

## A more ethical and realistic conversation: the Australian debate about asylum seekers and refugees

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### EXECUTIVE SUMMARY

Debate about asylum seekers and refugees, especially when it concerns “boatpeople”, is often characterised by misrepresentation and hysteria. Amid all of the politics concerning the issue, the ethical dimensions of asylum are not always given their proper attention.

This paper seeks to offer a brief guide to the ethics of asylum and refugees, focusing in particular on four general questions:

1. What should be the place of empathy and compassion in our moral reasoning with respect to asylum seekers and refugees?
2. To what extent must any ethical account of refugee policy incorporate concerns about practical or political feasibility?
3. What is the nature of Australia's moral obligations to asylum seekers and refugees, and to what extent are these shaped by our understanding of membership?
4. Can mandatory detention and offshore processing be ethically justified?

It is argued that empathy should figure in ethical reasoning; that it is irresponsible to adopt an ethical framework without

attention to practical feasibility; and that in a liberal democracy moral obligations are complicated by a value of self-determination. In policy terms, the paper argues that it is difficult to justify the continuation of mandatory detention, and that onshore processing of asylum seekers who arrive in Australia by boat is the most ideal response. Yet the latter would be best achieved with bipartisan political support and as part of a credible, regional solution. By itself, a shift to onshore processing is likely to lead to an increase in the arrival of boats carrying asylum seekers seeking to make it to Australian territory. In such a scenario, political leaders must educate public opinion about asylum seekers and refugees, and avoid politicking over boatpeople. Where such resolve is missing, a shift to onshore processing may carry the risk of a number of “spillover” effects – in particular, the possible undermining of public acceptance of a substantial racially

non-discriminatory immigration program, and of a multicultural Australian society.

If there is to be offshore processing, as may well be the case, there must be legislated minimal standards for how asylum seekers are treated in any offshore facility, based on relevant human rights standards, with adequate legal protections. It is also important that any durable policy response involves a regional dimension. It is important to ensure Australia bears a larger burden, if there is to be successful cooperation with our regional neighbours, particularly in stemming the arrival of asylum seekers by boat. It would be a demonstration of good faith if Australia should increase its intake of refugees under its humanitarian program. There is also merit in proposals to establish an independent commission to facilitate informed public debate, and an independent authority to administer Australia's humanitarian programs. At least until there can be strong bipartisan political leadership on this issue, it may be necessary to seek an institutionalised form of depoliticising this most divisive of issues.

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## INTRODUCTION

It has been ten years since the Tampa incident, which precipitated the “Pacific Solution” to unauthorised boat arrivals in Australia. During that time, there has been a dramatic hardening of public attitudes towards a subset of asylum seekers and refugees in Australia. A proportion of the Australian population regard asylum seekers, especially those who seek refuge by boat, with a measure of hostility and suspicion. Such sentiments are fed by political rhetoric emphasising the need to stop the arrival of boats, whether in the name of national security or even in the cause of justice or fairness.

The result has been a coarsening of public discourse. Discussion about how Australian society should deal with asylum seekers is frequently characterised by polemic and hysteria. Many would say it even spills over, from time to time, into xenophobia and racism. How has it come to this? And is it possible to have a more balanced public conversation?

This paper was written as part of The Ethics of Asylum and Refugees project, which has been pursued over the course of 2011. The project’s brief was to engage in a conscious effort to highlight some of the ethical dimensions of the asylum seeker and refugee issue – to foster greater deliberation and proportion with respect to such matters. To this end, a one-day symposium was held on 30 June 2011 in Sydney, attended by people from academia, media, government, and civil society organisations. Drawing upon some of the discussions conducted at the symposium, this paper aims to explore some of the underlying ethical questions of the political debate about asylum seekers and refugees. It seeks to offer a brief guide to the ethics of asylum and refugees.

This paper examines four sets of questions.

There are, first, some philosophical concerns about the place of empathy and emotions in moral reasoning. The traumatic experience of asylum seekers and refugees, fleeing from their homelands because of persecution, naturally provokes a compassionate response. Yet many believe compassion cannot be enough; if anything, it may even distort our moral reasoning. Should we adopt a sangfroid approach to ethics? Or is it better to step into someone else’s shoes before making a judgement?

Second, there are some questions concerning moral psychology and practical feasibility. Ethical discussions of asylum seekers and refugees frequently resort to moral standards, which may well be unattainable. But does that mean that

ethical and political considerations about asylum should be regarded as separate? Or could “non-ideal theory” play some role in ethical reflection?

Third, this paper addresses some questions concerning the ethics of membership. What is the nature of Australia’s ethical obligations to asylum seekers? Is this grounded in human rights and international legal norms? To what extent does this conflict with claims of national sovereignty? Or is there a prospect of grounding ethical obligations in national Australian traditions of fairness and egalitarianism?

Finally, some policy-related questions are considered: Is there a sound ethical basis for offshore processing of asylum seekers? Or is Australia, in so doing, exporting its moral obligations? And is a regime of mandatory detention for boat arrivals something that can be justified?

