THE VALUES SHAPING AUSTRALIAN ASYLUM POLICY: A HISTORICAL AND ETHICAL INQUIRY

David Palmer

PhD Thesis
2007
Abstract 350 words maximum

This thesis maps the values that have guided the asylum policy decisions of Australia's political leaders over the past half-century, drawing on archival records and interviews with former immigration ministers and senior public servants. For comparative purposes, it also maps the values shaping the views of asylum among leaders of a supra-national organization (the European Commission) and of a major non-government organization (the Jesuit Refugee Service).

The findings support the view that a culture of control permeates Australian asylum policy decisions, and that the quest for control stems from perceptions of national interest as articulated in immigration and foreign policy. However, beneath this it shows the primary values shaping policy to be nation building and good governance in the case of the Australian leaders, and (European) community building in the case of European Commission leaders.

Building on a 'caring for us, caring for them' conundrum found running through the values of all three groups of leaders, and seeking a secular equivalent to the faith-inspired relational approach of the Jesuit Refugee Service leaders, the thesis explores the contribution an ethics of care might make to asylum policy design, delivery and evaluation. It argues that such an approach, in which care is conceived as a value, process and practice rather than a sentiment or theory, is well suited to the area, especially when refined to provide for the work of empathy and imagination. It concludes by considering the potential implications for Australian asylum policy if an ethics of care were adopted.

The primary goals of the thesis are a better understanding of the issues involved in asylum policy, and the articulation of an ethical approach potentially as engaging of policy insiders as of policy spectators.
Abstract

This thesis maps the values that have guided the asylum policy decisions of Australia's political leaders over the past half-century, drawing on archival records and interviews with former immigration ministers and senior public servants. For comparative purposes, it also maps the values shaping the views of asylum among leaders of a supranational organization (the European Commission) and of a major non-government organization (the Jesuit Refugee Service).

The findings support the view that a culture of control permeates Australian asylum policy decisions, and that the quest for control stems from perceptions of national interest as articulated in immigration and foreign policy. However, beneath this it shows the primary values shaping policy to be nation building and good governance in the case of the Australian leaders, and (European) community building in the case of European Commission leaders.

Building on a 'caring for us, caring for them' conundrum found running through the values of all three groups of leaders, and seeking a secular equivalent to the faith-inspired relational approach of the Jesuit Refugee Service leaders, the thesis explores the contribution an ethics of care might make to asylum policy design, delivery and evaluation. It argues that such an approach, in which care is conceived as a value, process and practice rather than a sentiment or theory, is well suited to the area, especially when refined to provide for the work of empathy and imagination. It concludes by considering the potential implications for Australian asylum policy if an ethics of care were adopted.

The primary goals of the thesis are a better understanding of the issues involved in asylum policy, and the articulation of an ethical approach potentially as engaging of policy insiders as of policy spectators.
**Originality statement**

I hereby declare that this submission is my own work and to the best of my knowledge it contains no material previously published or written by another person, or substantial proportions of material which have been accepted for the award of any other degree or diploma at UNSW or any other educational institution, except where due acknowledgment is made in the thesis. Any contribution made to the research by others, with whom I have worked at UNSW or elsewhere, is explicitly acknowledged in the thesis. I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project’s design and conception or in style, presentation and linguistic expression is acknowledged.

……………………………………

(David Palmer)

……………………………………

(Date)
Copyright statement

I hereby grant the University of News South Wales or its agents the right to archive and to make available my thesis or dissertation in whole or part in the University libraries in all forms of media, now or here after known, subject to the provisions of the Copyright Act 1968. I retain all proprietary rights, such as patent rights. I also retain the right to use in future works (such as articles or books) all or part of this thesis or dissertation.

I also authorise University Microfilms to use the 350 word abstract of my thesis in Dissertation Abstract International. I have either used no substantial portions of copyright material in my thesis or I have obtained permission to use copyright material; where permission has not been granted I have applied / will apply for a partial restriction of the digital copy of my thesis or dissertation.

........................................
(David Palmer)

........................................
(Date)

Authenticity statement

I certify that the Library deposit digital copy is a direct equivalent of the final officially approved version of my thesis. No emendation of content has occurred and of there are any minor variations in formatting, they are the result of the conversion to digital format.

