality of adjudicative independence (Macklin 2013, p. 103). The rules and regulations make no specific mention of those who have experienced gender or sexuality related persecution. They do not make any exceptions for delayed disclosure in circumstances involving sexual harms, nor do they incorporate any of the existing guidelines about difficulties in remembering and articulating evidence, or the shame experienced by those making gender based claims (Baillot *et al.* 2009).

While refugee applicants have always been required to speak on the State's terms, these changes place even greater pressure on applicants to tell the right story as quickly, coherently, and as soon as possible. For those from DCOs, the realities of processing, including the requirement that a claim be finalised within 45 days of its filing, without access to administrative appeal processes, amounts to saying there is no claim at all. The Canadian Government's repeated justification for this reform, being that DCOs 'do not normally produce refugees', leaves individual claimants on shortened timelines in a situation where they are already understood as unlikely to be refugees (CIC 2013). Negative determinations, then, which reinforce these constructions, should not and will not come as a surprise.

The RSD reforms, as well as the other amendments made by Bill C-31, take place in the context of Canada's historical place as a 'best practice' example for the treatment of refugee and humanitarian entrants. In 2009 Macklin compared Canada's reputation as an 'especially welcome haven for refugees', and its liberal interpretation of the Refugees Convention with an increasing practice of keeping refugees 'out of earshot', such that those who fall within the refugee definition cannot access the system (Macklin 2009, p. 94). The reforms to RSD under Bill C-31 are in line with Macklin's observations about increasing constraints on asylum seekers' right to be heard in Canada. They complement reforms described by Macklin in 2009, making it near 'impossible for prospective asylum seekers to travel lawfully to Canada,' by limiting access to Canadian RSD once applicants arrive (Macklin 2009, p. 105). Donald Galloway echoes this assessment of the Bill C-31 reforms, arguing that their procedural amendments constitute a 'radical and revisionary shift in [Canadian] refugee law and the processes of refugee status determination,' such that the legal concept of the refugee is altered 'as radically as it would be by substantive redefinition' (Galloway 2014, pp. 39, 38). This shift and erosion of rights in Canada takes place in contrast to Australian refugee policy, which has for some time been associated with 'restrictive and deterrent' practices and with attempts to quarantine executive power over refugee applicants from judicial oversight and interference (Kneebone 2009, p. 172). The Australian practice of 'enhanced screening', which accords with these trends, is examined in detail in the following section.

4. 'Enhanced' screening and RSD: accelerated 'Screening-Out' and decision-making processes in Australia

The 'screening-in' of asylum applicants is a critical part of RSD processes and takes place in most refugee receiving States. Such screening-in processes usually involve border or customs officials establishing whether or not a person is seeking to make an asylum claim. It is usually a peremptory event, as the official generally does not have the power to determine the claim to asylum. If a person is 'screened in' and deemed to be seeking asylum, the requirement of *non-refoulement* under the

Refugees Convention is invoked, such that a State may not directly or indirectly return a person to any place where that person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion (*Convention relating to the Status of Refugees* 1951, article 33).

Under other international law obligations, a State has a duty not to *refouler* any person to a place where that person would face a real risk of irreparable harm by way of torture, or cruel, inhumane or degrading treatment, punishment, deprivation of life, or the death penalty (*Convention relating to the Status of Refugees* 1951, *Convention Against Torture* 1984, *International Covenant on Civil and Political Rights* 1966, see further Lauterpacht and Bethlehem 2003). The obligation applies to asylum seekers before they are assessed, who may gain refugee status but have not yet done so, and it is not subject to any exceptions. While the Refugees Convention is silent on the question of the precise process by which claims are to be determined, in order to meet the duty of *non-refoulement*, a state must use a reliable process to determine any claim to protection (UNHCR 2011, p. 37).¹⁵

In October 2012, the Australian government implemented an 'enhanced screening process' for Sri Lankan people arriving by boat without authorisation and in late 2013, extended this process to also apply to Vietnamese arrivals (Olle 2013a). Crucially, under the 'enhanced' process, those arriving by boat from countries designated by Department of Immigration and Border Protection officials can be immediately 'screened out' of the refugee status determination process and deported, with no further opportunity to present their claims.

