**Australia’s Asylum Seeker Code of Behaviour**

**Elyse Methven and Anthea Vogl**

*Dr Elyse Methven is a Lecturer in criminal law at the University of Technology Sydney.*

*Dr Anthea Vogl is a Lecturer in refugee and migration law at the University of Technology Sydney.*

In December 2013 the Australian government introduced a [code of behaviour](http://classic.austlii.edu.au/au/journals/UTSLRS/2015/10.html) for all asylum seekers released from mandatory, indefinite detention and living in the Australian community. The [*Code of Behaviour for Subclass 050 Bridging (General) visa holders*](https://immi.homeaffairs.gov.au/form-listing/forms/1444i.pdf) (‘the Code’), now in operation for over five years, applies to all so-called ‘illegal maritime arrivals’[[1]](#footnote-1) who apply for or seek to renew a bridging visa in order to be released from immigration detention. To be granted a bridging visa, this group of asylum seekers must sign the Code, and are thereafter bound by a ‘list of expectations’ regarding how to behave ‘at all times’ while in Australia. The Code’s expectations range from obeying the law, to refraining from spreading rumours, swearing in public, bullying anyone or lying to government officials. The Code’s introduction fits within a policy framework of punishment and deterrence applied to asylum seekers who arrive in Australia by boat and without authorisation. It functions to expand state surveillance and control over ‘illegal maritime arrivals’ and introduces a new mechanism to re-detain and punish asylum seekers living in Australia. As at December 2018, [15674 asylum seekers](https://www.homeaffairs.gov.au/research-and-stats/files/illegal-maritime-arrivals-bve-dec-2018.pdf) classed as ‘unauthorised maritime arrivals’, many of whom arrived between 2011 and 2014, were still living in the community on short-term bridging visas.

**The Content of the Code and the Consequences of a Breach**

The Code’s provisions extend well beyond existing Australian laws, and the possible consequences for an asylum seeker found to be in breach of the Code are highly punitive. If the Code’s provisions are deemed to be breached, an asylum seeker’s income support may be reduced or stopped, an existing bridging visa may be cancelled, and an asylum seeker may be re-detained in Australia or transferred to an offshore detention centre in Nauru or Papua New Guinea.

The Code’s substantive terms are prefaced with the following broad statement:

By signing the code you agree to behave according to values that are important to the Australian society while working towards the resolution of your immigration status.

The Code does not explicitly elaborate on the content of these important ‘values’. It does, however, note that Australia is ‘a free and democratic country where men and women are equal’ and that ‘[p]eople are expected to show respect for one another and not to abuse or threaten others’. It then lists six expectations regarding how asylum seekers must behave while in Australia.

The ‘list of expectations’ are repetitive, and stipulate both what asylum seekers *must* do, and what they *must not* do. Asylum seekers ‘must not disobey any Australian laws, including road laws’; asylum seekers ‘must not make sexual contact with another person without that person’s consent, regardless of their age’; they also must not engage in any kind of ‘criminal behaviour’. Asylum seekers must co-operate with ‘all reasonable requests’ from the Department of Home Affairs (the Department).

The Code then creates a number of broad public order-type offences. It stipulates that asylum seekers must not ‘harass, intimidate or bully any other person’. In addition, the Code forbids asylum seekers from engaging in ‘any anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community’. The Code defines ‘anti-social’ broadly, as an action that is ‘against the order of society’ and may include spitting or swearing in public, or other actions that people might find offensive. It defines ‘bullying’ as including attacking someone verbally or physically, spreading rumours, and excluding someone on purpose.

The Code’s vague terms, such as the requirement that asylum seekers must not engage in ‘any anti-social or disruptive activities’ resemble public order crimes that already exist throughout Australia, including prohibitions against using ‘offensive language’ and ‘offensive behaviour’ in a public place. Legal academics have long criticised offensive language and offensive behaviour crimes for their [vague wording](https://opus.lib.uts.edu.au/handle/10453/90323), presumption of a ‘[community standard](https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-132.pdf)’, and criminalisation of everyday behaviour. People who are [homeless](http://www.austlii.edu.au/au/journals/UQLawJl/2005/5.html), [Indigenous Australians](https://www.alrc.gov.au/publications/infringement-notices-offensive-language-2), [young people](https://www.tandfonline.com/doi/abs/10.1080/13676260120111742), and people with a [mental illness](http://classic.austlii.edu.au/au/journals/UQLawJl/2005/5.html) are statistically more likely to be charged with these offences. The Code adds asylum seekers to this list of marginalised populations whose everyday behaviour is surveilled and criminalised.

[A Human Rights Compatibility Statement to the Code](https://www.legislation.gov.au/Details/F2013L02102/Explanatory%20Statement/Text) recognised that these broad provisions — banning swearing, spreading rumours or being ‘inconsiderate’ — are capable of restricting asylum seekers’ rights to freedom of opinion and expression under Article 19 of the *International Covenant on Civil and Political Rights* (‘the ICCPR’). The [Statement](https://www.legislation.gov.au/Details/F2013L02102/Explanatory%20Statement/Text) found, however, that the restrictions were justified on the grounds of the ‘express limitation’ in Article 19 of the ICCPR for the purposes of ‘national security, public order, public safety, public morals and the protection of the human rights of others.’ Although a human rights analysis is beyond the scope of this article, it is clear that the Code’s broad terms and punitive sanctions are [not proportionate](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2014/244/c05#c05f6) to achieving its purposes. In addition, the Government has not demonstrated the need for the Code, given that regardless of its operation, asylum seekers must comply with Australian criminal laws, and were already (and continue to be) subject to [visa cancellation powers](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ma1958118/s116.html) if they have been charged with or convicted of a criminal offence.

