Submission to the Joint Select Committee on Australia's Immigration Detention Network

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12 August 2011

Summary

This submission introduces a body of relevant scholarly articles on the subject of credibility assessment as a key element in assessment of protection claims. It is presented in response to the experiences that have emerged as a result of the author's frequent visits to the Villawood Immigration Detention Centre as a member of the Blue Mountains Refugee Support Group.

It relates to section 1(r) of the Terms of Reference: "processes for assessment of protection claims made by irregular maritime arrivals and other persons and the impact on the detention network"

The analysis is critical of the current processes and practices and calls for careful, prompt and expert attention.

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1. Introduction

This submission focuses on section 1(r) of the Terms of Reference: "processes for assessment of protection claims made by irregular maritime arrivals and other persons and the impact on the detention network"

In particular I will refer to the use of credibility assessment as a key element in assessment of protection claims.

Personal credentials

I am a retired agricultural scientist and, development programs coordinator, and cross cultural consultant and trainer. I have lived in two Asian countries for a total of 13 years and worked extensively with international aid and development programs in Africa, Asia and the South Pacific, including 19 years with World Vision (7 in partnership, 12 as staff). Assignments in 20 countries have included supervision of a number of projects funded by AusAID and USAID. Along the way I received training in management, including personal assessment skills, and in cross-cultural communication, which I then taught in short courses and tutorials. I have also visited refugee camps and participated in managing refugee programs.

Relevant Recent Experiences

I have been visiting the Villawood Immigration Detention Centre on a fortnightly basis for most of this year. My simple agenda has been to offer friendship and support both personally and as a member of the Blue Mountains Refugee Support Group. My fluency in one particular Asian language and my international experience and cross-cultural skills were of obvious usefulness in this activity. I have established a number of friendships, facilitated by my seniority and the fact that I am a male among a largely male population whereas the overwhelming majority of visitors are female.

One of the most disturbing aspects of these visits has been the obvious distress of the detainees when they hear of a negative response to their claims. I was not satisfied that one particular friend, with whom I shared proficiency in a non-English language, had been assessed accurately. He gave me permission to exchange information with his assigned

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lawyers and I was then given access to the Independent Merits Review decision papers. I was shocked by what I read. The reasons given for the negative decision seemed totally inadequate, based on my own assessment of this person and his story over several months (consistent with the impressions of other visitors from our group), plus my knowledge of his original context and his transit context, my expertise in cross-cultural communication, and my knowledge of the potential difficulties of communicating through an interpreter. The reviewer said little more than that he did not believe the claimant was a credible witness, yet I am sure the reasons given would not stand up in a normal Australian court. There seemed to be little appreciation of the demonstrable grounds for fear in the claimant's original context nor of the cultural aspects of demeanor and story telling, nor of the impact of trauma, both detention induced and other kinds, on memory and recall.

I believed there would surely be strong grounds for an appeal, but then found that this decision was now beyond challenge, except on the grounds of possible errors of law. A seemingly unprofessional decision based on the impressions of just one person was also an unaccountable decision.

I wondered whether this was an isolated case, but soon realised that that was not so, affirmed by other advocates and advocate organisations and by my own reading of several other IMR and RRT decision documents. I then checked on the internet for literature addressing this issue and found a body of scholarly material that affirmed my misgivings with well researched conclusions.

It is that material that I want to present to the committee

2. Literature addressing the issue of credibility assessment as a key element in assessment of protection claims

In order to access the full text of many of the key documents on credibility assessment I registered with **The Refugee Law Reader Fifth Edition**, "which is the first comprehensive on-line model curriculum for the study of the complex and rapidly evolving field of international asylum and refugee law". This "is now being used in several continents for teaching, training and research"[2].

The following "readings" were listed for section II.2.4.3.2 Credibility

Core

R. Byrne[3], **'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals'**, *International Journal of Refugee Law*, vol. 19, no. 4 (December 2007), pp. 609−638.

J. Cohen[4], **'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers'**, *International Journal of Refugee Law*, vol. 13, no. 3 (July 2001), pp. 293−309.

[2] Editor-in-Chief, Dr Rosemary Byrne (B.A. Columbia, J.D. Harvard), is a senior lecturer in international and human rights law and the Director of the Centre for Post-Conflict Justice at Trinity College Dublin, Research Fellow at the Institute for International Integration Studies, Human Rights Commissioner, Irish Human Rights Commission and a Visiting Fellow at the Human Rights Program, Harvard Law School.