From October 2012 to February 2013, enhanced screening of Sri Lankan arrivals took place without the knowledge of the Australian public or media (Reilly and La Forgia 2013). The persistent inquiries of opposition and minority parties during Parliament forced the government to reveal that the process originally targeted Sri Lankan arrivals on the basis of a 'pronounced rise in arrivals' from Sri Lanka from October to December 2012. The Government also revealed that Sri Lanka was chosen on the basis of its status as a prominent refugee-sending state, rather than on the basis that Sri Lankans are unlikely to be found to be Convention refugees (Reilly and La Forgia 2013, p. 143, Commonwealth Parliamentary Debates 2013, p. 33).

Like the Canadian DCO reforms, this 'enhanced' screening process is applied at the discretion of the executive, though the process in Australia has taken place solely as an executive measure, rather than as a statutory reform. Due to the nature and speed of the enhanced process, usually occurring within the first week of arrival, as well as its recent introduction, it has been subject to very little scrutiny or analysis. The basis for the designation of certain countries of origin for 'enhanced screening' in Australia has been even less transparent than the Canadian DCO designation process. Although currently the policy only applies to Sri Lankan and Vietnamese applicants, the Australian Immigration Minister has stated that the government intends to use the procedure in relation to other source countries (Morrison 2013). One of the main factors influencing the designation of countries will be whether the Government is able to establish repatriation arrangements with particular source countries (Morrison 2013).

A focus on enhanced screening procedures is particularly significant in the Australian context, where the executive has moved to exclude refugee applicants from Australian territory altogether, by sending refugee applicants 'offshore' to the

¹⁵ The UNHCR Handbook (2011), which does deal with questions of procedure sets out that: '(i) The competent official ... to whom the applicant addresses himself at the border or in the territory of a Contracting state should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority' Handbook at 37. The Handbook does not directly address screening out practices in these circumstances.

Australian territory of Christmas Island and to Papua New Guinea and Nauru (Taylor 2005, Kneebone 2006, Foster and Pobjoy 2011). To date, enhanced screening reforms have been far less visible than the off-shoring of refugee applicants, or physical policies of deterrence. Enhanced screening applies secretly to refugee applicants who reach Australian territory (Foster and Pobjoy 2011). The policy aims to exclude those who appear to have reached Australia, and thereby achieved partial inclusion and potential access to protection. However, for those summarily returned, the absence of basic procedural rights and access to ordinary RSD undermines the significance of their arrival.¹⁶

In terms of providing applicants with a reasonable opportunity to state that they would like to access protection, what is most significant about the enhanced screening process is that the applicant is not informed of his or right to seek asylum (Evidence to Senate Legal and Constitutional Affairs Legislation Committee 2013) or the right to legal assistance, and applicants are generally interviewed as soon as possible after they arrive. Under the enhanced process, Immigration Department officials with experience in refugee protection visa decision-making determine whether or not a person invokes Australia's obligations (Taylor 2013). Government ministers describe the enhanced screening process as involving two steps. The first being an initial interview, where a government officer must make a preliminary finding about whether the interviewee engages Australia's obligations under the Refugees Convention or other treaties (Taylor 2013). Then, as Savitri Taylor (2013) explains:

The information is then forwarded to a more senior departmental officer for review, usually on the same day. If the senior officer agrees with the initial finding, it is confirmed. If the senior officer disagrees with the initial finding, the case is referred to a second senior officer for another opinion. If the two senior officers disagree on whether an individual should be screened-out or not, the individual receives the "benefit of the doubt" and is "screened-in".

If 'screened out', applicants will not be given another chance to present their claim. Arrivals who are screened out by the enhanced process are found not to raise Australia's *non-refoulement* obligations. They may be immediately returned to their country of origin without being given access to Australia's ordinary refugee status determination mechanisms. They are not given access to administrative or judicial review of 'screening-out' decisions or access to legal assistance unless they ask for it directly (Australian Human Rights Commission 2013a).

The Immigration Department reported that only applicants who ask for legal help are given 'reasonable facilities' to contact a legal advisor, where 'reasonable facilities' include a telephone, a phonebook and an interpreter if necessary (Evidence to Senate Legal and Constitutional Affairs Legislation Committee 2013, p. 62). No further information is provided to the applicant. Somewhat obviously, like with Canada's shortened timelines, applicants have no opportunity to arrange medical or expert opinions in order to support the claim being made – including in relation to the applicant's ability to competently present his or her claim.

