

Contemporary Comment

Every Death Counts: An Argument for Counting Deaths in Immigration Custody in the National Deaths in Custody Collection

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Abstract

The Australian Institute of Criminology ('AIC') is the Australian Government's designated monitoring body responsible for reporting on deaths in custody in Australia under the National Deaths in Custody Program ('NDICP'). Although the Border Crossing Observatory¹ has recorded the deaths of 77 persons in Australian immigration custody since 2000, these deaths are not included in NDICP annual reporting. In Australia, official deaths in custody monitoring and reporting have only accounted for those people who have died while in the custodial settings of prison, juvenile detention, and police custody (Lyneham, Joudo-Larson and Beacroft 2010). Official monitoring and reporting of deaths in custody in Australia does not consider, account for or report on deaths that occur in Australian onshore and offshore immigration detention centres, or deaths that occur while authorities attempt to take a suspected unlawful non-citizen into immigration custody, either in the process of offshore interdiction or on the mainland. We argue that deaths within these immigration custodial settings should be included under existing arrangements for monitoring and reporting in the interests of accountability and equity under the Australian border control regime.

Keywords: deaths in custody – accountability – Australian border deaths – Australia – Border Crossing Observatory – National Deaths in Custody Program

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¹ Established in 2010 at Monash University, The Border Crossing Observatory is an innovative virtual research centre that connects Australian and international stakeholders to high-quality, independent and cutting-edge research on border crossings: see <<http://www.borderobservatory.org>>.

Introduction

The death of Reza Berati on Manus Island in February 2014 brought to many people's attention both the perils of offshore detention and the absence of procedures and institutions to ensure democratic accountability for the tragedy. Alongside this controversial and high-profile event, many other non-citizens have perished in their attempts to enter or remain in Australia. Since 2000, the Border Crossing Observatory has recorded the names or descriptions of 1969 people on the Australian Border Deaths Database.² The majority of these people have drowned while trying to enter Australia by boat to lodge asylum claims, but other deaths have occurred inside immigration custodial settings or during contact with law enforcement officials, and thus may be linked to the operation of Australian border controls.

Of these contexts in which border-related deaths are known to occur, three generate a duty of care that could reasonably be considered to bring deaths within the criteria of 'deaths in custody': deaths within immigration detention centres operated under Australian legal authority (whether located onshore or offshore); deaths while under escort during deportation or while designated authorities (police or Department of Immigration and Citizenship compliance field officers) are attempting to take individuals into custody under the federal *Migration Act 1958* (Cth); and deaths that occur during offshore interdiction or rescue operations in Australian territorial waters once individuals or vessels have come under the surveillance or control of Australian border authorities.

To date, the Border Crossing Observatory has recorded 77 deaths in Australian immigration custody with 29 deaths recorded in onshore immigration detention centres, six in offshore immigration detention centres, 40 during interdiction at sea by Australian border control authorities and two from pursuit by immigration or police authorities in regards to their immigration status.³ These deaths in immigration custody raise serious questions about duty of care and state culpability. However, as it stands, the system effectively precludes a thorough consideration of these questions. This is a significant omission in human rights protections for irregular migrants and other non-citizens considering the burgeoning use of offshore interdiction, forced deportation and administrative detention of unlawful non-citizens, not only in Australia but worldwide.

² At 23 February 2015, 1969 deaths were recorded. The Australian Government does not provide an official count of Australian border deaths to the public. In the absence of this information, the Border Crossing Observatory has made the Australian Border Deaths Database a permanent fixture that is regularly updated as border deaths are reported. Its purpose is to count, and account for, border-related deaths in Australia from 2000 to the present. The number of deaths recorded includes estimates of passengers missing from shipwrecked vessels, believed drowned. See Australian Border Deaths Database <<http://artsonline.monash.edu.au/thebordercrossingobservatory/publications/australian-border-deaths-database/>>.

