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Regulation 5.35: Coerced treatment of detained asylum seekers on hunger strike. Legal, ethical and human rights implications

This would happen because you have no choice. You can't make any decisions in your life. Just to show you are alive you could make a decision to stop receiving anything in your body. That would show that you were alive, because you could make a decision, in a place that you can't make any decision. ('Mustapha', Former immigration detainee from Iran)

Introduction

In September 1992 three Cambodian asylum seekers launched a hunger strike refusing all food and taking only small quantities of water. They were detained in Villawood Immigration Detention Centre (IDC) in Sydney, Australia. All three were hospitalised for dehydration and after 2 weeks on the hunger strike were 'thought to be in grave danger of death'.² The then Australian Minister for Immigration sought orders in the Supreme Court of New South Wales to permit the administration of life saving medical treatment to two of the women without their consent. The court issued an interim order permitting the government 'to feed or to administer nourishment to the defendants against their will in order to prevent their death or serious bodily damage and for that purpose to use such force as is reasonably necessary.'³ Prior to the full hearing of the case the Australian government passed a law giving the Secretary of the Department of Immigration power to authorise medical treatment to be given to a person in immigration detention without their consent.⁴ This law is

¹ Names of all respondents have been changed.

² As reported in *Department of Immigration, Local Government and Ethnic Affairs v. Gek Bouy Mok* Supreme Court of New South Wales Equity Division, Powell J, 4982 of 1992, 30 September 1992; unreported.

³ As reported in *Department of Immigration, Local Government and Ethnic Affairs v. Gek Bouy Mok* Supreme Court of New South Wales Equity Division, Powell J, 4982 of 1992, 30 September 1992; unreported. For a discussion of the medical treatment of these hunger strikers and the ethical dilemmas posed see Derrick Silove, Jackie Curtis, Catherin Mason and Rise Becker 'Ethical Considerations in the Management of Asylum Seekers On Hunger Strike', (1996) 276 JAMA, 410.

⁴ *Migration Regulations 1994* (Cth), reg 5.35. The explanatory memorandum prepared by the then Labor government advised that the need for these provisions arose because two individuals whose applications for refugee status had been rejected, and who were held in immigration detention, had gone on a hunger strike. Prior to the matter coming back to court the Government introduced the regulation and the applications before the court were withdrawn by consent.

contained in regulation 5.35 of the *Migration Regulations 1994* (Cth). The regulation authorises the use of ‘reasonable force’ to administer medical treatment including the reasonable use of restraint and sedatives. This power has been used in respect of detained asylum seekers on hunger strike most notably for rehydration and naso-gastric feeding.

This chapter examines the case of detained asylum seekers on hunger strike and explores some of the complex legal and ethical issues that occur when managing and treating these cases. In examining the ethics and legality of regulation 5.35 it is important to look at the reasons for hunger strike, the competence of the individual engaging in hunger strike, the range of medical interventions available to treating practitioners (including the details of force feeding through a naso-gastric tube in particular), and the range of responses available to government authorities in responding to hunger strikes in detention environments. This chapter looks at hunger strikes as a form of protest particularly in Australian detention centres and considers the legal and political responses to those strikes. It concludes with a proposal for responding to hunger strikes by asylum seekers in detention.

The authors have interviewed former detainees who participated in hunger strikes in Australian immigration detention between 1999 and 2005 and quotes from those interviews are used throughout. A discussion of the reasons why asylum seekers engage in hunger strike action is important in determining what should be an appropriate response. Government representatives have often labelled hunger strikes by asylum seekers as ‘manipulative’ which then shapes authorities’ responses to hunger strikes and facilitates the use of invasive or punitive procedures such as forced non-consensual medical treatment. However these interviews demonstrate to the contrary that the reasons behind hunger strikes vary and that there are opportunities for negotiation which would, in our opinion, likely bring the majority of hunger strikes to a successful end prior to lasting medical and psychological harm to the individual(s) on hunger strike, without the need for invasive and potentially painful medical procedures while also keeping the government’s policies of mandatory detention and the integrity of the refugee status determination process in tact.⁵

⁵ Note: the authors do not support mandatory detention, but are addressing the issue of hunger strike within a pragmatic framework which recognises the government is unlikely to abandon this policy.

1. Hunger strike as a form of protest

Hunger strike has been used as a form of protest, typically by those in a position of relative powerlessness, for centuries. Hunger strike does not appear to be linked to any particular culture, gender or time. Suffragettes in the US and Europe launched hunger strikes for the right to vote and for improved legal and social recognition of women's rights.⁶ Gandhi regularly staged fasts aimed at influencing a range of political and social issues.⁷ Perhaps the most famous strike of recent history was in Long Kesh prison in 1981 when 23 Irish Republican Army (IRA) prisoners went on a prolonged hunger strike lasting 217 days which ultimately claimed the lives of 10 men.⁸ More recently thousands of Turkish prisoners and supporters staged a hunger strike lasting several years and which claimed the lives of more than 100 men and women.⁹ Detainees accused of terrorist activities and held without trial in Guantanamo Bay by United States authorities have also staged several hunger strikes opposing their ongoing detention and seeking to win improvements to their conditions of detention.¹⁰

What is common across these examples of hunger strikes is a significant power differential between the striker and the authority to which they appeal. Although hunger strikes are at times conducted by people living freely in the community, there is a high correlation between imprisonment and the use of hunger strike. This is likely a result of the paucity of alternate protest actions available to persons in detention. One former detainee in an Australian detention centre described this power imbalance:

In a way dealing with him [the Minister for Immigration] ... you can't really, there's no point. It's just like a rabbit try to negotiate with a lion the conditions of not eating him. It will eat eventually. ('Ali' - Iraq)

A clear definition of a hunger strike is difficult to establish. United States authorities responsible for prisons, immigration detention and Guantanamo Bay define hunger strike as an individual voluntarily refusing food for a period of 72 hours.¹¹ Other definitions do not

⁶ Maud Ellmann, *The Hunger Artists. Starving, writing and imprisonment*. (Virago Press 1993).