As at November 2013, the Department had returned to Sri Lanka 1070 Sri Lankans arriving by boat in Australia under the enhanced screening process (Australian Human Rights Commission 2013b, Evidence to Senate Legal and Constitutional Affairs Legislation Committee 2013, p. 36). Since individual decisions made under the enhanced screening process are not made public, it is difficult to gauge what kind of opportunity each applicant was given to articulate a desire to seek protection, or present any kind of relevant supporting material in order to be screened in. Nonetheless, in outlining the limited details available about the process, Taylor reports that during the interview, 'interviewees are asked: "what are your reasons for coming to Australia?" and, "do you have any other reasons for

¹⁶ I am grateful to an anonymous reviewer for drawing out this idea.

coming to Australia?'" (Taylor 2013). Then, if the interviewee claims they are fleeing from harm, 'follow-up questions are asked to probe the claim further' (Taylor 2013). Taylor rightly argues that since 'follow up questions' are asked, this involves 'an assessment of whether protection claims are credible and well-founded' (Taylor 2013). This is the case even though the only concern in relation to screening-in protocols should be whether protection claims are being made; the screening-in decision should not involve an evaluation of the claim.

Greg Lake, a former Immigration Department official who was involved in the process, confirms Taylor's account of the interview and highlights just how specific an applicant must be in order to invoke a protection claim under the enhanced process, writing that:

[I]f they say, 'I've run for my life because this government is persecuting me, because I'm a Tamil', for example, that's the kind of thing we'll go and explore with further questions ... But if they didn't say anything along those lines ... if the question is asked and nothing is invoked, at times it can be done in one question, which I think is very dangerous... (Cooper 2013).

Australian commentators have criticised the enhanced screening process as breaching Australia's international and *non-refoulement* obligations (Taylor 2013, Howie 2013). Alongside this important critique, the process should also be understood as a manifestation of procedural reforms that have curtailed the rights of refugee applicants to present their claims and have them reviewed. Like the Canadian DCO and timeline reforms, Australia's enhanced screening process is productively analysed in the context of acceleration and truncation. In the rhetoric of the Australian Government, the 'screening out' of certain persons is not just a process, but also an 'enhanced' one. It is significant that the Government wishes to characterise its peremptory screening practice as a *process* at all. Here, just as with the Canadian 'safe country lists', enhancing or improving the process primarily entails making it faster and more efficient. Processing bodies are expected to strive towards goals of efficiency and economy. As a consequence, the asylum seeker is denied the ability to articulate his or her claim but the claim is nonetheless 'processed' and shielded from further review.

Alongside the capacity of enhanced screening processes to limit asylum seekers' ability to articulate their claims, there is also evidence that applicants conveying a *prima facie* need for protection have been screened out. Greg Lake, the former official involved in enhanced screenings, publicly expressed a concern that legitimate asylum seekers had been turned back as a result of the screening interview (Cooper 2013). An Australian journalist tracked the case of a Vietnamese woman and her family, who were screened out and informed of their imminent deportation before advocates intervened. After the intervention, but still on the strength of their original interview, the family was screened back in (Olle 2013b). Concerns about such practices sparked an application for an injunction to stop the deportation of 57 Sri Lankans who had been 'screened out' in December 2012. After the High Court granted the injunction and signaled that it would seek information about each of the Sri Lankans, the Minister for Immigration advised that their claims would be processed and that no further action was necessary to halt their removal (Lee 2012). However, no major amendment of the policy has followed as a result.

In July 2014, the Australian Government interdicted two boats carrying 198 asylum seekers. 41 Sri Lankans aboard one of the vessels had their claims 'processed' at sea under the enhanced screening policy (Minister for Immigration and Border Protection 2014). All but one of the 41 claims were rejected and all those onboard were directly returned to Sri Lanka (Whyte 2014). This very high profile instance of enhanced screening was widely criticised (Laughland and Dehghan 2014). It was revealed applicants had been asked 'four questions' via teleconference while on the high seas, before having their claims assessed, an even more limited 'process' than

previous enhanced screening practices. The questions included the asylum seeker's name, their country of origin, where they had come from and why they had left (Whyte 2014). The UNHCR, among many others, expressed 'deep concern' about the legality of the transfer, and at the time of writing the matter of *CPCF v Minister for Immigration and Border Protection & Anor (S169/2014)* is before the Australian High Court, challenging the legality of the prolonged at sea detention of the second, intercepted boat (Laughland and Denghan 2014).¹⁷