This paper will address these concerns in turn, concluding with some reflections on the implications of our asylum seeker and refugee debate on the state of Australian democracy, and some recommendations for a better public conversation on the issue. But before I do, let me turn first to the social and political background of the matter.

### 1. Public opinion

There are few issues that raise passions in the same way as that of asylum seekers. The contours of public debate should be familiar.

On the one hand, many Australians regard asylum seekers, especially those who arrive in Australian territory on boats, with fear and loathing. Many consider boatpeople as merely illegal immigrants or queue-jumpers. Those who travel here on boats, often by paying so-called people smugglers, are portrayed as economic migrants who are undeserving of our generosity. Thus, it is frequently argued, when they arrive in Australia and have their claims for asylum recognised, this has the effect of punishing

those who are in the so-called queue waiting for resettlement. The proposed response is to take a hardline approach to stopping the arrival of boats, by offering suitable deterrents – for example, sending them back or diverting them somewhere other than Australia.

On the other hand are those Australians who regard such a response as little more than an expression of racism or xenophobia. Asylum seekers who arrive on boats do so because they often have no choice. Whether or not they have the economic wherewithal to make such a journey should not detract from the fact that they are fleeing from homelands where they face grave physical danger or persecution. While there should be an orderly way of processing claims, to suggest there is a queue much like there is at a bus stop ignores the fact that in many countries of strife and conflict, there is simply no queue that asylum seekers can join.

And then, located somewhere in the middle of these two extremes is a group of people who express concern about asylum seekers who are put to sea by people smugglers on dangerous boat journeys. For this group, any policy of “stopping the boats” is justified by the risk of death or injury that boat-borne asylum seekers face. The presumption is that asylum seekers are the victims of exploitation by people smugglers.

It is against this background that much of our debate on refugees and asylum seekers takes place. Regardless of where we might stand in the debate, one could perhaps agree that there are a number of defining characteristics about public attitudes.

First, any hostility that Australians have towards asylum seekers seems to be directed in particular at the spontaneous arrival of asylum seekers on boats.<sup>1</sup> The same level of concern doesn’t appear to exist with respect to asylum seekers who arrive by air, even though the overwhelming majority of those who seek refugee status arrive in Australia that way (according to the most recent figures from the Department of Immigration and Citizenship, in the past ten years 76 percent of asylum seekers came to Australia by air).<sup>2</sup>

In addition, the Australian public doesn’t seem to be exercised in the same way if governments put in place programs to re-settle refugees from offshore. One recent study by Professor Andrew Markus of Monash University found that two-thirds of respondents had a positive attitude to

refugees whose cases had been assessed by Australian authorities overseas. The same study found that 40 percent of those surveyed believed the best policy for dealing with asylum seekers trying to reach Australia by boat was either to detain asylum seekers and send them back or to turn back boats.<sup>3</sup>

The second characteristic of public opinion worth noting is that it is not always proportionate. By this, I mean that public opinion in the area of asylum and refugees can be rather susceptible to exaggeration or to myth. For example, popular concerns about invasions by boats or flotillas would suggest a much higher number of asylum seekers that arrive by sea than is actually the case and than what other countries have to contend with. In the five years to the end of last year, Australia received 15,226 boat arrivals (compared with Greece's 56,180, Italy's 91,821, Spain's 74,317 and Yemen's 185,810).<sup>4</sup>

Similarly, the debate about population and asylum seekers in the lead up to last year's election reflects the sense among many Australians that a large proportion of our migrant intake is composed of refugees. A survey by Essential Media last year found that 38 percent of voters believed that boatpeople comprised at least a tenth of Australia's migrant intake (with ten percent believing they comprised half or more).<sup>5</sup> In fact refugees make up a much smaller fraction (Australia's humanitarian program in 2009-10 took in 13,750 people, compared to 168,700 in the migration program).<sup>6</sup>

## 2. The politics of boatpeople

The most significant characteristic of the political context is that there has been a breakdown of a bipartisan consensus about a compassionate or humanitarian approach to asylum seekers. It was once the case that neither side of politics would seek to make political mileage from immigration issues in general. From the time a planned migration program was introduced in Australia during the post-Second World War period, political bipartisanship of a certain kind could be taken for granted.

Arguably, this consensus broke down with the political impact of Hansonism in the 1990s. Especially since the Tampa incident of 2001, we have seen asylum seeker policy particularly subject to a much more nakedly political contest. Both major political parties feel that any retreat from a hardline stance on unauthorised boat arrivals will result in savage electoral punishment. Much like the issue of "law

and order", political parties seek to outbid each other on how strong they are on maritime national security and how ruthless they are towards people smugglers. In one sense, then, one could say that a form of bipartisanship does exist. Even a Prime Minister like Kevin Rudd, someone who campaigned for government as Opposition Leader for an end to the Pacific Solution and ostensibly for a more compassionate approach to asylum seekers, sought to emphasise a "tough but humane" stance on the issue while infamously calling people smugglers "scum of the earth who can rot in hell".<sup>7</sup> The politics of boatpeople presents an especially traumatic problem for the Labor Party, which finds itself divided between responding to its more affluent, tertiary-educated progressive constituency in the inner-city, which favours a more generous stance towards refugees, and to its traditional, formerly working-class constituency in the outer suburbs, which tends not to be so sympathetic.