[3] See note 2

[4] Juliet Cohen, (MA, MB, BS, DipRACOG, MRCGP) is Head of Doctors at the UK Medical Foundation for the Care of Victims of Torture, for which she has worked since 1997.

M. Kagan[5], **'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations'**, *Georgetown Immigration Law Journal*, vol. 17, no. 3 (2003), pp. 367−394[6].

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Immigration and Refugee Board (Canada), '**Refugee Protection Division: Assessment of Credibility in Claims for Refugee Protection',** 31 January 2004.

W. Kälin[7], **'Troubled Communication: Cross-cultural Misunderstandings in the Asylum Hearing'** *International Migration Review*, vol. 20, no. 2 (1986), pp. 230−241.[8]

A. Macklin[9], **"Truth and Consequences: Credibility Determinations in the Refugee Context'** in *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary, IARLJ Conference* (Ottawa: International Association of Refugee Law Judges, 14−16 October 1998)[10].

S. Norman[11], **"Assessing the Credibility of Refugee Applicants: A Judicial Perspective"**, *International Journal of Refugee Law*, vol. 19, no. 2 (2007), pp.273−292.

Refugee Review Tribunal (Australia), '**Guidance on the Assessment of Credibility'** October 2006

<u>This reading list was supplemented by five other relevant papers available on line</u>:

Jane Herlihy, Peter Scragg, Stuart Turner[12] **"Discrepancies in autobiographical memories — implications for the assessment of asylum seekers: repeated interviews study"** *BMJ* 2002;324:324–7

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[5] Michael Kagan (J.D. Michigan), Associate Professor at University of Nevada Las Vegas Boyd School of Law; previously program director of the African and Middle East Refugee Assistance (AMERA) and a Senior Fellow in Human Rights Law at the American University in Cairo. Kagan has worked since 1998 to develop refugee legal aid programs throughout the Middle East. He is the founder of the website RSDWatch.org, which promotes fairness in the UN's refugee status determination procedures.

[6] The author based this article on research while he was adjunct assistant professor and visiting scholar at the American University in Cairo (2001-2002).

[7] Walter Kälin, Doctor of Law (Bern) LL.M. (Harvard), professor of international and constitutional law at the University of Bern since 1985. From 2003 to 2008, Kälin Member UN Human Rights Committee 2003-2008. Since 2004, the Representative of UN Secretary-General on the Human Rights of Internally Displaced Persons

[8] The author was advising and representing asylum seekers in Switzerland as an attorney from 1980-1983; most of the observations made in this article are based on that experience.

[9] Audrey Macklin is a professor at the Faculty of Law, University of Toronto. She holds law degrees from Yale and Toronto, and a bachelor of science degree.

[10] This paper is based on the author's service as a member of the Canadian Immigration and Refugee Board in the 1990's.

[11] At the time his paper was published Steve Norman was a Member of the Refugee Review Tribunal in Australia. His previous work included assisting in the drafting of Australia's contributions to UNHCRs 2001 Global Consultations on International Protection, and working with the UNHCR in the Sudan.

[12] Traumatic Stress Clinic, London: Jane Herlihy, psychologist in clinical training (MPhil DclinPsych, Chartered Clinical Psychologist, director of the Centre for the Study of Emotion and Law, which undertakes and disseminates research into the asylum decision-making process), Stuart Turner (MD FRCP FRCPsych, Consultant Psychiatrist University of London, former President of the

Guy Coffey[13] **"The Credibility of Credibility Evidence at the Refugee Review Tribunal"** International Journal of Refugee Law (2003) Volume 15, Issue 3, Pp. 377-417.

Selwyn A. Pieters[14] **"Assessment of credibility in the context of a Refugee Protection Division Hearing is not an exact science -- it is the art that makes or breaks a Refugee Claim"** Immigration Law Reports (Articles) 3rd Series 276 (2004)

Guy Coffey[15] and Steven Thompson[16] **"Submission to the Joint Standing Committee on Migration: Inquiry into Immigration Detention" (Australia),** 25 August 2008

Jenni Millbank[17] **"'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations"** *Int J Refugee Law (2009) 21 (1): 1-33*[18]*.*

It is to be noted that five of the papers (Kagan, Norman, Coffey, Coffey and Thompson, Millbank) either relate primarily to the Australian context or give it considerable attention.