As with the Canadian reforms, gender guidelines addressing the particular problems women claimants face at determination hearings have clearly not been incorporated into Australia's enhanced screening procedures. The existing Australian Gender guidelines, for example, explicitly set the 'difficulty an applicant may have in discussing his or her experiences of persecution because of shame or trauma' (Refugee and Migration Review Tribunal 2010, section 14). A similar warning about late disclosure and shame exists in the Canadian guidelines (Immigration and Refugee Board 1996, section D(1)). The Canadian guidelines also suggest that in some cases it will be appropriate to consider whether claimants 'should be allowed to have the option of providing their testimony outside the hearing room by affidavit or by videotape' (Immigration and Refugee Board 1996, section D(3)). The Australian guidelines reinforce the need to create 'an open and reassuring environment to establish trust and encourage the disclosure of personal information' where gender-related claims are made (Refugee and Migration Review Tribunal 2010, section 17).

It is obvious that the above guidelines and directions will have no place within enhanced screening procedures. Criticisms of the UK's DFT process included that the speed of the process essentially created a 'refusal factory' for female applicants, especially those who did not disclose the sexual violence at the centre of their claims (Cutler 2007). These observations are germane to the 'enhanced' screening process, where the applicant must articulate a claim immediately in order to enter the determination process.

Like Canada, the aim of the Australian process is one of reducing and limiting the number of successful asylum claims and this is enacted via procedural reforms. A media release of Tony Abbott, prior to his election as Prime Minister, stated that his party would 'deny permanent residency through a robust new assessment regime and the reintroduction of temporary protection visas' (Abbott 2013). The media release also stated that his 'Coalition will put those who deliberately seek to frustrate our refugee assessment process not at the back of the queue, but out of the queue altogether' (Abbott 2013).¹⁸

At the time of writing in 2014 the House of Representatives had passed the Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Bill 2014. The Bill proposes an expansive and diverse package of reforms, which includes among other things the acceleration of the refugee status determination process in Australia, and the removal or exclusion of merits review for certain groups of asylum seekers.¹⁹ As at October 2014, the Senate Legal and

¹⁷ The passengers aboard one of the boats were detained by the Australian government on the high seas for four weeks, before being transferred to the Australian offshore processing centre in Nauru (Doherty 2014).

¹⁸ In the same press release, Tony Abbott characterised the existing RSD process in Australia as 'a tick and flick' system of assessment where 90 per cent of 'illegal boat arrivals' are 'receiving permanent visas' (Abbott 2013).

¹⁹ The Bill sets out that acceleration procedures will be applied to applicants who arrived irregularly by boat or plane after August 2012. These 'fast track applicants' will only be entitled to merits review on the papers. A further limitation on review will apply to another subset within this group named, 'excluded fast review track applicants.' This group will not be entitled to merits review at all and will include applicants arriving after August 2012 who are assessed as: having submitted a bogus document in support of their claim without reasonable explanation; or who have a manifestly unfounded claim; or who have been refused protection elsewhere; or those who are deemed to have passed through a safe

Constitutional Affairs was conducting an inquiry into the bill, and its passage through the Australian Senate remained uncertain.

The Bill reflects a policy promise of the current government to speedily resolve a large number of outstanding asylum claims and to introduce temporary protection visas in Australia (Abbott 2013). The proposed reforms do not accelerate first instance determinations. However, their proposal to exclude or remove access to administrative review of decisions for certain applicants will have a significant effect, as first instance decisions are generally made extremely quickly. In 2012-13, for example, 51 per cent of all first instance determinations were made within 90 days, and in 2011-12, the median number of days to determine primary cases was 44 days (Department of Immigration and Citizenship 2013, Outcome 2).

The aims of enhanced screening, as a mode of silencing and excluding refugee applicants, is reinforced in light of reports that former Australian Prime Minister Julia Gillard put pressure on the Department of Immigration to deport as many Sri Lankans as possible as part of the process, with an expectation that up to 400 Sri Lankans arriving by boat could be sent back to Colombo per week (Cooper 2013). Also, comments made by Australian Immigration Minister Scott Morrison, indicated that the Government believed that the percentage of 'screen outs' achieved was too low since 'prior to the election, only one in five Sri Lankans were screened out and returned by the previous government' and the new Government did not plan to deal in half measures and planned to take 'a much stronger position on these issues' (Olle 2013b).