In more general terms, politicians have been mindful of the apparent fear that voters have about asylum seeking boatpeople. A Lowy Institute poll this year, for instance, found that 86 percent of respondents believed that boatpeople "pose a potential security threat to Australia".<sup>8</sup> Some scholars emphasise there is a deep-seated insularity and fear of outsiders in the Australian psyche. One academic argues, with respect to boatpeople, that "secreted in the crevices and dark, invisible spaces of these illegalised bodies and intruding small craft lurk the invading germs and threatening microorganisms of the tropics – that dangerous geography that the very construct of insular Australia strives to hold at bay".<sup>9</sup>

This is not the entire picture, however. One of the problems that those sympathetic to asylum seekers have in making their case is that they too easily accuse their opponents of being inveterate racists. In fact, there is evidence that suggests Australians are not necessarily as hostile to boatpeople as often made out. A recent Age-Nielsen poll showed that a majority of respondents believe asylum seekers who arrive to Australian territory by boat should have their claims for refugee status processed onshore.<sup>10</sup>

In any case, politicians are worried about a backlash from that section of Australian voters who indeed fear the boats – particularly those who live in marginal seats. The apparent potency of such fear was

evident in the lead-up to the 2010 federal election campaign, although it assumed something of a mutated form. Namely, there has been a conflation of concern about unauthorised boat arrivals and concern about population growth. Given that many voters mistakenly believe that those granted refugee status comprise a significant proportion of the annual migrant intake (as noted above), the boatpeople issue has become a vehicle for broader anxieties about population growth and quality of life. This seems especially the case in outer metropolitan areas of Sydney, Melbourne and the Gold Coast growth corridor, where population growth pressures are perceived to be acute.

The politics of boatpeople has therefore been conducted in the register of a politics of anxiety. The invocation by Prime Minister Julia Gillard last year of an idea of an "Australian sanctuary", particularly in the context of population growth, seems only to encourage Australian voters to conceive of the nation as something to be jealously guarded against encroachment.<sup>11</sup> Public discussion of boatpeople is consequently framed as a matter of national sovereignty and self-determination. The corollary of such a starting point is that boatpeople can be regarded as "illegal immigrants", determined to flout a nation-state's established procedures for determining who is to be admitted into its territory.<sup>12</sup>

Often lost in all of this are the legal obligations an Australian state owes to asylum seekers as a signatory to the 1951 Refugee Convention. In particular, the Convention binds its signatories not to impose penalties, on account of their mode of entry or lack of authorisation, to a territory, where they have a well-founded fear of persecution. Article 33 of the Convention imposes a duty of "non-refoulement", which states that a refugee shall not be expelled or returned to a country where his or her life would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.

In light of this, any invocation of national sovereignty should not ignore the fact of such obligations to allow people to seek asylum and to have their claim for protection processed in Australian territory. As the authors of one recent report put it, in willingly choosing to sign onto the Refugee Convention, "Australia proudly said yes to refugees and yes to asylum seekers fleeing persecution".<sup>13</sup>

### 3. Ethics and the need for empathy

Of course, the matter is not so simple as pointing to certain legal obligations and ending debate there. It is not the legal questions that exercise us, but rather the underlying ethical or moral ones. Yet the precise nature of the ethical or moral concerns that are involved in the asylum and refugee issue are not always clear.

At the most general level, one way of looking at the political division that exists today is to say that it might reflect different ways of regarding the proper response to human suffering. Those who adopt a sympathetic stance towards asylum seekers would argue that any instance of human suffering calls upon us to exercise some measure of empathy – to walk in someone else's shoes. Those who favour a more hardline stance would dispute this, and suggest that any feeling of empathy may in fact corrupt our moral judgement.

Consider some of the sentiments expressed in the recent SBS program *Go Back To Where You Came From*. The program involved taking six Australians on a journey to recreate the experiences of refugees who have come to Australia. Participants lived with settled refugees in Australia, and then with asylum seekers overseas waiting for their claims to be processed. They saw refugee camps up close. They observed a government raid on asylum seekers in Malaysia. They briefly experienced life on a leaky boat at sea.

At one point, not long after the program's participants had been rescued from an apparently sinking fishing boat, one of the participants protested that the exercise elicited his empathy without consent. This was something echoed, for example, in the criticism directed at the program by commentators such as Paul Sheehan in the *Sydney Morning Herald*, who wrote that the show involved "an empathy forced march". According to Sheehan, any insertion of empathy into the ethical equation leads to a distortion of the boatpeople issue:

The empathy argument is easily turned on its head, something the producers [of *Go Back To Where You Came From*] carefully avoid doing. Far from lacking empathy, the decision to send a punitive signal to the people smugglers and their clients has been proven to stop the people-smuggling trade. Detention centres, instead of being opened all over the country, would empty out. Lives would not be lost at sea. Hundreds of millions of dollars would be spent on people instead of policing. More refugees could

come to Australia under less stress and for less cost. [...] Because this debate is not about empathy. It is not about numbers. It is not about race. It is about principle: control the borders. The biggest beneficiaries of strict border control would be legitimate asylum seekers.<sup>14</sup>

To what extent, then, should emotions and empathy feature in our moral reasoning on asylum? Is it helpful to walk in someone else's shoes? Or is it better to take a more detached approach to our reasoning?