3. Comments on the cited literature

Although a novice in relation to law studies and some of the other relevant disciplines I found these papers to be very easily understandable and enlightening. I do not intend to review or critique them in any substantial way. They are readily available and I would commend them to the committee as **essential reading for any serious consideration of the subject identified in section 1(r) of the Terms of Reference**. However I would like to make a number of comments and note the most relevant general conclusions and recommendations, observing that there seemed to be a substantial if not remarkable level of broad agreement between the authors. In some instances I will make direct quotations with acknowledgment.

- **Summary statements from Dr Rosemary Byrne**[19]
  Notwithstanding the previous paragraph, I believe it is very important to note that the core paper by Rosemary Byrne herself reviews the other articles published by 2007 (along with other older papers on the subject) and provides this highly instructive summary:
  > ***"Although credibility determinations rest at the core of refugee protection, international refugee law has failed to develop a body of evidentiary principles that is tailored to the unique dimensions of the testimony of those seeking asylum. . . . Current social science research on the asylum procedures in several jurisdictions reveals that asylum decision makers often fail to adapt the determination process to account for the realities of refugees presenting their cases in legal fora, directing proceedings with a 'presumptive skepticism' of claims."***

International Society for Traumatic Stress Studies), Peter Scragg (BSc MSc PsychD DclinHyp Cpsychol, Chartered Psychologist).

[13] Guy Coffey, BA (Hons), MA, LLB, Clinical Psychologist, Direct Service Coordinator, Victorian Foundation for Survivors of Torture.

[14] At the time of publication Selwyn A. Pieters B.A., LL.B., was a Refugee Protection Officer at the Immigration and Refugee Board of Canada.

[15] See note 13

[16] Steven Thompson, Counselling Psychologist, Senior Counsellor, Survivors of Torture and Trauma Assistance and Rehabilitation Service, South Australia.

[17] Jenni Millbank, Professor of Law, University of Technology Sydney.

[18] This research is part of a larger project devised in conjunction with Professor Catherine Dauvergne at the University of British Columbia

[19] see note 2

In building her case Byrne points out that ***"there are a range of technical complications in asylum proceedings that create considerable risk for flawed credibility assessments. These include factors arising from errors in translation, interpretation in an oral hearing, and mistakes in the transcription of serial interviews."***

Application of social science methods to examine legal process points to ***"extensive problems with interpretation, technical and cultural, that substantially affected the accuracy of the record and, hence, the capacity of the decision makers to render fully informed and fair determinations".***

Byrne warns: ***"The mechanical application of the four traditional criteria of credibility (demeanor, corroboration, consistency and accuracy) to asylum proceedings will inevitably misguide the fact-finding process. In the context of asylum, corroboration is often absent, and demeanor is often misleading. The remaining two criteria, consistency and accuracy, remain important determinants of the credibility of testimony. Yet they also can easily lead to an inaccurate evidentiary record depending upon the fact-finding approach and skills of the interviewer."***

Of particular interest is the question of consistent recall. Byrne says: ***"The probative weight accorded to consistent recall from serial interviews is challenged in the substantial literature that examines the intersection between psychology, law and criminal justice. Aside from the scientific challenge to the link between credibility and accurate recall of traumatic experiences, . . . the range of technical complications inherent in asylum proceedings offers a strong and simple justification for there not to be an extensive reliance on accuracy and reproduction of prior statements. . . . studies document that this error is further exaggerated when issues pertaining to consistency with prior statements dominate the focus of proceedings. The consequence is that the record is not fully or . . . fairly developed. Hence, the focus of the determination process shifts from the testimony of the full oral hearing to deliberations over records of earlier meetings."***

Byrne also warns of the need for diligence and sophistication in assessing claims against the relevant political, cultural and sociological context. Decision makers are often found to fail to seek and take adequate account of expert testimony[20]. Even well trained decision makers often ***"focussed on demeanor, allowing for subjective bias to override information on country of origin or in-depth knowledge of the cultures of applicants.*** Furthermore ***traditional indices for credibility determination often result in unwarranted adverse decisions because they allow for the application of blanket political and cultural assumptions that are not adapted to account for distinctive circumstances."***

In summary Byrne affirms that ***"national asylum adjudicators, must transcend geographic, linguistic, cultural, educational and psychological barriers in order to assess the credibility of testimony."***

- Most authors acknowledge the necessity of credibility assessment as part of the process of determining asylum claims, but all warn of its shortcomings and of the need to apply it both very professionally and in careful combination with other factors.

