3rd International Conference

on Public Policy (ICPP3)

June 28-30, 2017 – Singapore

Panel T02P06 Session 3

Changing Role of the State: Interface of Law and Public Policy

Title of the paper

SCRUTINY OF OPERATION SOVEREIGN BORDERS 'OPERATIONAL MATTERS' – A NEW POLITICAL ROLE FOR AN OLD LEGAL DICHOTOMY IN AUSTRALIA?

Author(s)

Ms Suzanne Bevacqua and Dr. John Bevacqua

La Trobe University, Australia

s.bevacqua@latrobe.edu.au

j.bevacqua@latrobe.edu.au

Date of presentation

Thursday, 29th June 2017

SCRUTINY OF OPERATION SOVEREIGN BORDERS 'OPERATIONAL MATTERS' – A NEW POLITICAL ROLE FOR AN OLD LEGAL DICHOTOMY IN AUSTRALIA?

by

Ms Suzanne Bevacqua and Dr. John Bevacqua*

ABSTRACT

The Australian Government has consistently referred to the need to keep 'operational matters' associated with implementation of its 'Operation Sovereign Borders' offshore immigration control policies secret. This insistence has drawn significant and sustained criticism from media, academic commentators and refugee advocates who have called for greater transparency and scrutiny of operational aspects of these policies. This paper adds to these calls by examining the Government's use of the term 'operational matters' through the lens of the substantial body of legal precedent associated with the use of that term as part of the 'policy/operational dichotomy' a central tool for delineating the limits of sovereign immunity from suit and judicial scrutiny. It calls for the Government to adopt a use of the term more consistent with that body of legal precedent in delineating which aspects of its 'Operation Sovereign Borders' offshore immigration control policies should be disclosed for public scrutiny and which aspects justify continuing to be protected by a cloak of non-disclosure.

PART I - INTRODUCTION

It is trite but true that the Australian Government's Operation Sovereign Borders ('OSB') immigration border control policies are extremely controversial. Whilst key aspects of the policy have enjoyed significant public support[1], OSB has also been subjected to intense criticism from parts of the media, a range of academic commentators[2] and human rights and

* Suzanne Bevacqua, Lecturer, La Trobe University and Dr John Bevacqua, Academic Director – La Trobe Online, La Trobe University.

1 For example, the 2014 Lowy Institute Poll found majority support for key planks of the OSB policy, including the turn-back of asylum-seeker boats (71% support) and the processing of asylum seeker claims offshore (59% support. See <http://www.lowyinstitute.org/publications/lowy-institute-poll-2014> accessed 3 May 2016.

2 Noteworthy examples, touched upon later in this article, include Jane McAdam, 'Australia and Asylum Seekers' (2013) 25(3) *International Journal of Refugee Law* 435; Suzanna Dechent, 'Operation Sovereign Borders: The Very Real Risk of Refoulement of Refugees' (2014) 39(2) *Alternative Law Journal* 110; and Paul Hodge, 'A

refugee advocacy groups.[3] Criticisms of the merits of the policy extend from concerns about its effects on asylum seekers, particularly children held in long term detention[4], regional geopolitical relations[5] and Australia's international human rights obligations.[6] Adding to the criticisms has been the Australian Government's insistence on the need to keep OSB 'operational matters' out of the public eye. Recent criticisms have centred on the introduction of the *Australian Border Force Act 2015* (Cth) and the further entrenchment of secrecy of OSB facilitated by that Act.[7]

This paper proposes a different type of challenge to the secrecy surrounding OSB and the Government's grounds for insisting on secrecy. The challenge posed is to the defensibility of the Government's continuing use of the term 'operational matters' to describe OSB activities it considers inappropriate for public scrutiny. This exercise is more than a mere semantic exercise, because the term 'operational matters' has a long legal history associated with delineation of the limits of sovereign immunity from suit and judicial scrutiny as part of what is known as the 'policy/operational dichotomy'.

Grievable Life? The Criminalisation and Securing of Asylum Seeker Bodies in the 'Violent Frames' of Australia's Operation Sovereign Borders' (2015) 58 *Geoforum* 122.

3 Including the United Nations High Commission for Refugees, (UNHCR) who has repeatedly criticised the treatment of refugees in detention in reports on visits to offshore asylum claim processing facilities, Amnesty International, who has called for a Royal Commission into OSB and lists its complaints in its publication, *By Hook or By Crook; Australia's Abuse of Asylum Seekers at Sea* (2015), the Australian Human Rights Commission, Human Rights Law Centre, Refugee Council of Australia, Caritas Australia, UNICEF Australia, Worldvision, Children's Rights International, and the Human Rights Council of Australia.

4 See for example, the final report of the Australian Human Rights Commission 2014 inquiry into children in detention, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014*. <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children> accessed 4 May 2016. See also Louise Newman, Nicholas Proctor and Michael Dudley, 'Seeking Asylum in Australia: Immigration Detention, Human Rights and Mental Health Care' (2013) 21(4) *Australasian Psychiatry* 315.

5 For a good example, see Peter Chambers, The Embrace of Border Security: Maritime Jurisdiction, National Sovereignty, and the Geopolitics of Operation Sovereign Borders' (2015) 20(2) *Geopolitics* 404, 427.

6 See for example, Suzanna Dechent, above n 2. For a broad-ranging summary of the potential issues see Australian Human Rights Commission, *Human Rights Standards for Immigration Detention* (2013) <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/human-rights-standards-immigration-detention> accessed 3 May 2016.

7 See, for example, the ABC Four Corners expose entitled 'Bad Blood' screened on 25 April 2016. <http://www.abc.net.au/4corners/stories/2016/04/25/4447627.htm> accessed 4 May 2016. Section 42 of the *Australian Border Force Act 2015* (Cth) (entitled 'Secrecy') provides that a person who is an 'entrusted person' commits an offence punishable by up to two years imprisonment if he or she makes a record of, or discloses, 'protected information'. An 'entrusted person' is defined in section 4 of the Act to include an 'Immigration and Border Protection worker', which includes consultants or contractors as well as government employees. Under section 4 'protected information' is defined expansively as 'information that was obtained by a person in the person's capacity as an entrusted person.'

Viewed through this lens, a number of important issues can be addressed – which extend beyond merely challenging the secrecy surrounding OSB. One such issue is whether, if a legal challenge to the implementation of OSB arose, the Government would be able to rely on its categorisation of OSB activities as 'operational' to aid in resisting any such challenge. The key issue for the purposes of this paper, however, is whether the Government could use the term 'operational matters' in a manner more consistent with its rich legal history to assuage its critics and more appropriately delineate which OSB operational matters should properly be subject to public disclosure and scrutiny and those which should remain secret.

With these imperatives in mind, Part II elaborates on the Australian Government's current approach to disclosure of information relating to OSB 'operational matters.' It also sets out the apparent justifications for the Government's stance. In so doing, it demonstrates the ever-expanding breadth of the Government's definition of 'operational matters'. Building upon this base understanding of OSB 'operational matters' and the motivations for secrecy, Part III examines the legal meaning and history of the use of the term 'operational' and introduces the policy/operational dichotomy as a legal tool for delineating the proper boundaries for scrutiny of Government activities. It also assesses the use of the term 'operational matters' in the context of OSB. The analysis in this Part shows that the use of the term in this context is completely inconsistent with its traditional legal formulation as a tool for aiding in delineating the boundary between matters properly capable of being subjected to judicial scrutiny.

Part IV makes the case for using the categorisation of OSB matters as 'operational' or otherwise in a manner more consistent with the legal heritage of such delineations in order to assist in credibly determining what details and aspects of the policy and its implementation should be subject to public disclosure and scrutiny and which should legitimately continue to be protected by a veil of secrecy.