First, it might be helpful to clarify what is meant by empathy. Its Greek etymology notwithstanding, empathy has only a recent intellectual history. The term was introduced into the English language in 1909 by psychologist Edward Titchener as a translation of the German word *empathie*. As it was originally used, empathy meant being able to relate to the experience of another person, by mirroring it in one's mind. Empathy has been increasingly embraced by moral philosophers as a central component to moral reasoning. But does this fashion have a genuine basis?

The 18th-century philosophers of the Scottish Enlightenment may provide some answers. David Hume's defence of the role of passions in practical reasoning is certainly instructive: "Reason is and ought only to be the slave of the passions." In Hume's view, the extended sentiment of humanity – what he called sympathy – is ultimately "the foundation of morals".<sup>15</sup>

Sympathy, as it was invoked by Hume and his contemporaries, is equivalent to our more modern idea of empathy. In *The Theory of Moral Sentiments*, Adam Smith explained that sympathy involves an individual adopting the perspective of the "impartial spectator". Enjoying some fellow feeling for another requires that we project ourselves into another's world so as to conceive "what we ourselves should feel in the like situation".<sup>16</sup>

Smith was not naive enough to believe there could be a perfect union of sentiment between people. To be an impartial spectator meant being both involved and detached. It meant being involved enough to get closer to others, though not so much that one cannot make a sound judgment.

How might this apply to our case? In the case of asylum seekers (especially boatpeople), feeling sympathy need not commit one to exercising infinite, saintly compassion. But an impartial spectator would acknowledge that, historically, most boatpeople who make it to Australia are genuine refugees. An impartial spectator would recognise human suffering.

As both Hume and Smith recognised, our moral emotions are shaped by proximity. When those in hardship are remote from us, it is much easier to withhold our sympathy or to decline our obligations. This may perhaps explain why it is easier to adopt a hardline approach when asylum seekers are treated as an abstract category, rather than as real human beings in search of a sanctuary (as demonstrated, perhaps, by how some of the participants in *Go Back To Where You Came From* changed their views of asylum seekers once they had experienced life from the latter's respective). Yet a more satisfactory ethical approach should involve some measure of empathy, and some attempt to step into the shoes of those who flee their homelands from fear of persecution.

### 4. Ideal versus non-ideal theory

Merely reiterating the importance of empathy, however, seems not to advance the debate significantly. After all, the question of empathy seems easily to be deflected by those who believe that the real crux of the boatpeople issue lies elsewhere. It is common, therefore, for commentators such as Sheehan to dismiss empathy as just a talisman of the bleeding heart and affirm that the *real* issue lies in deterring the arrival of boats and preventing the loss of lives on the seas, or in cracking down on people smugglers.

There are as well questions concerning how ideals and reality should come together on the matter of asylum. In philosophical terms, this concerns the role of ideal theory. To what extent should we scrutinise existing practices, particularly those widely supported or deeply entrenched, from the vantage point of a perfect ideal? Does this actually do harm in deflecting attention from what may actually be feasible here and now in the real world?

These were some concerns raised by Robert Manne, writing about the choice between morality and politics on asylum earlier this year, reflecting on the failed suggestion of an "East Timor Solution":

The asylum seeker issue now poses an acute dilemma for the friends of asylum seekers. Most argue that as both mandatory detention and even more so, the Pacific Solution, are immoral, the Gillard Government should abolish mandatory detention and should not contemplate the establishment of an offshore processing centre on East Timor or anywhere else. This position is morally right but altogether unrealistic from the political point of view.<sup>17</sup>

It is unrealistic, in Manne's view, because Australian public opinion is consistently troubled by the spontaneous arrival of asylum seekers on boats. Moreover, Manne argues that it would be dangerous even to put a more morally sound policy into practice because public hostility might harden even further against asylum seekers and leave the way open to a strengthening of populist hysteria.

Such a critique is worth bearing in mind. It is easy, in any discussion about ethics, to bracket any considerations about practicality. The assumption is that only the purity of reason and moral principle matters, and nothing else.