³ Determining which offshore deaths are to be flagged as 'in custody' is not straightforward as there is often not much detail available in media reports about the exact circumstances of sinkings. For statistical purposes a broad approach is taken so that any report that indicates the presence of Australian border control personnel, including in a rescue situation, is counted as 'in custody'. Other fatalities that are potentially classifiable as deaths in custody may not be recorded as such if no mention is made of Australian authorities in source reports.

Expanding the national definition of ‘deaths in custody’

The Royal Commission into Aboriginal Deaths in Custody (‘RCIADC’) established the following definition that has been used since 1992 as the official definition to monitor Australian deaths in custody:

- the death wherever occurring of a person who is in prison custody or police custody or detention as a juvenile;
- the death wherever occurring of a person whose death is caused or contributed to by traumatic injuries sustained or by lack of proper care whilst in custody;
- the death wherever occurring of a person who dies or is fatally injured in the process of police or prison officers attempting to detain that person; and
- the death wherever occurring of a person who dies or is fatally injured in the process of that person escaping or attempting to escape from prison custody or police custody or juvenile detention (RCIADC 1991:4.5.45).

The law enforcement scenarios set out in this definition have clear parallels in the border control context. We have argued elsewhere that ‘deaths are considered to be potentially border-related if they occur at any of the functionally defined “border sites”’: at the physical border, en route, in offshore or onshore detention, during deportation’ (Weber and Pickering 2012:5). Custodial settings at border sites, where responsibility of care falls on Australian law enforcement officials, means that certain deaths at the border have scope to be reasonably considered as ‘deaths in custody’.

It is important to note that, as with the recognition of deaths in custody within criminal justice settings, applying the ‘deaths in custody’ label for the purposes of investigation and monitoring, does not constitute an attribution of responsibility for the death, a role that is reserved for coronial and criminal courts. However, the opening up of the deaths in custody definition brings a much wider range of official actors under scrutiny, including immigration compliance officers, state police exercising their Commonwealth powers under the Migration Act 1958, private security employees working in detention centres or involved in the transport or deportation of non-citizens, and Customs and Australian Defence Force personnel implementing offshore interdiction policies, and would significantly expand the information available to scholars, advocates and the wider public about this secretive area of public policy.

Monitoring and reporting on deaths in custody: The Australian Institute of Criminology National Deaths in Custody Program

The Australian Institute of Criminology (‘AIC’) National Deaths in Custody Program was set up in response to recommendations from the RCIADC report to monitor and report annually on deaths in custody from 1980 to the present (Lyneham and Chan 2013). The purpose of the program is to examine the circumstances of deaths in prison, police custody and juvenile detention around Australia, report on the number of deaths in custody in Australia and the patterns and trends observed in those deaths (AIC 2015). The database is developed using records from state and territory police services, correction and juvenile agencies and relevant coronial reports.

For the purposes of monitoring and reporting, the National Deaths in Custody Program uses the RCIADC definition of ‘deaths in custody’ and the 1994 resolution of the Australasian Police Ministers’ Council (‘APMC’) definition of ‘deaths in police custody’, which extended

the definition of police custody beyond institutional settings to include deaths during police operations (Lyneham, Joudo-Larson and Beacroft 2010). However, the increasing number of deaths in immigration custody has led to calls for the monitoring program to be extended to cover those deaths that take place in custodial settings outside the criminal justice system (see, for example, Inga Ting's *Crikey* article 'Immigration Detention, 27 Dead and (Not) Counting' reporting on the AIC's failure to record these deaths in immigration detention as deaths in custody (Ting 2010)). Counting and accounting for deaths in Australian immigration custody has been the subject of an ongoing campaign hosted by the Border Crossing Observatory since 2012.⁴

According to some reports, the AIC has justified the exclusion of these custodial deaths on historical grounds:

The terms of reference that came out of the Royal Commission into Aboriginal Deaths in Custody for us [the AIC] were such that we look at deaths in custody as a result of people incarcerated under the criminal law. No consideration was ever given to us looking at people detained under immigration law and our reporting on deaths in custody has been on that basis ever since (AIC spokesman cited in Ting 2010).