⁷ Bhikhu Parekh, *Gandhi's Political Philosophy, A critical examination* (Palgrave Macmillan 1989).

⁸ Paul Howard, 'The Long Kesh hunger strikers: 25 years later' (2006) 33.Social Justice 69, 71.

⁹ Patrick Anderson, 'To lie down to death for days' (2004) 18 Cultural Studies 816.

¹⁰ Centre for Constitutional Rights, *The Guantánamo Prisoner Hunger Strikes & Protests: February 2002 – August 2005* (A Special Report, New York 2005).

¹¹ 28 C.F.R.§§549.60-549.66 (2009),. § 549.61.

contain a temporal minimum, though many include an assessment of an individual's purpose or intent. Despite requests the authors have been unable to clarify with the Australian Department of Immigration and Citizenship its operational definition of a hunger strike. For the purpose of this chapter we have taken the World Medical Association (WMA) definition which states that: 'a hunger striker is a mentally competent person who has indicated that he (sic) has decided to embark on a hunger strike and has refused to take food and/or fluids for a significant interval.'¹²

2. Hunger strikes in Australian immigration detention centres

In Australia, like other first world countries, the asylum seeker issue has become increasingly contentious in recent years. Government responses since the 1990s have been to introduce restrictive public policies, including mandatorily detaining all asylum seekers who arrive in Australia without prior authorisation. Asylum seekers detained in Australia are often located in remote areas of Australia or offshore on Christmas Island and are denied certain procedural protections, such as the right to challenge their detention in the courts. Immigration detention centres are stressful environments with large numbers of people from diverse backgrounds living in often over-crowded accommodation with little meaningful activity to structure each day. They often have a high degree of anxiety, little reliable information about the progress of their refugee claims and limited contact with people outside detention. The deleterious effects of detention on mental health have been well documented over recent years.¹³ One respondent described the build up to a hunger strike in 1999:

The immigration didn't listen. The refugees, they lost any hope of leaving... We have kids in the detention centre, and we have a lot of women, and they have a lot of problems. The psychological pressure was really high at that time, living in what they call it, a donga, with tens of people. You can't sleep at night; you have security guards ... knock on the door every half an hour to count the refugees or to

¹² World Medical Association, 'Declaration on Hunger Strikes' *Adopted by the 43rd World Medical Assembly Malta, November 1991 and editorially revised at the 44th World Medical Assembly Marbella, Spain, September 1992*, <<http://www.legislationline.org/documents/action/popup/id/8591>> accessed 16 December 2010. For further discussions about the definition of hunger strike see Marlynn Wei and Rebecca W. Brendel, 'Psychiatry and Hunger Strikes' (2010) 23 *Harv. Hum. Rts. J.* 75, 78-81.

¹³ Janette P Green and Kathy Eagar, 'The health of people in Australian immigration detention centres' (2010) 192 *MJA* 65; Derrick Silove and Zachary Steel, *The mental health and well-being of on-shore asylum seekers in Australia*, (Psychiatry Research and Teaching Unit, University of New South Wales, Liverpool 1998); Derrick Silove, Patricia Austin, and Zachary Steel, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia' (2007) 44 *Transcultural Psychiatry* 359; Louise Newman, Michael Dudley and Zachary Steel, 'Asylum, detention and mental health in Australia' (1998) 27 *Refugee Survey Quarterly* 110; Linda Briskman, Susie Latham and Chris Goddard, *Human Rights Overboard. Seeking asylum in Australia* (Scribe Publications 2008).

check on them. It is a very disturbing environment for them. No talking to their families and they're overseas, no talking to anyone, the feeling of isolation, the feeling that no-one knows anything about us makes them do what they done. ... So once the guys there knew about the new system¹⁴ that was a reason for hunger strike, demonstrations, a lot of actions... So partly because of the legislation, the other part is because of the [the guards] behaviour in the detention centre. The guards there needed to be more aware of the human rights system. ('Issaq' - Iraq)

Information on the numbers of people who have participated in hunger strikes, the incidence of the use of the power under regulation 5.35 and policy regarding treatment of people on hunger strike is not recorded anywhere in the public domain and the authors were unable to obtain this information from the Department of Immigration prior to publication. The authors requested a copy of the Department's policy on managing hunger strikes in detention centres, but this request was declined as the policy is a 'commercial in confidence' document between Serco (the private provider contracted to run the detention centres) and the government.

A review of reports by official bodies including the Australian Parliamentary Joint Standing Committee on Foreign Affairs Defence and Trade, the Australian Human Rights Commission, the United Nations Working Group on Arbitrary Detention, the UNHCR along with media reports and a review of academic literature reveals that hunger strikes lasting from a few days to several weeks have consistently occurred in Australian detention centres since 1992.¹⁵ Some hunger strikes have been conducted by individuals whereas others have participated in larger group protests. Larger protests have typically occurred when there are high numbers of people detained for extended periods of time (often in excess of one year). Two such examples include a hunger strike staged in 2002 by over 269 detainees at the Woomera Immigration Reception and Processing Centre in South Australia. More recently in

¹⁴ This quote is referring to the introduction of a 3 year temporary protection visa in 1999. Temporary protection visas were given to individuals who were found to be refugees but who had entered Australia in an 'unauthorised' manner, that is without a visa. The temporary protection visa was abolished in August 2008.

¹⁵ Human Rights and Equal Opportunity Commission. *Those who've come across the seas: the report of the Commission's Inquiry into the detention of unauthorised arrivals*. (Canberra: HREOC, 1998); Human Rights and Equal Opportunity Commission HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention*, (HREOC, Sydney 2004); Joint Standing Committee on Foreign Affairs, Defence and Trade, *A Report on Visits to Immigration Detention Centres*, (Commonwealth of Australia, Canberra, 2001); United Nations Working Group on Arbitrary Detention, *Civil and Political Rights, Including the Question of Torture and Detention Report of the Working Group on Arbitrary Detention. Visit to Australia*, United Nations Commission on Human Rights, 59th Sess, UN Doc E/CN.4/2003/8/Add.2 (24 October 2002); United Nations High Commission for Refugees, 'UNHCR Urges Australia to review policy of detaining asylum seekers' (Media Release 1 February 2002) <[http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3c5abf1e2&query=hunger strike](http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3c5abf1e2&query=hunger%20strike)> Accessed 22 December 2010.