........................................
(David Palmer)

........................................
(Date)
Acknowledgments

I am grateful to Professor Richard Hugman, my supervisor, for his encouragement, my interviewees for their willingness to talk with me, and, above all, Mai Ch’ing, for the freedom she has given me to undertake this work.
TABLE OF CONTENTS

Chapter one: Introduction 1
   The state of debate 1
   Methods and methodology 9
   Definitions and concepts 26
   Chapter outline 32

Chapter two: Asylum values – the archival record on principles 35
   The right of asylum in the UDHR 36
   The 1951 Refugees Convention 41
   The 1967 Declaration on Territorial Asylum 68
   The 1967 Protocol 77
   Concluding comments 98

Chapter three: Asylum values – the archival record on practice 101
   Wartime refugees 101
   The 1956 Olympics 115
   Asylum seekers from West New Guinea 122
   Concluding comments 165

Chapter four: Asylum values – the personal record 170
   Developments since 1973 171
   Of ministerial whys and wherefores 185
   Concluding comments 234

Chapter five: Other leaders, other value maps 240
   The European Commission 241
   The Jesuit Refugee Service 281
   Concluding comments 307
<table>
<thead>
<tr>
<th>Chapter six: Towards an ethics of care in asylum policy</th>
<th>315</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ethics in public policy</td>
<td>317</td>
</tr>
<tr>
<td>Care as a political ethics</td>
<td>333</td>
</tr>
<tr>
<td>Care’s demons</td>
<td>356</td>
</tr>
<tr>
<td>Care and asylum policy</td>
<td>368</td>
</tr>
<tr>
<td>Concluding comments</td>
<td>405</td>
</tr>
<tr>
<td>Chapter seven: Conclusions</td>
<td>411</td>
</tr>
<tr>
<td>Bibliography</td>
<td>427</td>
</tr>
</tbody>
</table>
CHAPTER ONE: INTRODUCTION

Can one possibly develop the distance, the techniques and methods to describe and analyse issues [like asylum] that are impregnated with need, with fear, irrationality and emotion? (BS Chimni)

Much has been written about refugees and asylum seekers in recent years, including in Australia. It is an area where, perhaps more than most, scholarship and advocacy often blend. Indeed, some argue that the legitimacy and purpose of refugee and asylum studies come from advocacy, and that work in the area should be judged more by its impact on the design of assistance and the strengthening of protection than the clarity of understanding or explanation it affords (van Hear 1998).

This thesis seeks to straddle this divide. Its aim is two-fold: first, to chart the values that have guided Australia’s political leaders in asylum policy during the past sixty years or so, ever since thousands sought refuge here during World War Two, and second, to explore the potential contribution of an ethic or ethics of care1 in discussion of asylum policy design, delivery and evaluation.

The underlying purpose is to add to the stock of insights and tools that might enable constructive dialogue between government and asylum seeker advocates, and that seek to accommodate the interests of both asylum seekers and receiving communities.

THE STATE OF DEBATE

After accelerating from about 1980 and peaking in the early 1990s and again in 2001, the number of asylum applications in most affluent countries has fallen sharply, due

---

1 There is little consistency in the use of these terms in the literature (eg Tronto (2001, 1993) routinely refers to the ‘ethic of care’ and Mackay (2001) and Robinson (1999) the ‘ethics of care’), and for practical purposes the two can be viewed as interchangeable. Nevertheless, where an ‘ethic of care’ evokes an image of care as a specific set of processes and practices for making ethical judgments, or a particular mode of conduct, an ‘ethics of care’ suggests an all-encompassing account of human nature and values. Since most care ethicists view care as both (including Tronto), and mindful of the fact that a number of accounts of an ethic or ethics of care exist, the term ‘ethics of care’ will be employed in this thesis.
among other things to changing conditions in some regions of origin and increasingly restrictive policies in receiving countries. The 336,100 applications lodged in 2005 in the top fifty industrialised countries were fifteen per cent fewer than in 2004 (394,600) and forty-nine per cent fewer than in 2001, when 655,100 were lodged (UNHCR 2006a). The 331,600 applications in the thirty-eight countries for which comparable statistics are available were the lowest since 1987. Locally, the trend has been the same: between 2001 and 2005, applications in Australia fell from 12,370 to 3,210, and in New Zealand from 1,600 to 350, an overall fall of seventy-five per cent.

However, asylum seekers have been around for thousands of years, and while their number may ebb and flow, they are unlikely to disappear from the world scene anytime soon. Until then, they will remain an unsettling presence for individuals and governments alike, ethically and politically. Whatever their reason for flight – persecution, civil war or violence, or simply relief from poverty or hardship – they do not fit well in an era when nation states are expected to protect and provide for their own citizens first and foremost, identity politics is popular, and social capital fragile. Skilled or cashed-up global travellers are welcomed, but others tend to be treated with suspicion and sometimes hostility. In such an environment, asylum issues quickly become a flashpoint of convergence for principles, practices and emotions that make restless bedfellows, including human rights and state sovereignty, immigration control and global citizenship, sympathy and anxiety.

