

COUNTING BORDER DEATHS AS DEATHS IN CUSTODY

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OVERVIEW

In the Australian context, official 'deaths in custody' monitoring and reporting has only accounted for those people who have died whilst in the custodial settings of prison, juvenile detention, and police custody (Lyneham et al 2010). Official monitoring and accounting of 'deaths in custody' in Australia does not consider, account for, or report on deaths that occur in Australian immigration detention centres or deaths that occur whilst authorities attempt to take a suspected irregular migrant into immigration custody, including in the process of offshore interdiction. We argue here that deaths within these immigration custodial settings should be included under existing arrangements for monitoring and reporting.

Establishing a Definition of 'Deaths in Custody': The Royal Commission into Aboriginal Deaths in Custody

A Royal Commission into Aboriginal Deaths in Custody (RCIADC) was implemented in Australia in response to the high number of Aboriginal deaths in custody in the 1980s. The Royal Commission (RCIADC 1991) established the following definition that has been used since 1992 as the official definition to monitor Australian deaths in custody.

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

Monitoring and Reporting on Deaths in Custody: The Australian Institute of Criminology National Deaths in Custody Program

In response to recommendations from the RCIADC report, the Australian Institute of Criminology (AIC) National Deaths in Custody Program was set up to monitor and report annually on deaths in custody from 1980 to the present (AIC 2010). The purpose of the program is to examine the circumstances of deaths in prison, police custody and juvenile detention around Australia, and report on the number of deaths in custody in Australia, and the patterns and trends observed in those deaths (AIC National Deaths in Custody webpage). The report is developed using data from state and territory police services, correction and juvenile agencies and relevant coronial reports.

For the purposes of monitoring and reporting, the National Deaths in Custody Program uses the RCIADC definition of 'deaths in custody' and the 1994 resolution of the Australasian Police Ministers' Council (APMC) definition of 'deaths in police custody' which extended the definition of police custody beyond institutional settings to include deaths during police operations (Lyneham et al 2010). However, the increasing number of deaths in immigration custody has led to calls for the monitoring program to be extended to cover these deaths



that take place in custodial settings outside the criminal justice system (Ting 2010). This pressure is reflected in the Foreword of the most recent annual report (Lyneham et al 2010).

“This report analyses deaths occurring in custodial settings, such as prison and juvenile detention, as well as police custody and related operations, such as sieges and motor vehicle pursuits. It does not consider deaths in detention centres under immigration legislation.”

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

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

State by State: Coroner’s Definitions of ‘Deaths in Custody’

State Coroners are another important source of information about custodial deaths. In Australia, investigating and reporting on deaths in custody is the legal responsibility of the State Coroners office. The legal definition of ‘deaths in custody’ is presented under the Coroners Act of each State (see Research Brief No. 6 for more detail). Some of these definitions expand on the contexts in which custodial deaths can occur. For example, the ACT legislation specifies detention under the Mental Health Act and attendance on community service orders as locations where deaths in custody can occur. However no state definition of ‘death in custody’ or ‘person held in custody’ includes individuals who die in immigration custodial settings.

Expanding the Definition of ‘Deaths in Custody’ to include Border-Related Deaths

According to Weber and Pickering (2012, p5), border-related deaths can be defined in relation to the external (offshore) and internal (onshore) border.

‘...deaths are considered to be potentially border-related if they occur at any of the functionally defined ‘border sites’: at the physical border, en route, in offshore or onshore detention, during deportation, on forced return to homeland, and even within the community as a result of hate crime, labour exploitation, withholding of subsistence, or the promotion of conditions of legal and social precariousness.’

Of these contexts in which deaths are known to occur, deaths within immigration detention centres operated under Australian legal authority (whether located onshore or offshore), deaths while under escort during deportation, or while designated authorities (police or DIAC compliance field officers) are attempting to take individuals into custody under the Migration Act, and deaths that occur during offshore interdiction operations in Australian territorial waters once individuals or vessels have come under the surveillance or control of Australian border authorities, all generate a duty of care that falls on Australian law enforcement officials that could reasonably be considered to bring these deaths within the criteria of ‘deaths in custody’. It is important to note that, as with the recognition of ‘deaths in custody’ within criminal justice settings, applying this label for the purposes of investigation and monitoring, does not constitute an attribution of responsibility for the death.

Deaths in immigration custodial settings in Australia: Australian Border Deaths Monitoring List

Using the above-mentioned definition of border-related deaths, the Border Crossing Observatory has developed an Australian Border Deaths Monitoring List (see Border Crossing Observatory website below). The purpose of the list is to count, and account for, border related deaths in Australia from 2000 to present. To date (September 2012), 964 border-related deaths have been recorded. This figure includes estimates of passengers missing from shipwrecked vessels, believed drowned. While it is contended that each of these deaths can be related in some way to the operation of Australian border controls, only a proportion of them will fit the definition of ‘deaths in custody’ we have proposed here. Of the 964 recorded deaths, 27 have occurred in the custodial settings of offshore detention (2), onshore detention (21) and during apprehension/deportation (4).

In addition, the Ashmore Reef explosion, which claimed 5 lives in April 2009 and occurred while the asylum seeker vessel was in Australian waters and under the direct control of Australian Navy personnel, is an example of an offshore death in custody that occurred in circumstances very different from those encountered in the criminal justice system, but which raises similar issues about duty of care. In contrast, the loss of 50 lives in December 2010 when an asylum seeker vessel broke up on cliffs on Christmas Island, might be said not to have been under the control of Australian personnel at the time, although in this case it is the failure to assume control of the stricken vessel that attracted condemnation. The tragic sinking of the SIEV X, which accounts for the single largest loss of life on the Border Deaths Monitoring List, occurred outside Australian territorial waters, although in this case it is the possible proximity of Australian vessels that has attracted the most controversy.

Conclusion

While these cases do raise complex and unique definitional issues, applying a wider definition of 'deaths in custody' to include immigration custodial settings in the AIC National Deaths in Custody Monitoring Program, would greatly increase the knowledge base of deaths that occur under the custody of Australian law enforcement officials, and would indicate that the deaths of non-citizens while under the care and control of government officials are being accorded the same significance as the deaths of Australian citizens.

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Updated for the Border Crossing Observatory by Rebecca Powell, Leanne Weber and Sharon Pickering

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