Thus, many of those who do reflect upon the ethical dimensions of asylum seekers and refugees tend to invoke maxims such as Immanuel Kant's Categorical Imperative, and believe that the debate must be resolved there. Namely, we should bear in mind that one should "act only in accordance with that maxim through which you can at the same time will that it become a universal law". In Kant's view, the will can become moral only through the exercise of pure practical reason uncorrupted by considerations of the empirical world. Reason, and not desire, should move us to abide by the requirements of morality and justice. In other words, we are motivated to act morally or justly simply by engaging in practical reasoning.<sup>18</sup>

The problem with this model of moral psychology is obvious: we are not always rational creatures, after all. But what would be the point of clarifying philosophical concepts if it should produce only rules and norms that no one could be capable of obeying? To be fair to Kant, he also argued that ought implies can: that we are not ethically obliged to do the impossible. But what of the impolitic? The case of boatpeople seems to underline this. As political theorist Christina Boswell highlights, this seems to reflect the particular weakness of liberal universalist theories (which include rights-based theories drawing upon Kant as well as utilitarian ones) emphasising universal human rights to pass the test of practical feasibility:

... liberal theories run the risk of over-reaching themselves. They set up expectations about individual and collective ethical agency that cannot be redeemed, at least not under the economic and political conditions prevailing in liberal democratic societies. In this way, liberal thought runs the risk of marginalising itself in policy debates about asylum and refugee

protection. By setting up unrealistic and uncompromising expectations about ethical behaviour, it risks relegating itself to the margins of public debate in liberal democratic states.<sup>19</sup>

In particular, a liberal universalist argument, which emphasises the fundamental moral equality of human beings cannot account for the significance of membership of particular states or communities. If one should believe, for example, that nationality should have no ethical significance, then the corollary may well be that there should be open borders and no limits on assistance that a political community must offer to refugees.

To be sure, many liberal universalists do not go this far. One such proponent, Matthew Gibney, argues that there are instrumental grounds for restrictions on the assistance a state must provide to refugees: there may be a certain point beyond which the admission of refugees would be inconsistent with the conditions for trust and solidarity that are necessary for a functioning polity. States should accept only "as many refugees as they can without undermining the provision of collective or public goods amongst their members".<sup>20</sup> This seems to amount to a concession to a particularist or realist view of the state, which holds that citizens in a national community have some special ties, and that the obligations citizens owe to each other are of a different quality to those owed to human beings in general. Indeed, it seems to acknowledge that any application of even a universalistic ethics is subject to a non-ideal real world.

## 5. The ethics of membership

Asylum seekers do raise questions about the ethics of membership. In a globalised world, what precisely is the nature of Australia's ethical obligations to asylum seekers? Is this grounded in universal human rights and international legal norms? And if so, how might we reconcile this with a more particularistic value of national sovereignty?

In a globalising world, communities increasingly are being asked to choose between a universalist cosmopolitanism that makes no distinction between members and strangers, and a patriotic perspective that takes seriously national self-determination. For cosmopolitans, we are simply citizens of the world. Our citizenship shouldn't be defined by our membership of national communities. Whether Afghan or Australian, Sri Lankan or Swedish, we are all entitled to equal, non-negotiable rights of liberty and security. When push comes

to shove, these should trump any right of nations to territorial integrity.

Applied to asylum seekers, the cosmopolitan case places a presumptive burden on developed nations to relax their claims to territorial rights and accept more refugees. Anything less would involve a moral failure. Thus, as British journalist Philippe Legrain argues, border controls in the US, Europe and Australia effectively involve waging a war on migrants whose only crime is to aspire to a Western way of life.<sup>21</sup>

There is a good case to be made in favour of Australia accepting more refugees and it would be wise to avoid mass hysteria about boatpeople. But we should be clear about the precise nature of any moral duty owed to asylum seekers. It complicates matters that in Australia the cosmopolitan human rights argument is often merged with anti-racism.

One constant refrain is that any robust stance on border security involves a dog-whistling throwback to a paranoid White Australia or Fortress Australia mentality.

It verges on intellectual laziness, though, to dismiss all concern about territorial integrity as disguised racism. To be sure, any starting point for an ethical policy must recognise that the freedom of endangered individuals to exit their society counts as an important human right. Yet, short of having completely open borders, any right to exit isn't absolute; it depends on co-operating nation-states.

All this should be obvious enough. Any legitimate immigration program requires that the admission of new arrivals is managed according to a clear and acceptable rationale. In historical terms, public acceptance of mass immigration has been contingent on nation-building ambition. For example, during the past decade Australia has arguably been able to sustain high levels of incoming migrants (more than 200,000 in 2007-08) only because our migrant intake has been based on a points-based system geared towards meeting the needs of our growing economy.

In future, the success of any substantial immigration program will rest on public acceptance. Herein lies the problem. Any such contract between citizens and government about immigration is based on the idea that communities have the right to determine whom to admit as members, according to their national aspirations. This is under challenge from a universalist perspective.<sup>22</sup>

It is far from clear that Australians are prepared to accept a cosmopolitan citizenship, which repudiates the moral worth of national membership. The Lowy Institute's annual study of public attitudes has consistently revealed since its inception in 2005 that at least 70 percent of Australians surveyed either somewhat agreed or strongly agreed that they were concerned with unauthorised boat arrivals as an issue of national security. More generally speaking, Australians express a very real and genuine sense of patriotism, believing that there is an intrinsic moral worth to belonging to an Australian community.<sup>23</sup>

A world in which borders no longer count remains a distant dream. This should remind us of the limits of any cosmopolitanism. At the same time, it need not mean that any invocation of national self-determination must preclude a more liberal approach to asylum seekers.