November 2010 approximately 200 detainees staged a hunger strike in response to the deaths (by suicide) of two detainees in Villawood Immigration Detention Facility, New South Wales.

Recent figures obtained by a journalist at *The Australian* newspaper through Freedom of Information state that between July 2009 and June 2010 there were 219 detainees who had undertaken ‘voluntary starvation’¹⁶ in immigration detention. Three had required hospitalisation. There were a further 41 ‘voluntary starvation incidents’ between July and September 2010.¹⁷

CASE EXAMPLE

Following the allied invasion of Afghanistan in December 2001, the Australian government announced that it would suspend processing Afghan asylum claims while it reassessed country conditions. In response detainees at the Woomera Immigration Reception and Processing Centre staged a mass hunger strike. The Department of Immigration reported that 269 people were involved. Up to 70 detainees sewed their lips both to prove that they were not eating and to symbolically demonstrate their powerlessness and silencing by Australian authorities. Similar but smaller scale hunger strikes were staged at other detention centres around the country. Although only Afghan asylum seekers were directly affected by the policy ‘freeze’, asylum seekers of several nationalities joined in the strike and its stated objectives broadened beyond demanding the resumption of processing Afghan claims to include claims for an improvement of conditions in detention.

The protest lasted for 16 days and there are no reports of force feeding on the public record, though several people were medically rehydrated. It is unclear whether regulation 5.35 was invoked. The strike was concluded following protracted negotiations between strikers and the Australian government mediated by the Immigration Detention Advisory Group.¹⁸ The Australian government agreed to resume assessing claims and to review the standards of detention at Woomera.

¹⁶ Defined in the document to mean not consuming food and/or drink within 24 hours.

¹⁷ Information from Freedom from Information request provided to Sean Parnell from *The Australian* newspaper. Email from Sean Parnell to authors (14 December 2010).

¹⁸ The Immigration Detention Advisory Group was formed in February 2001. It was formed to give independent advice to the Minister for Immigration regarding detention issues. The IDAG was replaced by the Detention Health Advisory Group (DeHAG) in 2006.

Further mass hunger strikes were staged at Woomera in May and July the same year as conditions in detention did not improve.

3. Motivation for hunger strikes by asylum seekers

Understanding hunger strikes by asylum seekers requires consideration of the asylum seekers' legal status and of the detention environment which compounds existing psychological stress and coping. Developing an understanding of the particular reasons for each hunger strike is important in negotiating an end to a hunger strike without needing to invoke regulation 5.35.

Australian authorities have however, tended to interpret hunger strikes as manipulative efforts by failed asylum seekers to obtain visas and in so doing, have failed to recognise that protests often arise in relation to the conditions in detention, issues on which negotiation is possible. In response to the hunger strikes in January 2002 the Minister for Immigration was highly critical of the hunger strikers. He publicly labelled them 'extreme' and likened the strikers to 'hijackers' saying that they were manipulative and trying to 'force decisions that they may not be entitled to receive'.¹⁹ The current Minister for Immigration, Chris Bowen, in response to hunger strikes in November 2010 stated: 'any protest which is designed to change the result of refugee applications will not work'.²⁰

While hunger strike as protest is intended to influence another person or authority, to interpret it as only manipulative is unhelpful in resolving a very serious and potentially fatal form of protest. Hunger strike literature from a range of medical, legal, political science and semiotic disciplines outlines hunger strike as an act of communication intended to engage the conscience of its target²¹. Maud Ellmann states that hunger strike as protest is 'staged to trick

¹⁹ The Minister denied the extent of the hunger strikes claiming several were secretly eating. See interviews with the Hon Phillip Ruddock, 'Ruddock explains decision to restart refugee claims process', Australian Broadcasting Corporation, *The 7.30 Report* 24 January 2002, <<http://www.abc.net.au/7.30/content/2002/s465903.htm>> accessed 16 December 2010; 'Woomera detention centre faces uncertain future' Australian Broadcasting Corporation, *Lateline*, 29 January 2002, <<http://www.abc.net.au/lateline/stories/s469176.htm>> accessed 16 December 2010; 'Force-feeding and the law', Australian Broadcasting Corporation, *Law Report* 16 July 2002 <<http://www.abc.net.au/rn/lawreport/stories/2002/606948.htm>> accessed 16 December 2010; BBC, 'Hunger strikers keep pressure on Australia' *BBC* (London 27 January 2002) <<http://news.bbc.co.uk/2/hi/asia-pacific/1784415.stm>> accessed 10 June 2010; ABC, 'PM claims detainees are morally intimidating Australians' *ABC* (Sydney 25 January 2002) <<http://www.abc.net.au/news/newsitems/200201/s466277.htm>> accessed 10 June 2010

²⁰ 'Asylum seekers sew mouths shut', Australian Broadcasting Corporation, *Lateline*, 19 November 2010 <<http://www.abc.net.au/lateline/content/2010/s3072545.htm>> accessed 16 December 2010.