PART II - OSB 'OPERATIONAL MATTERS'

Operation Sovereign Borders was announced as a formal Liberal/National Coalition policy prior to the 2013 election. The policy was described as a 'military-led response to combat

people smuggling and to protect our borders.'[8] The policy was described as being in response to a 'border protection crisis' and 'national emergency'.[9] A 3-star general was appointed to lead the operation.[10] This military-led approach has informed the Government's approach to disseminating information about OSB activities.

Equally, there has been significant rhetoric characterising the issue as a matter of 'national sovereignty' in terms of Australia's rights to determine the conditions of entry to the country. Tactical reasons around not wishing to broadcast to people smugglers the details of OSB activities have also been cited as reasons for secrecy about OSB activities. This Part elaborates on each of these bases for denial of public access to information about OSB activities. The discussion then extends to introduction of how the 'operational matters' rhetoric has been used by the Australian Government to delineate the boundaries of permissible disclosures of OSB information to the public.

'Operational Matters' and the Grounds for OSB Secrecy

As noted above, the Australian Government has been quick to employ military rhetoric as a justification for resisting public disclosure of details of the implementation of OSB. For instance, in 2014 then Prime Minister Tony Abbott observed: 'If we were at war we wouldn't be giving out information that is of use to the enemy just because we might have an idle curiosity about it ourselves.'[11] The rhetoric has even extended to referring to OSB operations in intercepting asylum seeker vessels as the 'battle-space'.[12]

Hodge summarises the Government's approach:

---

[8] Liberal Party of Australia, *The Coalition's Operation Sovereign Borders Policy - Our Plan: Real Solutions for all Australians* (July 2013), 9 < http://lpaweb-static.s3.amazonaws.com/Policies/OperationSovereignBorders_Policy.pdf > accessed 2 May 2016.

[9] Ibid.

[10] Liuetenant-General Angus Campbell headed OSB until Major-General Andrew Bottrell took over command in March 2015.

[11] Jonathan Swan, 'Tony Abbott Compares Secrecy Over Asylum Seekers to War Time', January 11, 2014, *Sydney Morning Herald*. <http://www.smh.com.au/federal-politics/political-news/tony-abbott-compares-secrecy-over-asylum-seekers-to-war-time-20140110-30lyt.html> accessed 2 May 2016.

[12] Chief of the Defence Force David Hurley in testimony before Senate Estimates 26 February 2014. Commonwealth of Australia, *Official Committee Hansard, Senate Foreign Affairs, Defence and Trade Legislation Committee*, 26 February 2014, 64. For an example of media reaction see Bernard Keane, 'Training, Lifeboats and Asylum Seekers in the 'Battle-space'' 6 March 2014, *Crikey* <http://www.crikey.com.au/2014/03/06/training-lifeboats-and-asylum-seekers-in-the-battle-space/> accessed 2 May 2016.

> Since their election success in September 2013, the coalition government has readily adopted the language of war to characterise their border protection policy and struggle against people smugglers. The lack of transparency and secrecy on 'on-water operations' is deemed necessary and prudent given the ongoing fight to secure our borders.[13]

However, to what extent can OSB properly be characterised as a military operation? The question is worth asking given that, in evidence before the Senate's inquiry into navy vessel incursions into Indonesian sovereign waters when turning back asylum seeker boats as part of OSB, Michael Pezzullo, Chief Executive Officer of The Australian Customs and Border Protection Service, confirmed that 'matters pertaining to the management of illegal maritime arrivals is executed under civil legislation - the Customs Act and the Migration Act'.[14] In the enforcement of these two pieces of legislation, Mr Pezzullo described Australian Defence Force personnel conducting OSB operations as acting as 'civilian law enforcement officers…'[15] and confirmed '…it [OSB] is absolutely a civil operation.'[16]

An interesting question which flows from this characterisation is whether military personnel engaged as civilian law enforcement officers should be entitled to claim the same protections from scrutiny afforded to military personnel when engaged in military combat operations. A comprehensive answer to this question is beyond the scope of this paper, although there is precedent for distinguishing between different types of military engagements.

For example, a *Work Health and Safety Act 2011* (Cth) declaration draws a distinction between 'warlike' and 'non-warlike' operations for the purposes of exemptions from various workplace health and safety requirements under that Act.[17] A similar approach to the disclosure of information would see greater disclosure in the OSB non-combat context than in warlike OSB operations. But there is no evidence of any intention of the Australian Government to adopt

---

[13] Paul Hodge, above n 1, 127.
[14] Commonwealth of Australia, Senate Foreign Affairs, Defence and Trade References Committee, *Official Committee Hansard — Breach of Indonesian Foreign Waters* (21 March 2014), 10.
[15] Commonwealth of Australia, Senate Foreign Affairs, Defence and Trade References Committee, *Official Committee Hansard — Breach of Indonesian Foreign Waters* (21 March 2014), 10.
[16] Commonwealth of Australia, Senate Foreign Affairs, Defence and Trade References Committee, *Official Committee Hansard — Breach of Indonesian Foreign Waters* (21 March 2014), 9.
[17] See *Work Health and Safety Act 2011 (application to Defence activities and Defence members) Declaration 2012* (Cth) - F2012L02503.

such a nuanced approach to disclosure of OSB information.[18] The use of the term 'operational matters' does not appear to be an attempt by the Australian Government to add any such nuance to its approach to disclosure of OSB information. Arguably, the use of the term serves simply to further infuse OSB activities with the rhetoric of a military 'operation'.

However, this effort is probably unnecessary given the already significant and well-tested Australian legal concessions against public disclosure of information on national security or defence grounds. A good example of such a legal concession is contained in section 33 of the *Freedom of Information Act 1982* (Cth) which exempts from disclosure documents that affect Australia's national security, defence or international relations.[19] There is a body of case law which could be drawn upon in applying this exemption from disclosure in the OSB context. However, instead the indications to date are that the Government is taking a blanket approach to non-disclosure in the OSB context, aided by a largely unchallenged and unexplained use of the term 'operational matters'.[20]

For example, the Government has refused to supply a range of information sought by the Senate in relation to OSB operational matters on the basis of a blanket public interest immunity claim.[21] Despite the joint concession to the Senate Foreign Affairs, Defence and Trade Committee in 2014 by the Australian Customs Service and the Australian Defence Force that '[t]he release of information relating to operational matters needs to balance the public's legitimate right to be aware of such matters with operational requirements'[22] there is no explicit

---

[18] In fact, the only distinction made is the special exemption granted to OSB operatives from the requirement under sections 28 and 29 of the *Workplace Health and Safety Act 2011* (Cth) to take reasonable care of themselves and other persons in the workplace. This is a concession not available even to frontline troops. For a detailed critique see Bernard Keane, 'Training, Lifeboats and Asylum Seekers in the "Battle-space"' (6 March 2014) *Crikey* - <http://www.crikey.com.au/2014/03/06/training-lifeboats-and-asylum-seekers-in-the-battle-space/> accessed 5 May 2016. Keane summarises the distinction between military personnel engaged in OSB activities and frontline troops succinctly: 'Only those engaged in turning back unarmed people in wooden boats don't have to exercise reasonable care.'

[19] The exemption comprises two distinct categories of documents: (a) documents which, if disclosed, would, or could reasonably be expected to, cause damage to the Commonwealth's security, defence or international relations; and (b) documents that would divulge information communicated in confidence to the Commonwealth by a foreign government, an agency of a foreign government or an international organisation.

[20] The creation of the 'Australian Border Force' by the *Australian Border Force Act 2015* (Cth) and the broad secrecy obligations imposed on employees and contractors engaged in work to implement OSB by section 42 of that Act (discussed further above n 7) further indicates no softening of the Government's expansive approach to non-disclosure of information surrounding OSB.

[21] Made pursuant to Senate Order made on 9 May 2009, well before the commencement of OSB.