If there is to be a more balanced public debate about boatpeople, if not also a larger intake of refugees, this needs to be guided as much by national values as by universal human rights. The "fair go" is an obvious place to start. Such an ethos would mean little if we are incapable of extending it to those most vulnerable. National self-determination doesn't automatically mean exclusion: it is entirely consistent with a national ethos of a "fair go" for Australia to admit far more refugees in its migration program than is presently the case. In 2009 Australia only received and processed 6,500 asylum claims, compared to the 51,120 processed by the Nordic countries of Denmark, Sweden, Norway, Finland and Iceland (whose combined population of 25 million is not much larger than Australia's 22.5 million).<sup>24</sup>

This may be too imperfect a formula for many to accept over cosmopolitan purity. But, whatever its appeal, cosmopolitanism can never be enough. As 18th-century German philosopher J. G. Herder noted, there is something more authentic about the savage who works for his tribe than "that cultivated ghost, the citizen of the world, who, burning with love for all his fellow ghosts, loves a chimera".<sup>25</sup>

## 6. Policy dimensions: Mandatory detention and regional frameworks

Some attention should now be paid to questions about policy. At the time of writing, the future of the Federal Government's "Malaysia Solution" remains

unclear, after it was struck down by the High Court in August. There has been some suggestion that the effect of the High Court's judgment in the *Plaintiff M70* case precludes not only a form of offshore processing in Malaysia but also any offshore processing in Nauru and Manus Island in Papua New Guinea. But the Federal Government has displayed its determination to resurrect its agreement to swap asylum seekers with Malaysia by amending the Migration Act. Though there continue to be significant points of disagreement between the Government and Opposition, there remains the possibility that some agreement may be struck to support legislation, which would put offshore processing of refugee claims beyond doubt. Some model of mandatory detention and offshore processing is perhaps likely to be working practice in the foreseeable future (though its legality might yet again be challenged).

In this section, I wish to consider some of the policy concerns relating to asylum seekers and refugees, by using some of the ethical frameworks that have been proposed so far in this paper. In the first instance, my assumption is that a discussion of the policy context must exist in the realm of non-ideal theory. In an ideal scenario, it would be preferable to allow for all claims for refugee protection by asylum seekers who arrive in Australian territory to be processed "onshore" – that is, on the Australian mainland – rather than "offshore". Yet, short of resolute bipartisanship on this matter, such a stance is politically unfeasible. A realistic assessment would concede that, at least for some time to come, offshore processing of refugee claims may have to play some role in the mix of policies towards asylum seekers.

It may be useful to apply to any policy discussion the two other ethical lenses I have put forward. We should consider what role empathy and moral sympathy can play in structuring policy debates, and also the implications of accepting a particularist ethical view of membership. A shift away from the more morally stringent demands of rationalistic moral motivation and liberal universalism could perhaps lead to a more constructive engagement with current public opinion.

The possible role of empathy as a regulative ideal should be obvious, especially relating to the question of mandatory detention. It is difficult to find a morally persuasive argument in favour of any prolonged mandatory detention; certainly, it is telling that Australia is the only country in the world

to pursue a policy of mandatory detention for all asylum seekers who arrive by boat. While such a punitive approach may be justified as a measure aimed to deter boat arrivals, the evidence strongly suggests that detention does not have any such effect.<sup>26</sup>

Yet consider the crude human cost of the current detention framework, which can involve people being held in a detention centre under no criminal charge, and without a clearly defined time limit. Stories of hunger strikes, self-harm and rioting in detention centres, some of which are located in remote desert areas of Australia, reflect the sense of desperation incarceration can breed. Public health experts have long spoken out about how mandatory detention is a recipe for mental illness, especially among child detainees.

If we were, for example, to adopt the perspective of Smith's "impartial observer", and seek to conceive "what we ourselves should feel in the like situation" before coming to a moral judgement, would we conclude that mandatory detention can be morally justified? It seems difficult to see how we could.

The one possible counter-argument – that mandatory detention is required for the end of public safety – does not appear to hold up. It is worth noting, for example, that other countries, including many which receive a far higher number of asylum seeker arrivals, adopt alternatives to mandatory detention. In any case, it is anomalous that it is only asylum seekers who *arrive by boat* who are subject to mandatory detention; those who arrive by plane are not subject to the same regime. All this does not amount to a suggestion that all forms of detention must be abolished: there are good commonsense reasons to use detention for a defined, short-term period in order to conduct health, identity and safety assessments of all asylum seekers. But a transition to a more humane detention policy, which does not discriminate between those who arrive by air and by boat, would be a welcome policy change.

It remains to consider how a particularist ethics may bear upon policy discussions of onshore/offshore processing. As highlighted above, it is wrong to dismiss a value of national self-determination on these matters. The philosopher Michael Walzer put it best when he wrote that any discussion of distributive justice, encompassing decisions of how to allocate resources or how to share social goods, presupposes a notion of membership. Indeed, "the primary good that we distribute to one another is membership in some

human community".<sup>27</sup> What we do with membership – whom we decide to admit, and how – structures all our other distributive choices.