**Double Jeopardy, Enforcement of the Code and Procedural Fairness**

Asylum seekers are already bound by Australian criminal law. The practical effect of the Code is that asylum seekers may be punished for alleged criminal law breaches before being found guilty in an Australian court; breaches are adjudicated outside of the criminal justice system; and asylum seekers may be subjected to double punishment by the Department and the sentencing court. It remains unclear what effect the Department’s finding that an asylum seeker has breached the Code may have on any related criminal proceedings.

Unfortunately, Departmental processes for adjudicating and punishing breaches are not included as part of the Code. In addition, the details of allegations, decisions and outcomes for specific breaches to date are not publicly available. This means that we can only speculate on how the Code may be operating with what little information is available in the public domain.

The Code is silent on whether decision-makers will apply the general criminal law [principle](https://www.alrc.gov.au/publications/common-law-presumption) that ‘liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have’. While the Code’s introductory sentence states that it ‘contains a list of *expectations*’ rather than criminal offences, the seriousness of its sanctions – including visa cancellation, and sending ‘offenders’ to offshore detention centres – means that asylum seekers can be punished for unintended breaches of the Code’s provisions.

Through an FOI [request](http://classic.austlii.edu.au/au/journals/UTSLRS/2015/10.html), the then Department of Immigration and Border Protection informed us that it expects to receive allegations through ‘a range of sources’. These sources include ‘members of the public’, ‘service providers’, ‘police services’, and ‘other government agencies’. Thus, by signing the Code, asylum seekers become the recipients of an intrusive, omnipresent gaze of community organisations, law enforcement, Department officials and the general Australian community. As a result, anyone can ‘dob in’ an asylum seeker if, for example, they spot them uttering the occasional swearword or allegedly breaching Australian law. This renders asylum seekers subject to the constant surveillance, discipline and control of Australian citizens, service providers, their peers and the State.

When determining breaches, it appears that the Department does not uphold the [fundamental presumption](https://www.alrc.gov.au/publications/common-law-principle-5) under Australian criminal law that all persons are presumed innocent until proven guilty, and that crimes (or here, breaches of the Code) must be proven to the standard of ‘beyond reasonable doubt’. The Explanatory Statement to the Code recognises this, but argues that the displacement of the presumption of innocence is ‘proportionate to achieving its stated purpose’ being ‘to protect the public’. Under the Code, the burden of proof lies with the visa holder who ‘will be provided with the opportunity to show that the breach did not in fact occur, or provide reasons why their visa should not be cancelled’.

**Conclusion**

The Code’s ‘behavioural standards’ are based on the creation of two separate and oppositional categories: ‘adult illegal maritime arrivals’ and the ‘Australian community’, stating ‘[t]he Australian Government and the community expect non-citizens to abide by the law [and] respect Australian values’. The Code and the government construe ‘Australian values’ as an unwritten code of civility that forbids asylum seekers from such commonplace behaviour, such as ‘swearing’, being ‘inconsiderate’ or ‘spreading rumours’. Meanwhile, such ‘standards’ are not expected of, or maintained by many Australians, including [Members of Parliament](https://www.news.com.au/national/nsw-act/tony-abbott-wanted-malcolm-turnbulls-cbomb-attack-hushed-up/news-story/e0c1f781821ca86d533d59e6f551da28).

The Code’s expectations are incoherent, disturbingly broad and lack basic procedural fairness. They construct asylum seekers as dangerous and pre-criminal, and perpetuate a myth that asylum seekers endanger Australia and its territorial borders, rather than presenting undocumented boat arrivals as themselves at risk and in need of protection. Beyond its rhetoric, the *material* consequences of the Code are severe and operate against a population whose access to both procedurally fair refugee status determination and minimum standards of living whilst waiting to have their applications resolved have been [progressively](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662547) and [punitively](https://academicsforrefugees.files.wordpress.com/2017/10/an-unfair-and-dangerous-process-final.pdf) curtailed. The Code has been [documented](http://www.abc.net.au/news/2014-11-29/refugee-code-of-conduct-stressful-asylum-seekers-say/5923700) as causing heightened fear and anxiety among Australia’s sizeable population of asylum seekers on bridging visas. The constant threat of being reported for breaching the Code, including for minor behavioural offences such as ‘swearing’, and of re-detention for breaching the Code, adds further layers of Government discretion, control and surveillance of asylum seekers living in Australia.

1. We do not adopt the government’s label ‘illegal maritime arrivals’ as it presupposes this group of persons to be illegal by virtue of an arbitrary distinction created by the government between asylum seekers arriving to Australian by boat and those arriving by plane. We refer to this group of people as ‘asylum seekers’ for the remainder of the article. [↑](#footnote-ref-1)