[22] This concession was made by the Head of the Australian Customs and Border Protection Service, Michael Pezzullo, and General David Hurley, the Chief of the Defence Force on 21 March 2014 before a Senate inquiry into an incursion by the Australian Navy into Indonesian waters. See Commonwealth of Australia, Senate Foreign

evidence to date of any such weighing up process in seeking to withhold OSB information from the Senate and other interested bodies.

Whilst the justification for this apparent blanket approach to secrecy of OSB information is elusive, some grounds for restriction of information on national security grounds is easy to appreciate.[23] As Bateman, for example, has observed, '[t]hese relate to the modus operandi of the Special Forces (SF) in boarding refugee boats and using force as necessary to turn them around.'[24] However, Bateman concedes that such concerns have their limits and in some circumstances may be outweighed by countervailing policy concerns.[25] This is a valid and insightful observation which is examined in detail in Part IV below in the context of discussing how the policy/operational dichotomy *could* be utilised to weigh up these countervailing policy concerns. For present purposes it suffices to note that there is no express evidence of the Australian Government making any concerted effort to utilise the use of the term 'operational matters' as part of such a weighing up process.[26]

As noted above, the Government has also characterised OSB as a matter of national sovereignty and this is an equally fertile basis for claiming immunity from public scrutiny. The pre-election policy document itself characterises the need for OSB as a matter of 'national sovereignty', even harking back to former Prime Minister John Howard's declaration that 'we decide who comes to this country and the circumstances in which they come.'[27] Setting aside the politics of such statements,[28] at first glance the national sovereignty argument appears unimpeachable as a basis for resisting exposure to public scrutiny.

Affairs, Defence and Trade References Committee, *Official Committee Hansard — Breach of Indonesian Foreign Waters* (21 March 2014), 2.

[23] There is judicial precedent for being wary of impinging on matters of national security which is relatively uncontroversial. For example, Wilcox J noted in his judgment in *Minister for Arts Heritage and Environment v Peko-Walsend* (1987) 15 FCR 274 at 304, that the relevance of a decision to questions of national security would render a matter 'inappropriate' for judicial review.

[24] Sam Bateman, Should Operations to Turn the Boats Around be Kept Secret?' (27 September 2013) *The Conversation* <http://ro.uow.edu.au/cgi/viewcontent.cgi?article=2572&context=lhapapers> accessed 2 May 2016.

[25] Ibid.

[26] One commentator has described the reliance on 'national sovereignty' to deny access to OSB information as a 'veil of stubborn secrecy'. See Peter Chambers, above n 5, 427.

[27] Liberal Party of Australia, *The Coalition's Operation Sovereign Borders Policy* (July 2013) 2, <http://www.nationals.org.au/Portals/0/2013/policy/The%20Coalition%E2%80%99s%20Operation%20Sovereign%20Borders%20Policy.pdf> accessed 16 January 2015.

[28] There are many examples of well-reasoned challenge to the relatively recent Australian conceptualisation of refugee issues as a national security and sovereignty risk rather than a humanitarian concern. See, for instance, Richard Devetak, 'In Fear of Refugees: The Politics of Border Protection in Australia' (2004) 8(1) *International Journal of Human Rights* 101.

However, as with the national security argument outlined above, such imperatives still need to be weighed against possible countervailing policy considerations. The concept of national sovereignty is not a simple one – it is a matter of 'profound complexity'[29]. Accordingly, national sovereignty cannot operate as an impenetrable veil against public scrutiny of governmental action. For example, as one commentator has pertinently observed:

> …it is arguable that in the globalised spaces of the twenty-first century, sovereignty is increasingly illusory and identity is increasingly transnational, so that the old dichotomy between 'national sovereignty' and transnational values - especially 'universal human rights' - is becoming steadily less tenable.[30]

Again, though, the constant references by the Australian Government to 'operational matters' as a basis for non-disclosure of OSB activities does not signal an appreciation of the complexities of using national sovereignty as a justification for governmental action or secrecy when dealing with asylum seekers. It also ignores the global movement toward greater transparency and government accountability.

The third main basis for denial of access to OSB information cited frequently by the Australian Government is a tactical concern to ensure OSB activities are not signalled to potential people smugglers. At his first OSB briefing to the media, then Immigration Minister Scott Morrison was clear about this concern: 'This briefing is not about providing shipping news to people smugglers.'[31]

There are many questions that can and have been raised about this justification. Maxwell summarises some of the questions which have been raised in the media:

---

[29] William Maley, 'Asylum-seekers in Australia's International Relations' (2003) 57(1) *Australian Journal of International Affairs* 187, 188. Maley discusses at length the complexity of the issue of national sovereignty in the context of immigration policy.

[30] Don McMaster, 'Asylum-seekers and the Insecurity of a Nation' (2002) 56(2) *Australian Journal of International Affairs* 279, 280.

[31] The Hon. Scott Morrison MP, *Transcript of joint press conference: Sydney: 23 September 2013: Operation Sovereign Borders* 23 September 2013 <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/3099126/upload_binary/3099126.pdf;fileType=application%2Fpdf#search=%22media/pressrel/3099126%22> accessed 5 May 2016.

> The Abbott Government has asserted broadly that the release of information gives 'aid and comfort to the people smugglers'. ...How does particular information provide 'comfort' to people smugglers? Why is this relevant? …What kind of information - boat arrivals, turn-back procedures, conditions in detention – 'aids' the smuggling trade, and how? In failing to answer these questions, the Abbott Government has failed to make the case for the sweeping secrecy of Operation Sovereign Borders.[32]

Some have also been quick to point out the futility of this reasoning for suppression of information. For example, Bateman notes:

> It is most unlikely that the policy of suppressing information will work. The refugees have mobile phones and will try to tell their version of operations before their phones are seized by SF personnel on boarding a vessel. The residents of Christmas Island will also have a fair idea of what is happening. When the leaks about actual operations occur, the rumours may do more harm to Australia's international image than the actual facts.[33]

However, there is no evidence of any of these arguments dissuading the Australian Government from its current approach. The only real limit on the policy of non-disclosure of OSB information has been through a willingness to limit non-disclosure to 'operational matters'. However, in the absence of clarity as to what that term is actually intended to mean in the OSB context, it is difficult to appreciate how this chosen terminology specifically aids in balancing the objective of depriving people smugglers of information relevant to their illegal activities with the need for public transparency and scrutiny.

'Operational Matters' and the Limits of OSB Secrecy

As noted repeatedly above, since the introduction of OSB, Government spokespersons have consistently resisted answering questions about the details of the policy on the basis that such matters are 'operational matters'. However, it is unclear precisely what the Federal Government considers to be an 'operational matter.' The term has variously been used to resist disclosure of a range of information spanning from details about any asylum seeker vessel turn-

[32] Jack Maxwell, 'The Unjustified Secrecy of the Abbott Government' (2014) 24 (15) *Eureka Street* 26, 27.
[33] Bateman, above n 24, 1-2.

back activities[34], boat arrivals[35] and to relatively mundane matters such as whether Navy patrols carry GPS location devices (discussed further below).

In the first briefing to the media on 23 September 2013, then Immigration Minister Morrison made the Government's initial position clear:

> We want to make it crystal clear: operational and tactical issues that relate to current and prospective operations... will not be the subject of public commentary from these podiums…We will tell you what vessels have arrived and have gone into the care of the Department of Immigration and Border Protection…Those updates will be provided as well as transfers and other key policy decisions and announcements and implementation issues regarding this policy, but we are not getting into the tactical discussion of things that happen at sea.[36]

The only notable initial apparent qualification on the concept of 'operational' matters was the qualification of 'things that happen at sea' – which has subsequently been refined to 'on-water' operational matters. However, this qualification appears to have been progressively relaxed. The prohibition now appears to extend to information about matters which 'may be used on water' and as innocuous as training of OSB personnel as the following exchange between Labor Senator Stephen Conroy and Vice-Admiral Ray Griggs Chief of Navy, before Senate Estimates Committee on 26 February 2014 indicates:

> **Senator CONROY:** It cannot be a matter of national security what training is being provided to our service personnel. It is by definition not actually in Operation Sovereign Borders.