[20] B. Harrell-Bond and G. Verdirame, *Rights in Exile: Janus-Faced Humanitarianism*, (New York, 2005) 78-120.

- The UNHCR Handbook states that it is unlikely that refugees will be able to prove every aspect of their claim and that they should be given the ‘ benefit of the doubt’. However numerous commentators contend that in practice there has been consistent neglect of the ‘ benefit of the doubt ’ principle in lower level decision-making in all jurisdictions. Guy Coffey makes this point strongly in relation to the Australian context up to 2003, and this analysis still rings true.
- In practice credibility aspects of decisions are increasing in significance, yet they are the ***least*** reviewable. Add to this the manifest trans-national trend to truncate (or indeed remove) avenues for review and the conclusion is clear that it is doubly important to minimise mistakes as early as possible. There is no evidence that this is happening. (Millbank, 2009)
- Millbank’s recent studies, which include samples from the Australian system, show that credibility has played an increasingly major role in claim refusals, and negative credibility assessments were not always based on well reasoned or defensible grounds.
- Even within remaining avenues of review the ability to disturb findings on credibility is slight in many countries, including Australia.[21] Once a decision is in place the claimant faces a huge set of obstacles to have this reversed. Thus in the absence of “ordinary” (as opposed to “migration system”) legal opportunities for appeal, there needs to be a focus on improving first instance decision-making.
- Some researchers noted the overconfidence of decision makers, especially in their ability to assess credibility, or to weigh up question of inconsistency (especially in cases where applicants have suffered post-traumatic stress and delays in the assessment of their claims[22]), plausibility and feasibility, or to “read” demeanor across cultures. Macklin (1998) emphasises this point: ***“culture, gender, class, education, trauma, nervousness and simple variation among humans can all affect how people express themselves. It is dangerous at best, and misleading at worst, to rely on a uniform set of cues as demonstrative of credibility, or a lack thereof.”***

  Dr Juliet Cohen who works in the UK context says: ***There are strong grounds for arguing that lack of consistency per se cannot be used to give any negative weight to the assessment of credibility. In addition, it needs to be acknowledged that judgements about credibility are extremely fallible.***

  This conclusion is a corroboration of the work of psychologists Herlihy, Scragg and Turner[23] who showed that ***“the assumption that inconsistency of recall means that accounts have poor credibility is questionable. . . . inconsistencies should not be relied on as indicating a lack of credibility”.***

- **Country information.** Independent information about the social and political environment that existed in the applicant's country when the alleged persecution occurred has usually been given considerable weight and this is often a useful test of the truthfulness of the applicant's claims. However Coffey (2003) warns that this is not the same as testing for credibility; general information may not be relevant to a particular situation, and the particular context may be very difficult to research. Country information may be crucial in determining whether the political conditions in the applicant's country have altered since the alleged persecution occurred, but even these must be sufficiently focused and relevantly focused

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[21] For example: Guy Coffey, *The Credibility of Credibility Evidence at the Refugee Review Tribunal’* 15 *IJRL* 377 (2003)

[22] Herlihy et al, see note 12

[23] See note 12

- A repeated emphasis is the failure to appreciate and act on the difficulties of cross-cultural communication and understanding. Professor Kalin's 1986 studies and advice seem not to have been properly assimilated and implemented. He stressed that: "***Misunderstandings rooted in the differences between the asylum-seeker's and the official's cultural background can seriously distort the process of communication during the asylum-hearing and thus fundamentally impair the ability of refugees from Third World countries to make their claims credible."*** To address this situation Kalin recommends ensuring adequate training, organizational attention to developing teams of "officials" with various cultural specializations, disciplined application of sensitive interview skills, insistence on high quality interpreters ideally from a ***different*** and neutral national background. However Kalin says that even more important than these measures is ensuring effective procedural rights, ***"including the right to a comprehensive review of asylum-decisions; any curtailment of such rights potentially diminishes the chances that asylum-seekers can correct cross-cultural misunderstandings which have already occurred. The danger of profound misunderstandings between asylum-seeker and official also underscores the necessity of a principle giving asylum-seekers with <u>prima facie</u> credible claims the benefit of doubt."***
  Kalin's final summary is of profound significance: "***Asylum-seekers and officials are often both prisoners of their own culturally determined way of perceiving and thinking. The resulting frequency of misunderstandings means that without giving them the benefit of doubt genuine refugees will be denied asylum and this consequence is among the most serious in the legal system: These persons may be eventually deported to a country where they will be detained, tortured or killed for reasons of their race, religion, nationality, membership of a particular social group or political opinion.***
- The impact of trauma on credibility factors is emphasised by several of the authors. In a 2008 submission to the Australian Parliament Coffey and Thompson presented a still relevant study and set of warnings in relation to the Australian context.
- Conversely, the impact on a person of not being believed in spite of being truthful and transparent, yet having no recourse to restore stolen credibility, is rarely considered by "the system". The trauma and despair runs deep; indeed it is always devastating.
- The largely non-transparent and political nature of administrative appointments to refugee tribunals has also given rise to concerns about both quality and independence.
- Other well documented misgivings relate to a "culture of disbelief", the use of speculative reasoning, reliance on single member tribunal and review panels, and the quality, experience and relevant training of both first stage interviewers and reviewers.
- A particular concern in Australia is the perceived independence of tribunal decision-makers who have worked previously within the same government department responsible for the decisions under review by them.