A particularist reading of ethics need not automatically lead to a simple form of populism. Self-determination is not code for rule of the mob. To endorse it does not endorse the idea that a political community should merely follow the lead of public opinion on questions of whom to admit into its borders. But it does require some attention to be paid to the value that people in a community place in having a model of membership that they regard as legitimate.

In the context of the processing of refugees, a substantial number of Australians are more comfortable with a certain way of going about determining whom to admit as fellow members of their political community. That is to say, public sentiment remains deeply divided about the onshore processing of asylum seekers. We may wonder exactly why this may be the case: perhaps it has something to do with some subliminal attachment to a notion of a Fortress Australia, which boats arriving from the north should not be able to penetrate. Whatever the underlying reason, given that this is the case, any feasible policy approach may arguably need to include some offshore component.

There is one good precedent for this: when thousands of Indochinese refugees from southeast Asia were resettled in Australia, this was for the most part done through offshore processing, and conducted within a regional framework. Much debate has, of course, been raging about whether the Federal Government's "Malaysia Solution" could be considered analogous. The policy's many critics have pointed out that it cannot for one obvious reason: as it involves a swap of asylum seekers, and will send asylum seekers to Malaysia to uncertain conditions of protection, it suffers from an undeniable deficiency. On the other hand, it is argued that the swap offers the best prospect of deterring asylum seekers waiting in transit countries from making boat trips to Australia: the prospect of being sent to Malaysia would, in this view, be enough to break "the business model" of people smugglers.

If we accept that public policy must operate in a non-ideal context, and further accept that any application of a value of national self-determination is likely to endorse some offshore processing of refugees, then cannot something such as the Malaysia

Solution have some potentially positive pay-offs? In their recent report, Menadue et al., for instance, argue:

*Viewed through a regional lens it can become a catalyst to start the process of building a durable protection system in the region and delivering protection dividends for all asylum seekers. [...] Malaysia as a transit country is a key player in delivering a long term solution – indeed UNHCR in its recently released Global Report noted that while there are problems, "constructive dialogue with national authorities has resulted in an improvement of the situation". If this can be achieved we can dare to hope that – just as ASEAN is developing a regional Human Rights Instrument – we can look forward in the future to a Regional Protection Instrument.<sup>28</sup>*

At the very least, we should not dismiss the importance of ensuring that any policy response incorporates a regional focus. Countries such as Indonesia, Malaysia and Thailand receive a disproportionately large number of asylum seekers. But it is important that there is some sharing of the burden in the region. If Australia can help promote a regional framework that would remove incentives for dangerous boat journeys to be undertaken, and would see a higher number of refugees resettled. This is arguably one of the few points on which all political parties could agree. And if Australia should play a more generous, creative and constructive role in the reception and processing of asylum seekers and refugees, it is far more likely that our regional neighbours will be more cooperative in offering helping to manage a shared challenge. As things stand, our neighbours see Australian policy as simply a matter of "burden shifting" rather than "burden sharing" – that is, as something that works to their relative disadvantage.

## CONCLUSIONS AND RECOMMENDATIONS

This paper has sought to highlight some of the ethical dimensions of the asylum seeker and refugee issue, which sometimes are submerged within political debates. As should be clear, to engage in an ethical discussion of the matter should not be mistaken to mean removing all the politics from the conversation, or indeed presuming some unattainable, pure ideal of virtuous behaviour. It is a shortcoming of current discourse on the topic that there is not enough realism and not enough attention to moral psychology – and too much utopian grandstanding. Greater attention to moral sympathy over rationalism, to non-ideal theorising over ideal theorising, and to a

particularist ethics of membership over a universalist one may in fact help promote more humane and compassionate attitudes towards asylum seekers and refugees.

I want to conclude, however, by reflecting briefly on the implications that the current state of debate has on the state of Australian society, and on how ethics may inform various policy positions on the issue.

With respect to the former, there is cause for much concern. The Australian preoccupation with getting tough on people smugglers, and stopping the boats, leads to avoidable suffering on the part of those boatpeople who arrive in Australian territory and end up in detention centres, some for inordinate number of years before having their claims for refugee protection processed. This unedifying situation reflects poorly on Australia.

Moreover, there are two particular dangers posed by the oft-hysterical debate about boatpeople and the excessively punitive policies pursued by Australian federal governments. First, the policy of mandatory detention for boat arrivals has a harmful impact on the prospects of refugees integrating into Australian society. This is compounded by the potential for a polarised public debate to impact on the way Australians view refugees and on how refugees view Australia. We should not underestimate the negative "spillover" effects of punitive policies and of public demonisation of boatpeople on refugees who do end up residing in Australia. Moreover, there may be deleterious effects over time on the maintenance of social cohesion and trust in a multicultural Australian society.

Second, the frequently distorted nature of public debate about boatpeople does not augur well for Australian democracy. At its best, a democratic community should deliberate upon questions of common concern, guided by principles of reciprocity and accountability. Not least, debate should be guided by facts, and be conducted rationally. Such matters go to the heart of the morality of our public life and our ethical practice as citizens. But if in a democracy characterised by pluralism, we must negotiate our differences, the state of our public debate delivers a very sad verdict on our capacity to deliberate.