---

[34] ABC News, Emma Griffiths, 'Scott Morrison Says Government Won't Reveal when Asylum Seekers Boats Turned Back' 24 September 2013 <http://www.abc.net.au/news/2013-09-23/government-won27t-reveal-when-boats-turned-back/4975742> accessed 2 May 2016.

[35] Initially the subject of a complete 'media blackout' and subsequently restricted only to announcements made at the weekly OSB media briefings. See Peter Martin, 'Weekly Briefings Will End Boat Arrival Blackout, Says Minister' 23 September 2013, *Sydney Morning Herald* <http://www.smh.com.au/federal-politics/political-news/weekly-briefings-will-end-boat-arrival-blackout-says-minister-20130922-2u81u.html> accessed 5 May 2016.

[36] The Hon. Scott Morrison MP, *Transcript of joint press conference: Sydney: 23 September 2013: Operation Sovereign Borders* 23 September 2013 <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/3099126/upload_binary/3099126.pdf;fileType=application%2Fpdf#search=%22media/pressrel/3099126%22> accessed 5 May 2016.

> **Vice Adm. Griggs:** Yes, but if I talk about the type of training I will be going to on-water matters and the techniques and procedures *that may be used on water*.[37] [emphasis added]

The following exchange from the Senate Committee hearing into incursions by Customs vessels into Indonesian Sovereign waters in towing asylum seeker boats out of Australian waters as part of OSB between Mr Martin Bowles, Secretary of the Department of Immigration and Border Protection, and the Committee Chair, ALP Senator Sam Dastyari, provides further insight into the generality of the approach as to what constitutes 'operational matters':

> **CHAIR:** Are there vessels that do not have the basic function of GPS?
> **Mr Bowles:** We cannot go into capability issues of specific vessels.
> **CHAIR:** You cannot tell me whether or not we have GPS on vessels that are in the Royal Australian Navy?
> **Mr Bowles:** That is not what I said.
> **CHAIR:** What is it that you said?
> **Mr Bowles:** I said we are not going to go into the capability of our vessels. It is a sensitive issue from a security perspective.
> **CHAIR:** You cannot tell me whether we have GPS on our vessels or not?
> **Mr Bowles:** That is not what I said.[38]

In light of these types of farcical exchanges, the characterisation in some parts of the media of the 'operational matters' exemption as a 'tumour' that has 'metastasised' and 'spread further into ever more improbable areas'[39] is understandable. It has led one commentator to conclude:

> Exemptions to the public release of information designed for operational and national security measures have been extended beyond their legitimate realm. Parliament and

---

[37] Commonwealth of Australia, *Hansard, Senate Foreign Affairs, Defence and Trade Legislation Committee – Estimates*, (26 February 2014), 64.
[38] Commonwealth of Australia, Senate Foreign Affairs, Defence and Trade References Committee, *Official Committee Hansard — Breach of Indonesian Foreign Waters* (21 March 2014), 27.
[39] Bernard Keane, 'Operation Secretive Bureaucrats: It Just Keeps Expanding' 24 March 2014, *Crikey* <http://www.crikey.com.au/2014/03/24/operation-secretive-bureaucrats-it-just-keeps-expanding/> accessed 5 May 2016.

> its committees have been unable to obtain information — their requests for information often remain unanswered, rejected on the basis of operational security.[40]

Notwithstanding this sentiment, and the apparent ambiguity of the intended scope of the Government's use of 'operational matters' terminology, the question remains as to whether the Australian Government's use of that terminology is consistent with the historical legal development and use of that term. The question is important in that although a use of the term consistent with its legal heritage may not assuage the critics, it would provide some justification or explanation for its use in the OSB context, and provide some further clues as to the intended meaning of the term in the OSB context.

PART III – OSB OPERATIONAL MATTERS AND THE POLICY/OPERATIONAL DICHOTOMY

The preceding Part has shown a lack of clear Government directive as to precisely what constitutes an 'operational matter' for OSB purposes. This lack of a clear directive is, arguably, unsurprising as arriving at an all-encompassing definition of what constitutes an 'operational' matter is notoriously difficult. Whilst a useful starting point is the proposition that '[t]he word itself seems to imply something that is mechanical in nature...rather than discretionary'[41], the best guidance is to look for indicators as definitional guides.

The most likely indicator used by the Federal Government in the context of OSB is that operational activities are more concerned with *implementation* than *decision-making*. This description perhaps provides the best clues as to the Government's original interpretation when employing this terminology, based upon statements made shortly after the 2013 Federal election by then Immigration Minister, Scott Morrison, when introducing the communication policy surrounding the central policy plank of OSB of turning around asylum seeker vessels. Minister Morrison stated that decisions about whether to turn around asylum seeker boats are 'operational decisions for those operationally in control of *implementing* the Government's policies ... These are decisions politicians would only be involved in where policy guidance is

---

[40] Reilly, Alexander; Appleby, Gabrielle and Laforgia, Rebecca. 'To Watch, to Never Look Away': The Public's Responsibility for Australia's Offshore Processing of Asylum Seekers' (2014) 39(3) *Alternative Law Journal* 163, 164.

[41] David Baker, 'Maladministration and the Law of Torts' (1986) 10 *Adelaide Law Review* 207, 219.

sought'[42] (emphasis added).

However, even with this general guidance, the main definitional complexity remains – the fact that in many cases it will not be possible to draw a 'bright-line' distinction between policy-making and 'implementation.' For example, is the OSB decision to tow an asylum-seeker boat back to Indonesia simply an act of implementation of a Government policy, or does it require the making of a discretionary policy-making decision by those in command of 'on-water' activities? In order to answer that question it is helpful to have a basic understanding of the substantial body of case law, which has been developed to address such difficulties.

The Policy-Operational Dichotomy

In the context of defining what constitutes governmental 'operational' activity, undoubtedly the most intensive scrutiny of the term and its complexities has arisen in the context of tortious claims against government and statutory authorities and officials. In negligence claims, the issue has been addressed as part of discussion of what has been described as the 'policy/operational dichotomy'. The dichotomy has traditionally operated as an attempt to demarcate the boundary between liability and immunity from suit where negligence of a public body or official is alleged.

The policy/operational dichotomy was first expressly enunciated in Commonwealth courts[43] by the UK House of Lords in *Anns v Merton London Borough Council*[44] ('*Anns*'). In that case, Lord Wilberforce described the distinction as follows:

---

[42] Judith Ireland, Peter Martin, and Daniel Hurst, "Christmas Island residents 'will tell the world' about asylum seeker arrivals: union leader" 23 September 2013, *The Age* <http://www.smh.com.au/federal-politics/political-news/christmas-island-residents-will-tell-the-world-about-asylum-seeker-arrivals-union-leader-20130923-2u8se.html#ixzz3Iezwbsmy> accessed 5 May 2016.

[43] The original source is usually credited as the case law concerning a similar test contained in the United States *Federal Tort Claims Act of 1948*, 28 USC Pt IV Ch 171 (1948), most notably *Dalehite v United States* 346 US 15 (1953); *Indian Towing Co v United States* 350 US 61 (1955); and, more recently, *United States v Gaubert* 499 US 315 (1991). Hink & Schutter have extensively detailed the relevance of the policy/operational distinction in respect of the *Federal Tort Claims Act* and how it has been applied in the case law. On the former, they note: 'Section 421 of the *Federal Tort Claims Act* sets out a number of classes of claims as to which the United States does not waive its immunity. The most important of these is a non-waiver of claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government…" Clearly the intention was retention of immunity for high level policy decisions, analogous to the "Act of State" doctrine adopted in European countries.' Heinz Hink and David Schutter, 'Some Thoughts on American Law of Government Tort Liability' (1965-1966) 29 *Rutgers Law Journal* 710, 721-722.