However, pressure for change was at least acknowledged in the Foreword of the 2010 NDICP report (Lyneham, Joudo-Larson and Beacroft 2010:iii), which recognises at least one of the contexts in which we would contend that deaths in immigration custody occur: 'This report analyses deaths occurring in custodial settings, such as prison and juvenile detention, as well as police custody and related operations, such as sieges and motor vehicle pursuits. It does not consider deaths in detention centres under immigration legislation.'

The 2013 NDICP Monitoring Report, publishing data for the period from January 1980 to June 2011, goes one step further to acknowledge that deaths in immigration detention centres are deaths in custody. However, other immigration custodial settings are again not recognised:

Deaths of persons in the custody of the Department of Immigration and Citizenship, such as in immigration detention centres and other secure custody settings, are currently outside the scope of the NDICP. The AIC recognises that deaths in immigration detention centres are deaths in custody ... Any extension of the NDICP and how that might be achieved, rests with the AIC Director. However, changing the terms of the monitoring program is not a simple matter, as it relies on both Commonwealth and state government involvement and consent (Lyneham and Chan 2013:150).⁵

While deaths in immigration detention are at least recognised now as deaths in custody, the AIC has not yet managed to change the terms of their reporting requirements to include these deaths, apparently due to the inflexibility of bureaucratic processes, and the conflictual politics that invariably arises in federal-state negotiations. The inclusion of deaths in offshore detention facilities and during interdiction at sea has apparently not been considered, although

⁴ The Border Crossing Observatory launched the 'Count Border Deaths Campaign' in 2012 in response to the Australian Government's failure to officially count and account for deaths in Australian immigration custody. The campaign uses evidence on deaths in immigration custody in Australia as a foundation from which to push the Australian government to recognise and respond to the gap in deaths in custody reporting and to recognise that deaths in immigration custody in Australia are a serious and under-reported issue: see <<http://artsonline.monash.edu.au/thebordercrossingobservatory/news-events/count-border-deaths-campaign/>>.

⁵ The recognition by the AIC deaths in custody monitoring and reporting program of deaths in immigration detention as deaths in custody appears in Appendix A to the 2011 monitoring report 'Review of the National Deaths in Custody Program'. A comprehensive review of the National Deaths in Custody Program was conducted in 2011 and included a review of scope of monitoring and definitions.

they raise significant questions about extra-territorial accountability and may require international collaboration to answer them.

State by state: Coroners' definitions of 'deaths in custody'

State Coroners are an important source of information about custodial deaths. Of the 77 identified deaths from 47 incidents in immigration custody recorded by the Australian Border Deaths Database, 24 incidents are known to have resulted in a coronial inquest with two parliamentary inquiries (relating to Reza Barati's death on Manus Island during the 16–18 February 2014 incident). Only 11 of the resulting reports and the parliamentary reports are currently available for public access, accounting for the deaths of 16 of 77 persons.⁶

Within Australia's federation, investigating and reporting on deaths in custody is the legal responsibility of each State Coroner's office (for more detail on state procedures, see Powell, Weber and Pickering 2013). The legal definition of 'deaths in custody' is presented under the Coroners Act of each state. Some of these definitions expand on the contexts in which custodial deaths can occur. For example, the Australia Capital Territory ('ACT') legislation specifies detention under the *Mental Health Treatment and Care Act 1994* (ACT) and attendance on community service orders as locations where deaths in custody can occur. But no state definition of 'death in custody', 'person held in custody' or 'person held in care' explicitly includes individuals who die in immigration custodial settings. However, the definitions of 'in custody' used by some jurisdictions that include generic references to 'detention' (ACT, South Australia) and 'other' lawful custody (New South Wales) leave room for wide interpretation that has the potential to include immigration custody settings and immigration enforcement circumstances. Although it is not clear on the face of the legislation, the AIC has claimed that deaths in immigration detention 'are the subject of a mandatory coronial inquest under every State Coroner's Act' (Lyneham and Chan 2013:150).