What, then, can be done? The following points raise some ways in which there can be a more ethical approach to asylum seekers and refugees, which accounts for real-world political constraints.

## 1. The policy of mandatory detention

It is anomalous that asylum seekers who arrive by boat are subject to mandatory detention, while those who arrive by plane are not subject to the same regime. This is a distinction that runs counter to the spirit of Australia's humanitarian obligations as they exist under the Refugee Convention. Moreover, mandatory detention causes significant harm to asylum seekers, many of whom are detained for years without any certainty about their fate. Any detention of asylum seekers should exist only in so far as it is necessary to conduct health, security and identity checks. There should be a phasing out of mandatory detention.

### 2a. Onshore processing of the refugee claims of asylum seekers who arrive in Australia by boat

The most ideal response to the arrival of boatpeople would be to process their asylum claims "onshore", on the Australian mainland. Australia is a signatory to the Refugee Convention and should allow people to have their claims for protection processed in Australia. However, moving to an onshore regime would be best achieved with bipartisan political support. It is important that any such policy shift is accompanied by concerted political leadership, as it would be likely to lead to an increase in the number of boatpeople seeking to make it to Australian territory. In such a scenario, political leaders must educate public opinion about asylum seekers and refugees, and avoid politicking over boatpeople. Where such resolve is missing, a shift to onshore processing may carry the risk of undermining public acceptance of a significant, racially non-discriminatory immigration program, and of a multicultural Australian society.

### 2b. Offshore processing of the refugee claims of asylum seekers who arrive in Australia by boat

Given the apparent lack of bipartisan political support for onshore processing, it is likely that Australian refugee policy will contain some offshore processing element. This is far from ideal. But if offshore processing is to exist, every effort should be made to ensure that

there are improvements to current policy. Any offshore processing must involve humane treatment of asylum seekers. As stated in the Refugee Convention, asylum seekers should not be penalised for the manner in which they have entered Australian territory. As indicated by Point 1, any period spent in detention should be minimal – and involve conditions that allow for decent access to essential services such as health care. There should be legislated minimal standards for the treatment of all asylum seekers in any offshore processing centre, based on relevant human rights standards, with adequate legal protections.<sup>29</sup>

## 3. A regional framework and taking in more refugees

Any durable policy response must involve a regional dimension, and consider countries of origin and transit. Within our region, countries such as Indonesia, Malaysia and Thailand contend with the vast majority of asylum seeker movements. It is important to ensure Australia bears a larger burden, if there is to be successful cooperation with our regional neighbours, particularly in stemming the arrival of asylum seekers by boat. It would be a demonstration of good faith if Australia should increase its intake of refugees under its humanitarian program from the current 13,750 in 2009-10 to something in the range of 25,000, based on a resettlement of refugees currently in countries such as Indonesia, Malaysia and Thailand. Our regional neighbours are unlikely to engage in developing a credible regional response if they believe that Australia does not take its fair share of refugees.

## 4. Improving public debate and depoliticising the issue

There is considerable merit in proposals to establish an independent commission to facilitate informed public debate, and an independent authority to administer Australia's humanitarian programs.<sup>30</sup> Such a move would be similar to the delegation of monetary policy to an independent Reserve Bank. The politicisation of boat arrivals has been an unedifying and destructive development in the political culture. At least until there can be strong bipartisan political leadership on this issue, it may be necessary to seek an institutionalised form of depoliticising this most divisive of issues. ■

## Endnotes

- 1 Markus (2010: 40-43) found that "negative sentiment" towards asylum seekers who arrive by boat existed in the range of 60-70 percent among respondents to his most recent *Mapping Social Cohesion* survey.
- 2 Department of Immigration and Citizenship (2011).
- 3 Markus (2010: 41-42).
- 4 Steketee (2011).
- 5 Essential Media (2010).
- 6 Department of Immigration and Citizenship (2011).
- 7 Australian Broadcasting Corporation (2009).
- 8 Hanson (2011: 14).
- 9 Perera (2010: 165).
- 10 Grattan (2011).
- 11 Soutphommasane (2010).
- 12 Sheridan (2011).
- 13 Menadue et al. (2011: 10).
- 14 Sheehan (2011).
- 15 Hume ([1739] 2006: II.3.3).
- 16 Smith ([1759] 1976: I.1.1).
- 17 Manne (2011).
- 18 Kant ([1785] 1998).
- 19 Boswell (2005: 1).
- 20 Gibney (2004: 84).
- 21 Legrain (2007).
- 22 For a leading example of a universalist approach, see Singer and Singer (1988).
- 23 See, e.g., Soutphommasane (2009); Brett and Moran (2006).
- 24 Menadue et al. (2011: 13).
- 25 Herder, cited in Berlin (1998: 394-95).
- 26 Samson et al. (2011); Menadue et al. (2011).
- 27 Walzer (1983: 31).
- 28 Menadue et al. (2011: 24).
- 29 See Human Rights and Equal Opportunity Commission (2009).
- 30 Menadue et al. (2011).

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