Instructive guidelines

- In spite of her misgivings Dr Juliet Cohen has some helpful advice: ***"On a practical level, standardising questions and formats of all interviews would go some way to improving consistency. Increasing the detail of medical histories with particular reference to the conditions discussed: weight loss/malnutrition, head injury, post traumatic stress disorder, sleep disorder, depression and chronic pain, would also aid in this difficult task of assessing credibility."***
- Selwyn A. Pieters (2004) who worked in the Canadian Refugee Protection Division gives many practical observation and suggestions. ***"To be a judge or assessor of credibility in the refugee determination process requires interpersonal skills, cultural, gender, religious and racial sensitivity, judgment, thoroughness, a sense of***

proportionality, fairness and most importantly, compassion. The deficit of one or more of these characteristics is sufficient, in my view, for a member to make very inappropriate findings of credibility or life or death decisions that is invariably what refugee determination is about."

Pieters provides a helpful conclusion: **"*Finally, and most importantly, as reiterated throughout this paper, decision-makers are directed to consider the evidence with an open mind, accepting that sworn evidence is presumed to be true. In any event, taking the personal characteristics and vulnerabilities of the claimants into account and even in instances where the claimant's evidence is either vague or at odds with the documentary evidence the claimant ought to be given the benefit of the doubt."***

4. Personal notes and recommendations

- I would like to mention one matters that does not seem to be covered in the literature

  Matching of claimants with decision makers

  I was alerted to the fact that one asylum seeker who I know, a Pakistani Hazara was interviewed by an official of Indian extraction. He was most uncomfortable with this arrangement but could do nothing about it. I believe there should be clear guidelines to ensure that such matchings do not happen. The history of tension between the two nations makes it entirely possible that some bias, even at a subconscious level, may affect the outcome, and at the very least there will be unnecessary apprehension on the part of the claimant.
- The research papers and reports matched my own observations and experiences and confirmed my worst misgivings. I am especially concerned about the seeming "culture of disbelief", the limited levels of supervision and accountability, and the apparent lack of professionalism, even by some reviewers who may be lawyers but who do not necessarily possess the required cross cultural skills, interviewing wisdom, and detailed contextual knowledge required. The consequence is failure in practice to honour Australia's obligations under the Refugee Convention's provisions.
- I could have much more to say about the bigger picture, but others will certainly be doing that anyway.
- As a result of my reading and my enhanced personal understanding of how the system "works" I have found possible explanations for events that were previously a total mystery: the high level of rejections received by people who are clearly genuine refugees (based on my understanding of their contexts and my personal relationship with them and my awareness of the "Convention" definition), the apparent arbitrariness of the decisions, and the increase in negative to positive ratios over time in spite of worsening original contexts. Credibility assessment is one of the possible variable mechanisms that allows for unaccountable responses to changes in political or administrative guidelines. It is very important that this be noted and remedies taken before more innocent people are damaged.

- **My only recommendation is that these observations, findings and recommendations be given careful, prompt and expert attention. The current toll on human lives is unconscionable – whether we focus on the torment of those caught up in the process through no fault of their own, or whether it is the consequence of flawed decisions that send refugees back to the very situation of danger and fear from which they fled. For people simply seeking safety to be treated so harshly (because of the flawed process) simply as an imagined warning for others desperately fleeing for their lives is totally unacceptable.**