In addition to the silencing or foreclosing of asylum seekers' ability to speak, Reilly and La Forgia (2013) argue that 'enhanced screening' and other procedural moves that enforce secrecy in relation to asylum seekers affect the ability of 'the public' to discuss matters, particularly cruelty and harm, that relate to asylum seekers. They argue that because 'democracy is government through communication', secret pre-screening processes prevent democratic deliberation and shift the capacity for moral responsibility away from the polity and to the government and the executive (Reilly and La Forgia 2013, p. 144). Hastened, secret dealings with asylum seekers entail that the public loses its ability to speak competently about onshore refugees and their treatment (Reilly and La Forgia 2013, p. 144). While the focus of this piece is not the relationship between RSD processing and democratic governance, Reilly and La Forgia's concerns echo claims made by critical race and feminist theorists, who argue that we construct social reality by devising and sanctioning certain stories over others, and that marginalised groups challenge 'official' or legal stories about them by providing 'counter' stories that reflect their experiences and subject positions (Delgado 1989, Ewick and Silbey 1995).

The direct consequence of enhanced screening is that select groups of asylum seekers in Australia will be given the most limited opportunity to date to present their claims. Their applications will then be denied *because* no claim is evident, or because their claim has been unsuccessfully made out. As a result, these applicants will be constructed as illegitimate or fraudulent refugee applicants. And, the need to remove allegedly 'fraudulent' or bogus asylum seekers from the system was of course at the centre of justifications for these reforms at their outset.

5. Conclusion

The Australian and Canadian governments have each characterised the success of the reforms discussed in this piece in terms of their ability to deter onshore refugee applicants. Although the reforms were each introduced against a backdrop of improving the efficiency of RSD, in each instance their success has been measured, at least in part, in relation to deterrence rates. Soon after Bill C-31's introduction,

third country or to have had access to effective protection elsewhere: Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.

Canadian Minister for Immigration Jason Kenney commented that the reforms were already successful as they have had fewer people applying and those who did apply were achieving a lower success rate (Kenny 2013). In Australia, the Government set enhanced screening targets, which aimed to reduce the number of onshore refugee applicants through fast screening out procedures (Taylor 2013).

The two packages of reform exemplify a pattern of accelerated RSD processes in refugee-receiving states. By denying asylum seekers the time and space to gather and articulate their stories and then rejecting claims *due to* a lack of credible evidence, the new procedures reinforce claims that refugee applicants are illegitimate and fraudulent. When asylum seekers' claims are rejected, these rejections are used to signal the 'correctness' of excluding such applicants and of the reforms that achieve these exclusions. These diminished processes 'let' applicants into an ultimately procedurally unfair system, and then use the increased chance of a negative outcome to both physically and rhetorically exclude them.

These procedural reforms, that speed up and truncate RSD, not only enact the exclusion of certain refugee applicants. The changes also dismiss and undo decades of reform that have attempted to recognise the unique difficulties faced by certain kinds of applicants, namely women and applicants making gender and sexuality based claims, as well as applicants with histories of trauma and torture. The analyses of fast-tracking reforms in the UK and Netherlands confirm that those making gender-based claims will be among those most excluded as a consequence of reforming RSD using speed, economy and efficiency as primary goals and outcomes.

Macklin has described the phenomenon of the 'disappearing refugee'. By this she does not mean that asylum seekers are no longer coming to the territories of wealthy industrial states. Rather, that a series of discursive moves and the conjunction of legal and popular cultures have eroded the idea that those who seek onshore asylum might actually be refugees (Macklin 2005, p. 101). Macklin's observations hold true in relation to contemporary procedural reforms of RSD, which attempt to vanish genuine refugees from the territory of Western States. To date, scholars have observed and critiqued a culture of disbelief within refugee decision-making and identified credibility assessment as a major barrier to accessing protection. With refugee processing reforms, the disbelief has been shifted to restricting applicants' access to RSD at all, and ultimately has created a fast and efficient means of exclusion for the many claimants who make it 'in' but fail to meet the new procedural strictures and deadlines imposed on them.

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