[44] *Anns v Merton London Borough Council* [1977] 2 All ER 492. Although, as Bailey and Bowman point out, prior to the *Anns* decision, Lord Diplock in *Dorset Yacht Co. Ltd v Home Office* [1970] AC 1004 clearly had in mind drawing a line between statutorily authorised damage and damage caused by negligent exercise of statutory

> Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this "discretion" meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes also prescribe or at least presuppose the practical execution of policy decisions; a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area.[45]

In Australia, Mason J in *Sutherland Shire Council v Heyman*[46] ('*Sutherland*') subsequently explained the distinction between policy and operational acts in the following terms:

> The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognise that a public authority is under no duty of care in relation to decisions which involve or are dictated to by financial, economic, social or political factors or constraints…But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.[47]

Applied in the OSB context, questions involving allegations that the Minister has made an error in interpreting the *Migration Act 1958* (Cth) would clearly fall within the exercise of the Minister's *policy* or *discretionary* powers. Applying the policy/operational distinction, this characterisation would afford those activities immunity from suit. In contrast, a simple example of an operational failure would be if the Minister intended to give a directive to turn around an asylum-seeker boat to Indonesia, but due to a purely administrative oversight such as a typographical or computer error, communicated the opposite position to the Navy or Customs personnel charged with implementing this directive.

---

power. For a detailed discussion see Stephen Bailey and Michael Bowman, 'The Policy-Operational Dichotomy - Cuckoo in the Nest' (1986) 45 *Cambridge Law Journal* 430, 431-436.

[45] *Anns v Merton London Borough Council*, [1977] 2 All ER 492, 501.

[46] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

[47] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 469.

This type of activity is far more likely to be considered justiciable because in such a situation there is arguably no challenge to the Minister's power to exercise her or his *discretion* to interpret the migration laws however she or he considers appropriate within the scope of her or his statutory mandate. The only challenge is to the faulty implementation of that exercise of discretion. The application of the distinction in these circumstances is enlightening as clearly no challenge to any policy-making powers is posed in this case. Accordingly, any judicial fears of undue judicial intervention in the legislative or executive sphere in enforcing any aggrieved asylum seeker's private law rights to seek compensation for any ensuing loss in such a case are more readily allayed.

However, determining whether an act is operational or administrative in nature is often more complex.[48] The obvious problem with the policy/operational distinction is that any act, even one that is fundamentally operational or administrative in nature, may expressly or implicitly involve the exercise of *some* degree of discretionary power. This is because 'even knocking a nail into a piece of wood involves the exercise of some choice or discretion and yet there may be a duty of care in the way it is done.'[49]

A simple example in the OSB context can readily illustrate complexities such as these. Assume a Customs official or Australian Navy officer boarding an asylum seeker vessel gives incorrect information to an asylum seeker about their asylum claim. Can giving this incorrect information confidently be characterised as an exercise of discretionary power or a simple operational activity? To answer the question would require a complex and detailed inquiry into the decision-making processes and internal workings of the Customs and/or the Navy.

A relevant issue would be an assessment of the role and level of authority of the official. The lower the level of authority of the official the more likely it will be that the advice given is administrative in nature. Conversely, it would be expected that a very high ranking officer would be concerned almost entirely with high level policy or discretionary decision-making.

---

[48] Although, perhaps not as often as might appear from the cases which have examined the issue. Naturally, it is only the most difficult cases which reach the appellate courts. It is also only those cases in which the parties have the financial resources to judicially pursue the matter.

[49] *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 571. This reference to 'knocking in a nail' is derived from the United States case of *Ham v Los Angeles County* 46 Cal App 148 (1920) in which it was noted, at 162, that: 'It would be difficult to conceive of any official act, no matter how directly ministerial that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail.'

However, classification of the offending officer alone would not be conclusive.[50] There also needs to be consideration of whether the information is wrong *but consistent* with Customs or Navy guidelines or internal policies. The giving of the information in these circumstances is likely to be characterised as the exercise of a policy-making or discretionary power. This is because a challenge to the decision in such a case would be tantamount to a direct challenge to the exercise of policy-making power in arriving at the erroneous guideline or internal policy. Alternatively, if the information is wrong *and inconsistent* with any internal or public guideline issued by Customs or Navy, it is possible to mount a stronger argument that this is a characteristically operational error. In this instance, the policy-making power was exercised when the relevant guideline or internal policy was drafted. The error resulted purely from faulty implementation of that policy decision.

Also relevant, however, would be questions of whether the error arose as a result of 'financial, economic, social or political factors or constraints.'[51] It is these factors or constraints which render attempts to devise neat, comprehensive lists of operational activities or all-encompassing definitions impossible. Any of these factors or constraints might transform an otherwise apparently administrative act into a clear exercise of policy-making power. This might be the case if, for example, a delay in processing a refugee's claim for asylum (a frequent basis for complaint[52]) was due to a deliberate policy of directing resources and senior staff away from the processing of claims and into OSB border control activities due to internal, high-level budgetary decisions.

These definitional challenges associated with attempting to determine whether a matter is 'operational' exposed by the preceding discussion have led judicial and academic thought, both in Australia and overseas, to gradually (albeit far from uniformly)[53] swing against support for

---

[50] United States commentators have also made the point, observing that the status of the relevant officer should not be a 'controlling factor' in the application of the test. See Osborne Reynolds, 'The Discretionary Function Exceptions of the Federal Torts Claims Act' (1968) 57 *Georgetown Law Journal* 81, 130-131.

[51] This is a return to the terminology of Mason J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

[52] Discussed at length in Part IV below.

[53] Notable judicial proponents include Mason J and Gibbs J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, where their Honours used the words 'logical and convenient' to describe the distinction. Kirby J in *Pyrenees Shire Council v Day* (1998) 192 CLR 375 also gave qualified support noting that although the distinction is 'far from perfect' it has 'some validity'. There was also High Court support from Gaudron J in *Crimmins v Stevedoring Committee* (1999) 200 CLR 1. Academic writings viewing the distinction favourably include Buckley, above n **Error! Bookmark not defined.**; Susan Kneebone, *Tort Liability of Public Authorities* (1998); Harry Woolf, *Protection of the Public - A New Challenge* (1990), 60; and Reynolds, above n 50.

the retention of the policy/operational dichotomy as a guide on the limits of government legal accountability, especially in the tort law context.[54] However, the definitional challenges of defining whether a matter is 'operational' are undoubtedly exacerbated in the minds of analysts by virtue of the fact that appellate courts will usually be dealing with the more problematic cases. In the vast majority of cases, determining whether a matter is 'operational' remains possible.

For example, consider the allegation in 2014 that asylum seekers were injured through being forced to put their hands against an exhaust causing burns to their hands when boarded by Navy Officers as part of OSB.[55] If this allegation was true, it is difficult to conceive of this activity as involving any conscious policy-making decision on the part of the Navy Officers involved to cause such physical injury. Instead, the result is almost certainly due to an operational mistake, capable of being subjected to judicial scrutiny to determine if the mistake happened because of a failure to meet the standard of care expected of reasonably competent officials.[56]

There are many similar examples which readily come to mind. For example, the decision of whether to turn an asylum seeker vessel back to an Indonesian port could be considered a discretionary policy decision. However, again, once that decision is made, the actions taken in order to effect that policy – for example, the speed at which to tow the boat in light of its possible fragility, decisions on whether to leave sick passengers on the boat for the return trip, the route to take for the tow-back, precautions that should be taken to ensure the safety of those on board the vessel during that manoeuvre, etc., are all distinctly operational matters at first glance. There may well be other public policy reasons for resisting disclosure of information

---

[54] The avalanche of academic writings critical of the distinction include Dawn Oliver, '*Anns v London Borough of Merton Reconsidered*' (1980) 33 *Current Legal Problems* 270, 275; John Smillie, 'Liability of Public Authorities for Negligence' (1985) 23 *University Of Western Ontario Law Review* 213, 216-217; Stephen Todd, 'The Negligence Liability of Public Authorities: Divergence in the Common Law' (1986) 102 *Law Quarterly Review* 370, 398-402; Cohen and Smith, above n **Error! Bookmark not defined.**, 26-27; Stephen Bailey and Michael Bowman, above n 44; Kevin Woodall, 'Private Law Liability of Public Authorities for Negligent Inspection and Regulation' (1992) 37 *MacGill Law Journal* 83, 90-95; and Allars, above n **Error! Bookmark not defined.**, 55-56.