According to our enquiries, several deaths related to immigration control have been held to fall under this definition as far as coronial procedures are concerned. However, the approach to classifying these deaths as deaths in custody is discretionary and varies across different state jurisdictions and these cases are not then referred to the NDICP for recording. Examples include the death of Wah Aun Chan in South Australia, which was considered a death in custody because it occurred in the context of a traffic stop by police, and the Ashmore Reef SIEV 36 explosion during an interception by the Australian Navy where Afghans Mohammed Hassan Ayubi, Muzafar Ali Sefarali, Mohammed Amen Zamen, Awar Nader and Baquer Husani all died. On the other hand, even high-profile deaths, such as the killing of Reza Barati on Manus Island, have fallen outside the jurisdiction of state coroners and have been responded to, controversially, with ad hoc government inquiries and counter-inquiries (Senate Legal and Constitutional Affairs References Committee 2014; Cornall 2014).

Against this background of limited or uncertain coronial jurisdiction, two border death incidents referred to the Western Australian Coroner for the conduct of an inquest

⁶ The 11 Coronial inquests publically available include: Mohammed Saleh (WA); Nurjan and Fatima Hussein (WA); Fatima Irfani (WA); the Ashmore Reef Explosion resulting in the deaths of Mohammed Hassan Ayubi, Muzafar Ali Sefarali, Mohammed Amen Zamen, Awar Nader and Baquer Husani (NT); Wah Aun Chan (SA); Josefa Raulini, Ahmad al-Akabi and David Saunders (joint NSW Coronial Inquest); Mohammed Heri (NT); Mansur la Ibu (NT); Alexander Nikolaevich Vasilkov (WA); Senate Legal and Constitutional Affairs References Committee (2014) 'Incident at the Manus Island Detention Centre from 16 February to 18 February 2014' for the death of Reza Barati.

(Mohammed Saleh, June 2001 and Fatima Irfani, January 2003) resulted in the Coroner calling for deaths in immigration detention centres to be included under the definition of 'deaths in care' within state legislation (*Irfani v State Coroner*). The Coroner used the Saleh case as a means to push for legislative change to widen the definition of 'in care' to include persons held in immigration detention. The death of Saleh was used by the Coroner to exemplify that a person held in immigration detention does not meet the definition of a person held in care under the current legislation, the implication being that a change in legislation would be desirable. In the *Irfani* case, the Coroner ruled that, as a person held in immigration detention, her death was indistinguishable from a person held in care, while acknowledging the *Coroner's Act 1996* (WA) failed to recognise immigration detention as a place of care (*Irfani v State Coroner*). Although these are positive developments giving solid cause for an expansion of the current custodial definitions to incorporate immigration custodial settings, these cases have not sufficiently spurred legislators to approach investigations into deaths in immigration custody in such a systematic way. The present discretionary arrangements for coronial inquests into deaths in immigration custody by state and territory coroners are a fragile basis on which to seek accountability for the deaths of non-citizens in custodial settings.

International human rights protocols: Promoting increased accountability for deaths in immigration custody

The kinds of deaths we identify as deaths in custody and the sorts of accountability mechanisms proposed are informed by global attempts to increase compliance with human rights mechanisms and processes (see, for example, Australian Human Rights Commission 2013). Unfortunately, immigration custody is often seen as an exceptional form of sovereign control used to trump concerns for individual human rights.