²¹ Joseph Pugliese 'Penal asylum: refugees, ethics, hospitality' (2002) 1 *Borderlands E-Journal* <http://www.borderlands.net.au/vol1no1_2002/pugliese.html> accessed 22 December 2010; Don Sneed and Harry W Stonecipher, 'Prisoner fasting as symbolic speech: The ultimate speech-action test' (1989) (72nd Annual Meeting of the Association for Education in Journalism and Mass Communication, Washington DC, August 1989); Lionel Wee, 'The hunger strike as a communicative act: Intention without responsibility' (2007) 17 *Journal of Linguistic Anthropology* 61; Kim F Hall, "'Use words not your body": The hunger that has no name' (2008) 18 *Women & Performance: A journal of feminist theory* 169.

the conscience of its viewers, forcing them to recognise that they are implicated in the spectacle that they behold'²² It is very often an action taken by a person that feels powerless in a given situation and cannot see any other course of action that they expect to result in their complaints being heard. When challenged about the coercive and potentially manipulative nature of hunger striking, Gandhi defended his actions by explaining that he intended only to provoke people to reflect on their own actions and to act in accordance with the values they claimed to hold and that therefore, hunger strike was really the 'coercion of conscience.'²³

These themes were reiterated in interviews conducted with former immigration detainees. Their responses demonstrated that their fasts had a number of functions and characteristics. Several respondents stated that they felt unheard and they wanted the Australian public and international community to know about their detention and the conditions of detention. Strikes arising from this motivation were typically aimed at attracting media attention.

...if people knew about detentions, detention wouldn't be 500k away from a city. It would have been inside a city if people were supporting it. But people are not supporting it. It's something that people don't know about. Now we just need to make sure that they know... peacefully doesn't answer anything because there is no journos here. We need to get journos here and how we can do it? ...to make a scene, have a story for a TV or radio or newspaper to put that budget for journalists to fly in there and see us because they had to come from Adelaide and it was like 500k away. So they needed a good story. People sewing their lips in detention was a good story. ('Hassan' - Iran)

Other strikes were intended to exert pressure to achieve a specific outcome such as the resumption of asylum claims processing, improvements in particular conditions such as access to telephones, better food or greater access to education and social interaction. In such cases respondents were able to articulate what they hoped to achieve and to locate their decision to go on hunger strike to a specific or general policy initiative of the government²⁴ or with a more local objective such as access to telephones.

We just nothing to do, we just wanted to just make a call and that's it. No other thing else. We protest ourselves like just the best way we have to do. Do hunger

²² Maud Ellmann, *The Hunger Artists. Starving, writing and imprisonment*. (Virago Press 1993), 17.

²³ Bhikhu Parekh, *Gandhi's Political Philosophy, A critical examination* (Palgrave Macmillan 1989), 161.

²⁴ Such as that articulated by respondent 'Issaq' in relation to the introduction of temporary protection visas set out above.

strike because we have no idea to do anything. It's unreasonable to us, we can't handle that. ('Farid' - Iran)

Respondents also talked about the highly controlled and regulated detention environment and the impact this had on their sense of self and autonomy. Hunger striking was a way of asserting some form of self determination.

Of course, the protest helped. Because at least I did something for my rights. Because if I didn't do those things, nothing different between me and this table. With me? I got a soul. I got a mind. I got thinking. While this table... of course, I wouldn't stay like that. ('Zak' - Iran)

It is important to distinguish hunger strike from suicide and other forms of self-harm in that, although it undoubtedly harms the body, there is rarely a desire to die. Rather a hunger strike is an effort to have one's complaints heard and responded to. It is a communicative act intended to operate on the conscience of its target and other spectators, in this case the Australian immigration authorities and the Australian public.

'Khader': So we did in 2001 hunger strike there, we just stop eating, but just drinking. No eating, just drinking, cos you can't survive without water.

Interviewer: So there was never an intention to die from it?

'Khader': No! ... I myself, if I wanted to die, why I have to come to Australia to die? I would die in my country. We just wanted to show them, we won't eat the food unless you listen to us, unless you solve our problem. At least let the media come to see the situation and let the people know what kind of a place we are in. ('Khader' - Afghanistan)

While these quotes demonstrate a conscious act to use hunger strikes as a form of protest psychiatrists have documented the reasons for food refusal among asylum seekers may be for more complex or even mixed reasons.²⁵ Hunger strikes by asylum seekers may have elements of self-harm or be an indication of possible mental illness. Detention centres hold many individuals who have been exposed to high levels of trauma either in their countries of origin or during their journey to Australia. After arrival, other factors may contribute to or

²⁵ Derrick Silove, Jackie Curtis, Catherin Mason and Rise Becker 'Ethical Considerations in the Management of Asylum Seekers On Hunger Strike', (1996) 276 JAMA, 410; M. Kenny, D. Silove & Z. Steel, Legal and ethical implications of medically enforced feeding of detained asylum seekers on hunger strike (2004) 180 MJA 237

exacerbate existing psychological distress including detention, separation from family and stress associated with the asylum application process.²⁶ This is demonstrated in the following case example.²⁷

A young male detainee commenced a hunger strike in a remote detention centre after his claim for refugee status had been rejected. The initial strike was a protest about his treatment in detention, which he alleged had involved a period of solitary confinement and physical restraint. During the first strike, he was rehydrated intravenously under regulation 5.35. Some months later he again refused food and was rehydrated and fed through a nasogastric tube on several occasions under regulation 5.35. He developed symptoms of severe depression with associated weight loss of over 10 kg. After 2 months of failed treatment with an antidepressant, he was transferred to a metropolitan hospital. Attending clinicians judged that he was no longer on active hunger strike and that his symptoms of anorexia, hopelessness, loss of interest, and vague suicidal thoughts amounted to clinical depression. Electroconvulsive therapy, intravenous hydration and nasogastric feeding were recommended by the treating staff. The patient refused consent, leading to regulation 5.35 being invoked.

It is important for authorities not to interpret hunger strike simply as manipulative behaviour, but rather to sincerely engage with the hunger striker at the earliest moment to determine the reasons for that particular strike and the competence of the individual(s) in deciding to fast. These two factors are critical in developing an effective response to the hunger strike, one which enables an end to the fast without needing to force feed which, while it may preserve life in the immediate, is likely to exacerbate feelings of powerlessness and frustration which are motivating factors in several hunger strikes. Force feeding also does not necessarily cause the individual to end his fast as demonstrated by Mr Abdul Rahman Shalabi, a detainee at Guantanamo Bay who has been on hunger strike for 4 years and who has been forcibly fed through a naso-gastric tube over 3000 times.²⁸

²⁶ D. Silove, Z. Steel & C. Watters, "Policies of deterrence and the mental health of asylum seekers," (2000) 284 JAMA 604 – 611

²⁷ Case example from M. Kenny, D. Silove & Z. Steel, Legal and ethical implications of medically enforced feeding of detained asylum seekers on hunger strike (2004) 180 MJA 237, 237

²⁸ Affidavit of Dr Sondra Crosby submitted as evidence in *Saleh Abdulla Al-Oshen v Obama*, Civil Action No: 05 – 0520 (RMU) in the United States District Court for the District of Columbia. 2 November 2009, <http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-lawyers/ramsey_shalabi.pdf> accessed 16 December 2010.