[55] Asylum seekers recounted their allegations on current affairs program ABC 7:30, televised on 24 March 2014. See <http://www.abc.net.au/7.30/content/2014/s3970527.htm> accessed 2 May 2016.

[56] Of course, there would remain other policy and practical matters which could legitimately be raised at this point which might determine the matter in court. However, these are no basis for a wholesale rejection of any opportunity to test those policy and practical matters in a public or judicial setting. This is an issue addressed further in Part IV.

about those matters, (for example national security concerns) but the operational nature of those matters per se provides no such justification.

Notwithstanding, however, it is clear that the Government's use of the term 'operational' to describe matters which should *not* be scrutinised is completely apposite to the manner in which the term has traditionally been used in a legal context. Certainly, if the Government sought to rely solely on the 'operational' nature of an activity as a basis for resisting its subjection to judicial scrutiny, that argument would likely fail.

PART IV – OPERATIONAL MATTERS AND PUBLIC DISCLOSURE – THE CASE FOR CHANGE

In light of the preceding discussion, the Government may be best advised to completely abandon its confusing use of the term 'operational matters' in the context of resisting releasing information about OSB activities to the public. Alternatively, the Government could modify its use of the term to a use which is more consistent with the legal meaning and use of that term. The latter approach is preferable for a number of reasons.

The first of these reasons is that, despite the apparent loss of legal favour of the policy/operational dichotomy, distinguishing between matters which are 'operational' and matters which are 'policy' remains an important factor in determining whether matters should be subjected to judicial scrutiny in tortious contexts,[57] equitable contexts[58] and administrative

---

[57] For example, Hayne J in *Crimmins v Stevedoring Committee* (1999) 200 CLR 1 in acknowledging that 'quasi-legislative' functions should be immune from private law tortious suit recently affirmed the link between the public/private law friction encapsulated in separation of powers concerns and the policy/operational distinction observing, at 101: 'Put at its most general and abstract level, the fundamental reason for not imposing a duty in negligence in relation to the quasi-legislative functions of a public body is that the function is one that must have a public rather than a private or individual focus. To impose a private law duty will (or at least will often) distort that focus. This kind of distinction might be said to find reflection in the dichotomy that has been drawn between the operational and the policy decisions or functions of public bodies.'

[58] In the equitable context, the relevance of the policy/operational distinction has come to the fore as a qualification to the *Southend-on-Sea* principle (that an estoppel should not be raised to prevent the performance of a statutory duty or to hinder the exercise of a statutory discretion) and has been applied in a number of cases. The most notable example is *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193. In that case, at 215, Gummow J stated: 'The planning or policy level of decision making wherein statutory discretions are exercised has, in my view a different character or quality to what one might call the operational decisions which implement decisions made in exercise of that policy…where a public authority makes representations in the course of implementation of a decision arrived at by the exercise of its discretion, then usually there will not be an objection to the application of a private law doctrine of promissory estoppel.' It is probable, given His Honour's shift away from application of the policy/operational dichotomy in cases such as *Crimmins v Stevedoring Committee* (1999) 200 CLR 1, that Gummow J would today be more equivocal in his support for applying the distinction in estoppel claims too.

law contexts.[59] Perhaps most significantly, however, it is the legal foundation blocks of justiciability which the dichotomy has come to represent in this range of legal contexts which provide a strong, credible basis for the Government delineating the boundary between matters concerning OSB which it is prepared to disclose to the public and those which it is not.

The fact that that difficult borderline cases might arise from time to time is no reason for abandoning the distinction as a potentially useful guide for determining matters appropriate for public disclosure just as it has served for determining matters appropriate for judicial scrutiny. As Gleeson J has extra-judicially observed, '[t]wilight does not invalidate the distinction between night and day.'[60] This is especially true when no more satisfactory principle has emerged.[61]

As one United States commentator has pointed out:

> [T]he terms "planning" and "operational" are indefinite; the problem of drawing a line remains. But all interpretations involve drawing distinctions. The present situation is aided by terms which have a considerable history of application. They have been used, with varying degrees of consciousness...It is true that formulation is mixed with implementation and application in government workings, but separation and classification are not impossible.[62]

---

[59] The relevance of distinguishing operational functions from those that are discretionary in nature also extends to public law cases where judicial review is sought and the reviewability of a decision of a public authority is at issue. Brodie, for instance, has suggested that the policy/operational distinction may be utilised in some judicial review cases in conjunction with the concept of ultra vires to assist in delineating between 'impeachable and unimpeachable discretion.' Douglas Brodie, 'Public Authorities and the Duty of Care' (1996) *Juridical Review* 127, 133. Hayne J also discusses the issue, in the context of explaining the *Wednesbury* unreasonableness test, in his judgment in *Brodie v Singleton Shire Council* (2001) 206 CLR 512. His Honour notes, at 628: 'In public law, decisions may be examined for error of law, but statute apart, there is no review of the merits of decisions made by such bodies. The closest the courts come to such a review is what is usually called *Wednesbury* unreasonableness, where the test is whether the decision is so unreasonable that no reasonable decision-maker could have made it. What the *Wednesbury* test reflects is that the courts are not well placed to review decisions made by such bodies when, as is often the case, the decisions are made in light of conflicting pressures including political and financial pressures.' While his Honour does not take the step explicitly, the terminology used by His Honour to delineate between reviewable and non-reviewable decisions is similar to terminology used in tort cases to explain the policy/operational distinction. Noteworthy, for instance, is the similarity between the Hayne J reference to 'political and financial pressures' and the 'financial, social, economic or political factors or constraints' referred to by Mason J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

[60] Murray Gleeson, 'Judicial Legitimacy' (2000) 20 *Australian Bar Review* 4, 11.

[61] As noted by Buckley: Richard Buckley, 'Negligence in the Public Sphere: Is Clarity Possible?' (2000) 51 *Northern Ireland Legal Quarterly* 25, 41.

[62] Osborne Reynolds, above n 50, 129.