The *Refugee Convention*, the *International Covenant on Civil and Political Rights* ('ICCPR') and the *Optional Protocol to the Convention against Torture* ('OPCAT') are international human rights instruments that should work to promote increased accountability for deaths in immigration custody. The *Refugee Convention* and the ICCPR uphold that the detention of asylum seekers should be as a last resort and only when non-custodial alternatives have been considered unsuitable in each individual case. It is known and widely reported in the media and by the United Nations and other human rights monitoring bodies that the Australian Government's mandatory detention policy has breached the ICCPR prohibition on arbitrary detention on numerous occasions (Australian Human Rights Commission 2014; Maloney 2012; Laughland 2013; UNHCR 2012, 2013a, 2013b, 2013c).

The OPCAT provides a platform for independent monitoring and inspection in all places of detention, including immigration detention, in an effort to prevent ill treatment and promote humane conditions of all detainees. The evidence available overwhelmingly shows that such scrutiny can prevent ill treatment and death. Australia has not yet ratified OPCAT after signing the protocol in 2010.

Recording and reporting on deaths in immigration custody within the NDICP would be a basic first step towards providing an accountability framework for immigration detention that compares with the standards expected in criminal justice contexts.

Conclusion

While the reported cases of deaths in immigration custody in Australia do raise complex and unique definitional issues, applying a wider definition of 'deaths in custody' to include immigration custodial settings in the AIC National Deaths in Custody Monitoring Program would greatly increase the knowledge base of deaths that occur under the custody of Australian law enforcement officials. It would also indicate that the deaths of non-citizens while under the care and control of government officials are being accorded the same significance as the deaths of Australian citizens, and could bolster human rights protections in order to prevent such deaths from occurring. The inclusion of deaths occurring in offshore locations presents particular bureaucratic difficulties, but is necessary in order to respond to the unique circumstances of border control where state authority is increasingly expressed offshore. The requirement for better monitoring in these unaccountable spaces is currently under discussion in international fora (for example, see Brian and Laczko 2014).

Our information is that the AIC is currently considering a proposal for incorporating deaths in immigration custody into their regular reporting. The most recent update is provided by the 2013 National Deaths in Custody Program Monitoring Report, which states:

At the time of writing, the AIC has engaged in discussions with the Department of Immigration and Citizenship about undertaking research into deaths in immigration custody. Whether such research is undertaken and subsequently leads to an expansion in scope of the NDICP to include deaths of immigration detainees is yet to be determined (Lyneham and Chan 2013:150).

This statement indicates that there is scope and potential for deaths in immigration custody to be counted and accounted for by Australia's NDICP monitoring and reporting, but also a seeming lack of urgency about the need to instigate these systems. The narrow scope of the AIC's deaths in custody classification only includes deaths in immigration detention centres, which gives rise to a cause for concern that other custodial deaths will likely never be counted and accounted for.

Achieving a uniform coronial response to deaths in immigration custody settings is even more challenging, since jurisdiction for these functions resides at state level and relies on the discretion of individual coroners as to whether they will treat the death as a death in custody, although individual coroners have taken some steps to bring these cases under the deaths in custody umbrella. The introduction of a Commonwealth power to investigate offshore deaths in which a duty of care by the Australian Government is apparent may be a fruitful avenue for alleviating the current lack of accountability in these areas. This power might possibly reside with the Commonwealth Ombudsman, who has been active in addressing immigration matters.

Robust data on deaths in custody is widely accepted as critical to contribute to efforts to prevent further deaths and to ensure appropriate accountability for processes and practices contributing to lives lost. For Australian criminologists, the inclusion of deaths in immigration detention is a common-sense shift achievable within the existing DICMP and one that surely should not take any longer. To overlook or resist including these deaths in the program is a failure to comprehend the deaths within a growing system of incarceration, and places Australia at odds with internationally accepted definitions and approaches to preventing and responding to deaths in immigration detention. Every effort should be taken to decrease deaths in immigration detention. Counting is the least criminologists can contribute to this effort.

Case

Irfani v State Coroner [2011] WASC 270 (3 October 2011)

Legislation

Coroner's Act 1996 (WA)

Mental Health Treatment and Care Act 1994 (ACT)

Migration Act 1958 (Cth)

Conventions

Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954)

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006)

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