4. Effects of hunger strike

The physical effects of a hunger strike are profound, long lasting and can result in death. A hunger strike may involve the refusal of food but with the striker continuing to take fluids including water, tea or broth. If there is a refusal of fluids deterioration of the striker's health is accelerated and death is expected to occur between 7 and 14 days. Death from a hunger strike involving food refusal but taking fluids by an individual who is well nourished and healthy at the start of the strike is expected to occur after 6 to 8 weeks.²⁹ The effect of hunger strike on the body's immune system increases the risk of infection and many hunger strikers die from a secondary infection before malnourishment has reached a fatal stage.³⁰

The physical effects of hunger strike vary between individuals, but medical literature predicts the following:³¹

- In the first 3 days the individual experiences severe hunger pangs and stomach cramps. There is a measurable reduction in muscle strength and immune system functioning.
- After one week the individual experiences dramatic weight loss. The individual's medical condition progressively deteriorates with every system in the body adversely affected.
- From week two onwards the individual's vital organs begin to atrophy. The pulse slows, blood pressure falls and the individual experiences dizziness, lethargy, faintness and headaches. Concentration is significantly impaired and the individual becomes apathetic and bedridden.
- Between 35 and 42 days the oculomotor muscles become paralysed. Vision is seriously impaired as is the individual's ability to swallow water. Compulsive vomiting occurs. This phase lasts approximately one week and once it passes, the individual is left physically weakened, sleeps extensively, loses awareness of their surroundings and often becomes incoherent.
- Death occurs anywhere from day 40 onwards³²

²⁹ Department of Health (UK), *Offender Health: Guidelines for the clinical management of people refusing food in detention* (August 2009), <<http://www.dh.gov.uk/publications>> accessed 16 December 2010, 8. The existence of illness or disease such as heart problems, diabetes or kidney damage presents a heightened risk and death can occur as early as 3 weeks.

³⁰ Department of Health (UK), *Offender Health: Guidelines for the clinical management of people refusing food in detention* (August 2009), <<http://www.dh.gov.uk/publications>> accessed 16 December 2010, 8

³¹ International Criminal Tribunal for the Former Yugoslavia, *Voluntary Protest Fasts – Information for detainees*, (2009), 5 – 7

³² Michael Peel, 'Hunger strikes: understanding the underlying physiology will help doctors provide proper advice' (1997) 315 *BMJ* 8.

There is extensive evidence that a person's cognitive functioning and psychological state also progressively deteriorate throughout a hunger strike. Irritability, impaired capacity for interpreting data and irrational or illogical thought patterns are common features.³³ This reduction in cognitive competence in the latter phases of a hunger strike has particular significance for legal, medical and other professionals working with a hunger striker. For this reason the World Medical Association recommends legal and medical personnel take comprehensive instructions from a person entering a hunger strike at the earliest point possible.³⁴

Recovery from a hunger strike is also dangerous. Voluntary re-feeding following a strike of 5 days or more carries dangers of pulmonary oedema (excess water accumulating in tissues, including the lungs), encephalopathy (damage or malfunction of the brain usually caused by liver damage or kidney failure) and cardiac failure among other serious medical consequences. Hospitalisation to enable close medical supervision of re-feeding is recommended for the first several days post hunger strike.³⁵

5. Involuntary Feeding

There are a number of medical interventions possible when a person is on hunger strike including treatments for secondary infections, relief of pain, rehydration and feeding through a naso-gastric tube. Feeding through a naso-gastric tube is an intrusive procedure, often causing severe discomfort and pain. When the procedure is performed against the person's will it is termed 'force-feeding' and the effects are amplified. Sylvia Pankhurst described being force-fed³⁶

Presently I heard footsteps approaching, collecting outside my cell. I was strangled with fear, cold and stunned, yet alert to every sound. The door opened... not the doctors, but a crowd of wardresses filled the doorway... I struggled, but was overcome. There were six of them, all much bigger and stronger than I. They flung me on my back on the bed, and held me down firmly by shoulders and

³³ Marlynn Wei and Rebecca W. Brendel, 'Psychiatry and Hunger Strikes' (2010) 23 *Harv. Hum. Rts. J.* 75.

³⁴ World Medical Association, 'Declaration on Hunger Strikes' *Adopted by the 43rd World Medical Assembly Malta, November 1991 and editorially revised at the 44th World Medical Assembly Marbella, Spain, September 1992*, <<http://www.legislationline.org/documents/action/popup/id/8591>> accessed 16 December 2010.

³⁵ Michael Peel, 'Hunger strikes: understanding the physiology' (1997) 315 *BMJ* 8; Department of Health (UK), *Offender Health*, (August 2009), <<http://www.dh.gov.uk/publications>> accessed 16 December 2010, 9.

³⁶ Maud Ellmann, *The Hunger Artists. Starving, writing and imprisonment.* (Virago Press 1993), 33.

wrists, hips, knees and ankles. Then the doctors came stealing in. Someone seized me by the head and thrust a sheet under my chin. My eyes were shut. I set my teeth and tightened my lips over them with all my strength. A man's hands were trying to force open my mouth; my breath was coming so fast that I felt as though I should suffocate. His fingers were striving to pull my lips apart--getting inside. I felt them and a steel instrument pressing round my gums, feeling for gaps in my teeth... Then something gradually forced my jaws apart as a screw was turned; the pain was like having teeth drawn. They were trying to get the tube down my throat. They got it down, I suppose, though I was unconscious of anything save a mad revolt of struggling, for they said at last: 'That's all!' and I vomited as the tube came up.