Fairgrieve also rebuts the uncertainty argument, concentrating on the fact that some degree of uncertainty is unavoidable. He points to the justiciability underpinning of the policy/operational distinction as the basis for the unavoidable uncertainty in applying the test, given the lack of any 'acceptable bright-line method of delimiting justiciable and non-justiciable issues.'[63] In effect, Fairgrieve sees a role for the policy/operational distinction as just *one* among a number of tools to assist in determining the justiciability issue in claims involving statutory authorities.[64]

Many critics have ignored the fact that the policy operational distinction, and the justiciability dilemma which it represents, is but one of a number of tools which has been used to determine liability. Buckley points this out, arguing that this misconception has led in large part to the perception that the distinction has been discredited. Buckley notes that 'this perception seems to have been based, at least in part, on the fallacious assumption that the distinction purported to be a *comprehensive* statement of the conditions required for the imposition of negligence liability upon public authorities.'[65]

However, even if the views of the critics were to be accepted without qualification, the difficulty of devising some alternative approach which resolves the problems raised remains. To date this has proved an intractable problem. For example, Davies in his article discussing one of the leading recent Australian negligence cases concerning statutory authority liability, *Crimmins v Stevedoring Industry Finance Committee*[66], identifies one of the dangers of using an alternative test to take the place of the policy/operational dichotomy. Davies notes:

> [T]he majority appears to take the view that the standard of care required of a statutory body that has failed to act positively in exercising statutory powers is that of the reasonable authority with the powers and resources of that body. If that is right, trial

---

[63] Duncan Fairgrieve, *State Liability in Tort: A Comparative Law Study* (2003), 62.
[64] Ibid, 62-63.
[65] Buckley, above n 61, 43. The fact remains that the distinction was never intended to be applied exclusively. It was simply intended as one of a number of considerations which might be relevant to the question of imposition of liability on a statutory authority, including the danger of fettering future discretion of that authority and the relevant statutory context. In fact, in *Anns*, the first stage of the Court's analysis was detailed consideration by Lord Wilberforce of the statutory setting - the *Public Health Act 1936* (UK). His Lordship also considered (albeit briefly) the question of proximity and public policy arguments around adverse motivational effects of finding the existence of a duty of care. See the discussion by Lord Wilberforce in *Anns v Merton London Borough Council* [1977] 2 All ER 492, especially at 499-502.
[66] *Crimmins v Stevedoring Committee* (1999) 200 CLR 1.

> courts will be required to consider what would have been reasonable budgetary and resource priorities at the time the statutory body made its decision. That would amount to more intrusive scrutiny of the decision-making processes of statutory bodies than the classical policy/operational distinction supposes.[67]

Consequently, the use of the policy/operational dichotomy provides an opportunity for the Government to take an approach which falls short of a blanket ban on release of any information associated with OSB and which has a significant legal history upon which to draw upon in order to make defensible assessments as to what information should be released.

There is, however, a further very practical reason for utilising the distinction between policy and operational matters as a basis for delineating matters appropriate for public disclosure. This justification stems from the fact that characteristically operational matters have in recent times been the most common bases for legal complaint in the immigration context. The Commonwealth Ombudsman spends much of his time in his capacity as Immigration Ombudsman investigating instances of alleged Immigration Department operational failures. For example, the Commonwealth Ombudsman, in his 2014-15 Annual Report observes that '[t]he largest category of complaints was delays in visa application processing. The second largest was complaints about delays or the refusal of citizenship applications.'[68] This continues ongoing complaint trends. For example, in his 2013-14 report the Commonwealth Ombudsman observed, '[a]s in previous years, delay is the most common cause of complaint, particularly in relation to the processing of some visa categories…'[69] Delays such as those identified as leading causes of complaint in the 2014 and 2015 Ombudsman Annual Reports are characteristically procedural or operational issues.

The Ombudsman's 2014-15 Annual Report also points to other systemic complaint themes which are similarly characteristically operational in nature. '…property issues are a common area of complaint, including detainees' property going missing or not being transferred when detainees are moved within the detention network, as well as complaints about compensation

---

[67] Martin Davies, 'Common Law Liability of Statutory Authorities: *Crimmins v Stevedoring Industry Finance Committee'* (2000) 8 *Torts Law Journal* 1, 11-12.
[68] Commonwealth Ombudsman, *Annual Report 2014-2015* (2015), 51.
[69] Commonwealth Ombudsman, *Annual Report 2014-2015* (2015), 51.

claims for lost or damaged property.'[70] Again, this echoes similar statements in the 2013-14 Annual Report: 'Management of detainee property in detention is also a concern, with these complaints mostly concerning property that is damaged or lost while it is in the custody of the detention facility management.'[71] Past Ombudsman Annual Reports reveal similar significant operational themes. For example the Ombudsman's 2011-12 Annual Report notes that: 'The complaint themes we observed in 2011–12 were similar to those in the previous year with delay being the main cause of complaints.'[72] The 2011-12 Report elaborates further pointing to many more characteristically operational matters as key concerns, particularly for those in mandatory detention. These include delay in processing protection claims, problems with property management and loss of property and concerns about the skill and accuracy of some interpreters.[73] Reports such as these indicate that these operational matters are significant contributors to the mental harm experienced by mandatory detainees – a systematic approach to disclosure and discussion of these issues is an important step in addressing them.

Similar operational themes are echoed in the findings of the Commonwealth Ombudsman 2013 investigation into suicide and self-harm of persons held in immigration detention. The Ombudsman found that mandatory immigration detainees are particularly vulnerable and that '[t]hese vulnerabilities can also be exacerbated by anxiety about, and frustrations with immigration decision-making processing…'[74] In its conclusions the Ombudsman's report repeatedly refers to the need for the Department of Immigration and Border Protection to engage more strategically in addressing its operational functions and pressures.[75] Again the link between operational activities and significant and serious unaddressed concerns is highlighted.

Accordingly, application of the policy/operational dichotomy to determine matters to expose to the public would introduce transparency into the immigration systems in those areas which are presently causing significant harm to detainees. It would allow the Government to demonstrate a commitment to dealing with these operational matters in a more strategic and

---

[70] Commonwealth Ombudsman, *Annual Report 2013-2014* (2014), 52.
[71] Commonwealth Ombudsman, *Annual Report 2013-2014* (2014), 52.
[72] Commonwealth Ombudsman, *Annual Report 2011-2012* (2012), 75.
[73] Commonwealth Ombudsman, *Annual Report 2011-2012* (2012), 76-77.
[74] Report by the Commonwealth and Immigration Ombudsman, Colin Neave, under the *Ombudsman Act 1976*, *Report No, 02/2013 - Suicide and Self-Harm in the Immigration Detention Network* (May 2013), 27.
[75] Ibid, 32.

systematic manner as called for by the Commonwealth Ombudsman. It allows a conscious and systemic focus on operational matters.

Adopting a policy of disclosure which is more consistent with legal principles would also demonstrate a systemic shift toward a more pro-disclosure approach and directly address possible perceptions of a culture of secrecy associated with immigration matters. This would be consistent with the recent recommendations of an independent comparative review of the Immigration and Citizenship Department Freedom of Information procedures by Robert Cornall AO. The Cornall Report found that:

> '…the Department's current level of performance in regard to freedom of information is unacceptable. It is not an option to maintain the status quo, particularly given the Government's recent FOI reforms and its expectation that all agencies will adopt a more pro-disclosure approach.'[76]

The Cornall Report also found that the Department 'presently appears to have more of an attitude of resistance to disclosure'.[77] The current confused approach to refusing to disclose operational matters as part of OSB is unlikely to be aiding in changing that attitude of resistance to disclosure.

A related incentive for shifting to a more systematic and legally defensible approach to disclosure of operation matters associated with OSB might also address the Department's current enormous FOI application workload. The Department consistently receives the largest number of freedom of information requests of any Australian Government agency – as high as 34% of all claims and almost twice the number of any other Department.[78]

---

[76] Ibid, 3. The Report further notes, at 35, that: 'It is not an option to maintain the status quo, particularly given the Government's recent freedom of information reforms and its expectation that all agencies will adopt a more pro-disclosure approach.'

[77] Ibid, 24.

[78] Robert Cornall AO, *Independent Comparative Review of the Department of Immigration and Citizenship's Freedom of Information Procedures Report*, 30 August 2012, 2 <https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/independent-comparative-review-foi-procedures.pdf> accessed 5 May 2016, citing Office of the Australian Information Commissioner, *Processing of Non-Routine FOI Requests by the Department of Immigration and Citizenship – Report of an Own Motion Investigation*, 3 <https://www.oaic.gov.au/images/documents/migrated/oaic/repository/publications/reports/DIAC_FOI_own_motion_report_FINAL.pdf> accessed 5 May 2016.