In her account Pankhurst goes on to describe the physical restraint and procedure as an invasion of her personal integrity 'as an oral rape that violates the essence of the self.'³⁷ Little has changed in the century since Pankhurst's experience. Regulation 5.35 of the *Migration Regulations 1994* permits the use of physical restraint and/or sedatives. A respondent described his experience:

My hunger strike was about 21 days... I lost nearly 25 kilo when I was on that. The reason I break it, I couldn't move nothing. I was just lying there and I didn't know what's going on around me. Suddenly I saw they put their syringe through my nose, through my thing and it was really hurting in my nose. It was really hurtful. They broke my fast. I was kind of like fainted... It was terrible. They forced me... they hold my hands and they put the syringe in my nose by force.... ('Ismail' - Iran)

Force feeding is an intrusive procedure which causes physical pain and may cause medical damage to the hunger striker. It also has an existential aspect in that it further erodes a person's free will. As such the decision to feed a person against their will is a serious one with critical legal, ethical and medical considerations.

³⁷ Maud Ellmann, *The Hunger Artists. Starving, writing and imprisonment.* (Virago Press 1993), 33

6. Legal issues

6.1 Regulation 5.35 of the *Migration Regulations*

Regulation 5.35 of the *Migration Regulations 1994* (Cth) empowers the Secretary of the Department of Immigration to authorise medical treatment to be given to a person in immigration detention without their consent. The regulation is invoked when a Commonwealth Medical Officer or a registered medical practitioner provides written advice to the Secretary of the Department of Immigration that:

- if medical treatment is not given to a particular detainee, there will be a serious risk to his or her life or health; and
- the detainee refuses to give, or is not reasonably capable of giving, consent for the medical treatment.

The Secretary can then authorise non-consensual treatment, including the use of ‘reasonable force’. Authorisation by the Secretary does not compel medical practitioners to enforce treatment if such action is contrary to their ‘ethical, moral or religious convictions’.³⁸ There is no reference in the Australian Parliamentary *Hansard* that this regulation received any attention or debate at the time it was introduced. Nor has it been the subject of any challenge in Australian courts. The Australian Human Rights Commission has recommended that the regulation be repealed as it believes the regulation may be in breach of article 10.1 of the International Covenant on Civil and Political Rights which guarantees that detainees shall be treated with humanity and with respect for their inherent dignity.³⁹

Regulation 5.35 is the only regulation relating to the care and management of immigration detainees. In the case of challenging a decision to force-feed a detainee an argument could be made that a decision made pursuant to this regulation cannot be justified by reference to the *Migration Act 1958*. The source of the power to make this regulation comes from s 273 of the *Migration Act* which refers only to the power to make regulations regarding the conduct and supervision of detainees and powers of those performing functions in connection with the

³⁸ *Migration Regulations 1994*, reg 5.35(6). For a discussion on medical ethics see M. Kenny, D. Silove & Z. Steel, Legal and ethical implications of medically enforced feeding of detained asylum seekers on hunger strike (2004) 180 MJA 237.

³⁹ Human Rights and Equal Opportunity Commission. *Those who've come across the seas: the report of the Commission's Inquiry into the detention of unauthorised arrivals*. (Canberra: HREOC, 1998) 124.

supervision of detainees. It could be argued that the power contained in regulation 5.35 is *ultra vires* in that it goes beyond such a function.⁴⁰

The regulation directly contravenes the ethical standards set by the World Medical Association (WMA) Declaration on Hunger Strikes (the Malta Declaration) which cautions against non-consensual medical treatment of hunger strikers. The WMA recommends that when a decision to refuse food has been made by a competent individual those wishes should be respected including when those wishes are to the individual's detriment including to the extent of death. The Malta Declaration ends with an emphatic statement against force feeding.⁴¹

Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment. Equally unacceptable is the forced feeding of some detainees in order to intimidate or coerce other hunger strikers to stop fasting.

If regulation 5.35 is indeed invalid we should also consider whether there are any broader principles from the common law which would authorise non-consensual medical treatment.

6.2 Common law right to self-determination

There is a long established common law principle that the right to refuse medical treatment is part of a broader right – an individual's right of self-determination. A person of full mental capacity has the right to choose whether to eat or not. Even if that refusal is tantamount to suicide, a person cannot be compelled to eat or be forcibly fed. A medical practitioner who performs such medical treatment without his or her patient's consent commits an assault or trespass upon the individual.⁴²

The common law right to refuse food and water was recently considered by the Supreme Court of Western Australia in *Brightwater Care Group (Inc) v Rossiter*.⁴³ That case involved a quadriplegic man who was not terminally ill. Mr Rossiter told his residential care facility

⁴⁰ For further discussion see Mary Anne Kenny, 'Force feeding asylum seekers' (2002) 27 Alt LJ 107.

⁴¹ World Medical Association, 'Declaration on Hunger Strikes' *Adopted by the 43rd World Medical Assembly Malta, November 1991 and editorially revised at the 44th World Medical Assembly Marbella, Spain, September 1992*, <<http://www.legislationline.org/documents/action/popup/id/8591>> accessed 16 December 2010.

⁴² See *B v Croydon Health Authority* [1995] 1 All ER 683, 686.

⁴³ *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229.

that he wished to die and directed them to discontinue the provision of nutrition and general hydration. Martin CJ made declarations that Brightwater was neither required nor entitled to use force to feed and hydrate Mr Rossiter against his wishes. In doing so he articulated the right of self-determination recognised by the common law.

[A]n individual of full capacity is not obliged to give consent to medical treatment, nor is a medical practitioner or other service provider under any obligation to provide such treatment without consent, even if the failure to treat will result in the loss of the patient's life.⁴⁴

The court went on to state that a medical practitioner who provides treatment contrary to the wishes of a mentally competent patient breaks the law by committing a trespass against that patient.⁴⁵

6.3 Possible limitations on the right

The right of personal autonomy and self-determination may be subject to some limitation when dealing with prisoners or detainees who refuse food and/or water. This is an issue that has received little attention in Australia; however, there have been developments in other jurisdictions, such as the United Kingdom and the United States.

In Australia the issue of force-feeding a detainee has been considered on only two occasions. The first was in 1993 in *Schneidas v Corrective Services Commission & Others*⁴⁶ in which a prisoner sought an injunction to restrain the defendant from force-feeding him. Justice Lee in the Supreme Court of New South Wales would not grant the injunction. He based his decision on s. 16(2) of the *Prisons Act 1952 (NSW)* finding that where a prisoner's health reached a point where there was a likely loss of organ function, forced feeding constituted 'medical treatment' under that section and was therefore authorised. In doing so Justice Lee doubted there existed a common law justification for force-feeding a prisoner against their will.

⁴⁴ *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229 [26].

⁴⁵ *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229 [31]. See also *H Ltd v J and Anor* [2010] SASC 176

⁴⁶ Unreported Supreme Court of NSW, Administrative Law division, Lee J. No 4082 of 1983, 8 April 1983 (BC 8300004)

As discussed in the introduction, the Supreme Court of NSW granted an interim order permitting the Department of Immigration to force feed two detained asylum seekers on hunger strike in 1992.⁴⁷

Courts in the UK and the US have engaged in a balancing of the rights of the individual against a number of state interests. These include such ‘paternal’ interests as the preservation of life and the prevention of suicide. There are also ‘institutional’ interests such as the fulfilment of the duty to provide medical care and the enforcement of prison security and order.

In the UK there has been a gradual shift toward a rights based approach and the preservation of the individual's rights. In *Secretary of State for the Home Department v Robb*⁴⁸ Thorpe J rejected the previous paternalistic approach as set out in the 1909 authority *Leigh v Gladstone*⁴⁹ which related to the force-feeding of a British suffragette. In *Leigh v Gladstone* Lord Alverstone CJ directed a jury that it was the duty of prison officials to preserve the health of prisoners in their custody including force feeding. Justice Thorpe considered the arguments regarding the countervailing state interests and concluded:

It seems to me that within this jurisdiction there is perhaps a stronger emphasis on the right of the individual's self-determination when the balance comes to be struck between that right and any countervailing interests of the state. So this decision is not a borderline one.... The right of the defendant to determine his future is plain. That right is not diminished by his status as a detained prisoner.

The UK now has the *Mental Capacity Act 2005* which provides that a person must be assumed to have capacity unless it is established that they lack capacity and must not be considered unable to make a decision merely because they make an unwise decision. The Act enables individuals to make ‘advanced directives’ as to their future medical treatment should they become incapacitated

⁴⁷ *Department of Immigration, Local Government and Ethnic Affairs v Gek Bouy Mok* Supreme Court of New South Wales Equity Division, Powell J, 4982 of 1992, 30 September 1992; unreported.

⁴⁸ [1995] 1 All ER 677 at 681, referred to with approval in *R (On the Application of Wilkinson) v. The Responsible Medical Officer Broadmoor Hospital* [2001] EWCA Civ 1545 (22nd October, 2001) The decision in the *Secretary of State for the Home Department v Robb* was followed in *Re W (adult: refusal of medical treatment)* decision delivered on 24 April 2002 by Dame Elizabeth Butler-Sloss P in the Family Division of the High Court.

⁴⁹ (1909) 26 TLR 139.

in the future.⁵⁰ Specific guidance for prison officials for dealing with hunger strikes in a prison setting is also provided in a Department of Health manual.⁵¹

Courts in the United States have considered whether force-feeding of prisoners is acceptable in the context of constitutionally enshrined rights to freedom of speech and privacy. The First Amendment freedom of speech clause, it is argued, protects a prisoner's hunger strike and the force-feeding of a prisoner against his or her will to prevent death would violate constitutional rights to privacy. However courts in the US have generally found that the state's interests in preserving life and maintaining order and security in prisons outweigh an inmate's rights to privacy.⁵² United States government officials at Guantanamo Bay have relied on state interests arguments to defend the force-feeding of detainees including the preservation of life and security concerns.⁵³

The above-mentioned cases are instructive in drawing out some of the legal concerns facing state authorities in responding to imprisoned hunger strikers. It is important to note however, that (particularly refused) asylum seekers, not holding citizenship of the detaining state, have a fundamentally different relationship with that state which further problematises an already complex situation. As one commentator notes:

[A]sylum seekers wish to claim citizenship and hence the protection of a state in which they have not been domiciled previously. In rejecting such claims, the state effectively expresses its intent to disqualify the asylum seekers from the protection it is obliged to provide to its citizens and other residents. Thus, asserting the *parens patriae* principle over such individuals is a contradictory action on the part of the state. While force-feeding other categories of hunger strikers may be solely directed at keeping them alive in prison, it can be claimed

⁵⁰ See *Mental Capacity Act 2005* (UK) ss 24-26

⁵¹ Department of Health (UK), *Offender Health : Guidelines for the clinical management of people refusing food in detention*, August 2009, <www.dh.gov.uk/publications> accessed 16 December 2010, UK Department of Health 2007.

⁵² Nearly fifteen state and federal courts in the United States have found that prison officials may force feed a hunger-striking prisoner. See Mara Silver, 'Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation' (2005) 58 *Stan. L. Rev.* 631, 632.