Further, the Cornall Report found that in addressing FOI concerns there is an apparent lack of understanding within the Department of Immigration and Citizenship of national security and non-national security classifications – these are not effectively or consistently applied.[79] The application of the policy/operational dichotomy would allow the Government to focus on the underpinning public policy matters which have informed the development and judicial application of that dichotomy, including matters which are not justiciable due to national security and similar overriding public policy concerns.

The more systemic approach to disclosure of information surrounding OSB which the adoption of the policy/operational dichotomy would signal to the community is also likely to have further benefits in terms of enhancing public confidence and trust in the immigration detention system. There is a large body of work developing in other fields which clearly links community trust and confidence in government instrumentalities and officials when the system is perceived to be fair, even-handed and transparent.[80] The conclusion of much of this work is that '[i]f individuals perceive an authority to be acting fairly and neutrally, and they feel treated with respect and dignity, they will be more willing to trust that authority and will voluntarily obey and defer to its decision and rules.'[81]

On a related point, the Report also alludes to reputational harm associated with current shortcomings in its approach to public disclosure which the adoption of a systemic and widely-recognised approach to delineating matters appropriate for disclosure which the policy/operational dichotomy would facilitate:

---

[79] Robert Cornall AO, *Independent Comparative Review of the Department of Immigration and Citizenship's Freedom of Information Procedures Report*, 30 August 2012, 5 <https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/independent-comparative-review-foi-procedures.pdf> accessed 5 May 2016

[80] This body of literature is particularly developed in fields such as tax, where many studies have demonstrated a link between transparency and fairness and taxpayer trust and confidence translated into increased willingness to voluntarily comply with tax obligations. For examples see John Scholz, 'Trust, Taxes and Compliance' in Valerie Braithwaite and Margaret Levi (eds), *Trust and Governance* (1998), 135; Jenny Job and Monika Reinhart, 'Trusting the Tax Office: Does Putnam's Thesis relate to Tax?' (2003) 38 *Australian Journal of Social Issues* 307; Valerie Braithwaite, *Taxing Democracy: Understanding Tax Avoidance and Evasion* (2003) Aldershot: Ashgate; Kristina Murphy, 'Procedural Justice and Tax Compliance' (2003) 38 *Australian Journal of Social Issues* 379; John T. Scholz and Mark Lubell, 'Trust and Taxpaying: Testing the Heuristic Approach to Collective Action' (1998) 42(2) *American Journal of Political Science* 398; and Benno Torgler, Ihsan C. Demir, Alison Macintyre and Markus Schaffner, 'Causes and Consequences of Tax Morale: An Empirical Investigation' (2008) 38(2) *Economic Analysis and Policy* 313

[81] Kristina Murphy, 'The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders' (2004) 28 *Law and Human Behaviour* 187 190.

> The Department's current level of performance in regard to freedom of information is unacceptable. DIAC is not complying with its legal obligations. It is in bad standing with the FOI regulator. Its FOI shortcomings damage the Department's relationship with the Minister and his Office and reflect adversely on the Department's reputation within the Australian Government.[82]

The link between operational failures such as these and the public and Government reputation of the Department was also highlighted by the Public Service Commission in their recent review. They found 'perceptions that DIAC is crisis prone have an effect on the department's public and parliamentary reputation and are a legitimate concern for the minister and the government'[83].

A further basis for adopting a reputable approach to dealing with disclosure and scrutiny of operational matters is the fact that operational standards of the Department of Immigration and Citizenship are also clearly a concern of the Government. There have been numerous recent Inquiries into various aspects of the operational performance of the Department. The most damning of these was the recent KPMG Report[84] into an operational failure in February 2014 which saw 'the information of up to 10,000 adults and children in Australian immigration detention inadvertently made available. The database included their full names, nationalities, location in Australia, arrival date and their boat arrival information.'[85] That review found a range of operational failures contributed to the release of the information and made numerous procedural change recommendations including that '…the department develop procedures for

---

[82] Robert Cornall AO, *Independent Comparative Review of the Department of Immigration and Citizenship's Freedom of Information Procedures Report*, 30 August 2012, 35 <https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/independent-comparative-review-foi-procedures.pdf> accessed 5 May 2016.

[83] Sean Parnell, 'Department of Immigration and Citizenship culture heavily risk averse, says Australian Public Service Commission' 4 December 2012 *The Australian*, <http://www.theaustralian.com.au/news/foi/department-of-immigration-and-citizenship-culture-heavily-risk-averse-says-australian-public-service-commission/story-fn8r0e18-1226529744381> accessed 5 May 2016.

[84] KPMG, *Management Initiated Review, Privacy Breach – Data Management*, 20 May 2014: <http://www.immi.gov.au/pub-res/Documents/reviews/kpmg-data-breach-abridged-report.pdf> accessed 3 May 2016.

[85] Emma Griffiths, 'Immigration Minister Scott Morrison demands answers from his department after it accidentally disclosed asylum seeker personal details online' 19 February 2014, *ABC News*, <http://www.abc.net.au/news/2014-02-19/personal-details-of-asylum-seekers-published-by-immigration-dept/52694> accessed 2 May 2016.

"cleansing" personal data, update review procedures, develop an IT security training program and incorporate privacy training in connection with the Australian Privacy Principles.'[86]

A Public Service Commission Report also made major findings into operational performance of the Department pointing to the continuing failure of the Department to develop control mechanisms 'to reduce the risk of future failures of *process*'[87] (emphasis added). All of this adds to a compelling case for the Government radically reframing its current use of 'operational matters' as a filter for determining appropriateness for public disclosure of OSB information.

PART V - CONCLUSIONS

This paper has demonstrated that the Government's present use of the term 'operational matters' as a distinction for determining OSB activities which should not be revealed to the public is entirely inconsistent with the substantial body of legal analysis which has built up around that term in the context of appropriateness of governmental activity for judicial scrutiny. It has demonstrated that this continued inconsistent and largely unexplained use is unlikely to stand up to judicial scrutiny if challenged as part of a civil law claim arising out of OSB activities.

Consequently, the Government should reconsider its use of this term and either explain the reasoning for the inconsistency with established legal principle or begin using that term in a manner that accords more closely with legal authority. This can add to the credibility of the Government's claims for immunity from public scrutiny of certain OSB activities and enhance trust and confidence of the public and other stakeholders in the Immigration system. The latter has been shown to be the preferable course for a number of reasons. Perhaps the most significant of these is that continued use of the terminology in a manner consistent with the legal approach to the term would allow the Government to introduce an element of transparency and order to the operational aspects of the Immigration system which have been consistent themes for complaint to the Commonwealth Ombudsman and the cause of significant harm to mandatory immigration detainees to date. It would allow the Government

---

[86] Paul Farrell and Oliver Laughland, 'Review blames Immigration for data breach exposing 10,000 detainees' 12 June 2014, *The Guardian* <http://www.theguardian.com/world/2014/jun/12/review-blames-immigration-data-breach-detainees> accessed 5 May 2016.
[87] Sean Parnell, above n 83.

to achieve these objectives while remaining cognoscente of the various public policy concerns around various aspects of OSB which warrant protection both from public scrutiny and judicial scrutiny. These include policy concerns around national security, preserving life at sea, ensuring the safety of staff charged with implementing OSB etc.

Applying a well-established approach such as the policy/operational dichotomy to determine whether matters should be disclosed for public scrutiny allows for public policy concerns such as these to be dealt with in a more direct, express and questioning manner. It is conceded that the policy/operational dichotomy is not a perfect solution. The dichotomy would require case-by-case consideration of whether to release information in difficult cases. This is simply unavoidable in a complex and polycentric policy area such as immigration. However, it establishes a useful framework for a more systematic approach which would foster consideration of both positive and negative policy concerns and the *demonstrability* of these concerns. In effect, the Government would need to subject public policy concerns such as national security concerns to some degree of evidentiary scrutiny rather than accepting them according to their inherent logical appeal or political expediency.