⁵³ Kristine Huskey and Stephen Xenakis, 'Hunger Strikes: Challenges to the Guantanamo Detainee Health Care Policy' (2009) 30 *Whittier L. Rev.* 783, 791. To date there has been no court case relating to the ability to refuse medical treatment of the Guantanamo detainees. The hunger striking cases that have come before the courts relate to treatment of hunger strikers and lawyers' access to medical records.

that an overriding motive for so doing in asylum seekers is to facilitate their forced return to the country of origin.⁵⁴

7. Rights of the government versus the rights of the individual

In Australia if a challenge was brought on the power of state authorities to engage in non-consensual medical treatment the rights of the individual would have to be balanced against the government's various interests in immigration detention centres. Hunger strikes by detainees place the Australian government in a difficult political position. The Department of Immigration believes that if it were to give in to the demands of hunger strikers the incidence of such protests would increase. This would place an increased number of detainees at risk of harm and the operation of the centres would become unmanageable.⁵⁵ The former Minister for Immigration described hunger strikes as a form of 'moral blackmail'⁵⁶ and accused hunger strikers of 'trying to manipulate' the government.⁵⁷ Invoking regulation 5.35 was claimed to be necessary for preserving the life of detainees: 'I think the State has a responsibility to ensure in those circumstances, that they survive, and that's what we've sought to do.'⁵⁸

The Australian government also has another interest in trying to ensure that no hunger striker dies. It has, for some time, been facing significant domestic and international pressure over its policy of mandatory detention. If an asylum seeker were to die as a result of a hunger strike it could further aggravate an already tense political situation. The question arises as to whether these arguments are sufficiently compelling to justify forced treatment. Statements made by Australian government officials reduce possible responses by the state to only two options – order non-consensual medical treatment of a detainee, or do nothing and permit the detainee to die.

8. A way forward

It is our view that the current approach is too simplistic. Authorities have a range of responses at their disposal which would enable the state to meet its duty to preserve life,

⁵⁴ Derrick Silove, Jackie Curtis, Catherin Mason and Rise Becker, 'Ethical Considerations in the Management of Asylum Seekers on Hunger Strike' (1996) 276 JAMA, 410.

⁵⁵ Human Rights and Equal Opportunity Commission. *Those who've come across the seas: the report of the Commission's Inquiry into the detention of unauthorised arrivals*. Canberra: HREOC, 1998, 107.

⁵⁶ 'Labor rethinks detention stance' Australian Broadcasting Corporation, *Lateline*, 28 January 2002, <<http://www.abc.net.au/lateline/stories/s468643.htm>> accessed 16 December 2010.

⁵⁷ 'Woomera detention centre faces uncertain future' Australian Broadcasting Corporation, *Lateline*, 29 January, 2002, <<http://www.abc.net.au/lateline/stories/s469176.htm>> accessed 16 December 2010.

⁵⁸ 'Force-feeding and the law', Australian Broadcasting Corporation, *The Law Report*, 16 July 2002 <<http://www.abc.net.au/rn/lawreport/stories/2002/606948.htm>> accessed 16 December 2010.

while also maintaining its policy objectives. It is important to note that most strikers do not wish to die, but want a resolution to their problems and to feel that they have been heard. This desire to live provides the detaining authority with considerable room for negotiation.

The UK Health Department, the International Criminal Tribunal for the Former Yugoslavia and the World Medical Association all recommend that the detaining authority allow early independent medical assessment for hunger strikers.⁵⁹ The independent doctor's role is to ascertain the competence of the person undertaking the strike, to advise the striker of the likely course of the strike and the medical implications at each stage, and to establish a clear understanding of the striker's informed intentions (an 'advanced directive') should their condition deteriorate and they lapse into unconsciousness or a state of incoherence.

The Department of Immigration should establish a panel consisting of independent physicians, psychiatrists, psychologists, legal officers and ethicists to develop comprehensive guidelines for the management of hunger strikes that recognises the government's duty of care toward detainees and which draws upon international best practice in managing hunger strike in places of detention. Guidelines should provide that the assessment and treatment of detainees on hunger strike would similarly be treated by a panel of independent physicians who would consider questions of autonomy. While every effort should be made to negotiate a successful end to hunger strikes, detainees who are otherwise competent and capable of deciding treatment for themselves should be able to refuse treatment even if this leads to death. In this sense asylum seekers should be treated like any other patient who refuses medical treatment, their immigration status should not mean they are subject to a different or lesser standard.

Regulation 5.35 of the *Migration Act 1994* should be repealed. There is no clear common law authority in Australia regarding the non-consensual medical treatment of detainees. Most states in Australia have legislation which provides for the ability of competent adults to make an 'advanced health directive' which allows individuals, in consultation with a physician, to make decisions regarding their future medical treatment in which they can either consent to or refuse future medical treatment.⁶⁰ There would seem to be no reason why such directives

⁵⁹ Department of Health (UK), *Offender Health : Guidelines for the clinical management of people refusing food in detention*, August 2009, <www.dh.gov.uk/publications> accessed 16 December 2010, UK Department of Health 2007; World Medical Association, 'Declaration on Hunger Strikes' Adopted by the 43rd World Medical Assembly Malta, November 1991 and editorially revised at the 44th World Medical Assembly Marbella, Spain, September 1992, <<http://www.legislationline.org/documents/action/popup/id/8591>> accessed 16 December 2010.

⁶⁰ See for example *Guardianship and Administration Act 1990* (WA).

could not be used in cases involving asylum seekers in detention. If it is decided that a person lacks capacity to consent to treatment then authorities should seek orders for medical treatment through the courts in accordance with current mental health legislation rather than through an administrative process.

9. Conclusion

The prevention and successful management of hunger strikes by detained asylum seekers is an important issue across a number of jurisdictions. As well as state interest arguments of preserving life and maintaining security and order in detention centres, hunger strikes engage critical and competing human rights including the rights to life, to self-determination, to privacy, and to freedom from inhuman and degrading treatment. It is incumbent upon states which detain asylum seekers to protect those rights not unavoidably limited through the pursuit of detention itself. Force feeding is, in the authors' opinion, an unnecessary violation of an individual's rights to self-determination, and to be treated with dignity and respect. As previously noted, public comments by Australian government ministers indicate an overly simplistic and judgemental approach to hunger strikes by asylum seekers, leading to a narrowed range of responses. A more appropriate course of action would engage meaningfully with asylum seekers at the earliest possible moment to advise them on the physical consequences, to determine their mental competence and their future wishes. In this way the competence and integrity of the strikers is recognised and respected.