Asylum has become a particularly vexed political issue in recent decades. The international protection regime that was developed in the 1950s, with the 1951 Refugees Convention as its centrepiece, emerged against a backdrop of efforts to deal with refugees and others engaged in forced or irregular migration.

---

2 According to Lubbers (2004), references to granting asylum to people fleeing persecution in foreign lands have been found in texts dating back as far as 3,500 years.

3 Bauman (1998) draws an evocative comparison between global ‘tourists’ and global ‘vagabonds’, with the former referring to tourists, business people and skilled workers, and the latter people engaged in forced or irregular migration.

4 By this is meant the national and international body of institutions, law, policy and practice that exist to deal with refugees and others engaged in forced migration.

5 The Convention is properly titled the 1951 Convention relating to the Status of Refugees. Today it is commonly taken to refer also to the 1967 Protocol relating the Status of Refugees, an independent but
resettle Europeans displaced by World War Two, rivalry between communist and anti-communist blocs, and the liberal and human rights-inspired environment of the 1948 Universal Declaration on Human Rights (UDHR). Significant changes have since occurred in the asylum policy environment, causing strain on this framework. These changes include the increased scale and spread of forced and irregular migration, the growth of a people smuggling industry, the rise of large bureaucracies to assess the claims of asylum seekers, assist in their resettlement or repatriation, and, increasingly, prevent their arrival, the growth of a complex body of refugee and human rights law, and ongoing and often highly charged public debates about asylum, migration and population issues in general. Around the world, policies aimed at curtailing the number of asylum seekers have become ubiquitous (Crisp 2003, Gibney & Hanson 2002).

In this context, discussion of asylum policy can slide easily into a kind of trench warfare of claim and counter-claim about the motives, merits and effects of different initiatives. When this occurs, political leaders and their critics often talk past rather than to each other. In Australia this has particularly been the case since the introduction by a Labor government in 1992 of mandatory detention of unauthorised arrivals and limited court powers to order the release of individuals so detained, and by a Coalition government in the early 2000s of temporary protection and offshore interception and processing arrangements. Burchell (2005: 117) captures the mood of the last few years well when he writes,

Future historians might do worse than to term them Australia’s empathy wars. I’m talking about the historical moment that began with appearance of the MV Tampa on the fringe of the Australian immigration zone in August 2001, and which took a new turn with the appearance of

closely related legal instrument (under the Protocol, states agree to apply the Convention without the restriction it contains in Article 1A(2) whereby their obligations under the Convention are limited to refugee situations that occurred before 1 January 1951) (UNHCR 1992).

6 Forced migration is used here to refer to instances where people are forced to flee their homes and seek refuge elsewhere, either in their own country or another, for reasons such as armed conflict, natural disasters, and persecution. Irregular migration is used to refer to instances where people voluntarily leave their homes, for reasons such as better work or life opportunities and family reunion. The distinction between forced and irregular migration is often blurred, giving rise to the concept of the ‘asylum-migration nexus’ (Castles 2006).
those terrifying, inexorable waves across the coastlines of South Asia on Boxing Day 2004. This was the time, more than any other in recent memory, when where you stood in Australian politics was defined by a single symbolically charged political issue – how you reacted towards the sudden influx of hundreds of foreign nationals into our immigration zones and our detention centres.

The divisions and acrimonious tenor of debate over asylum issues is understandable, if unfortunate. For one thing, the stakes are high. For asylum seekers, their lives, freedom or future prospects for themselves and their families may indeed be at risk, and return to the place from which they have left might have tragic consequences. For receiving communities, anxiety about the possible implications is natural, especially when a ‘trickle’ of asylum seekers turns into a perceived ‘flood’. Asylum seekers are ‘different’, and the desire of a community to control who gains entry and on what conditions is not only a defining feature of nation states, but communities of varying shapes and sizes.

The intention here is not to be provocative, but merely state the obvious: shared humanity aside, the profiles of asylum seekers and receiving populations are usually different, whether in backgrounds, circumstances, cultures, religions, physical features and so on, and these differences influence how asylum seekers are perceived and portrayed. Indeed, it can be harmful to asylum seekers themselves if receiving populations do not provide for at least some differences, for example their likely background of loss and trauma, and present circumstances of uncertainty and vulnerability.

As put by the High Court of Australia, ‘The power to exclude or expel even a friendly alien is recognized by international law as an incident of sovereignty over territory. As Lord Atkinson, speaking for a Judicial Committee of the Privy Council, said in Canada (Attorney-General) v Cain ((53) (1906) AC 542 at p 546): One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter the State, to annex what conditions it pleases to the permission to enter, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests’ (Brennan, Deane & Dawson JJ, in Lim v MILGEA (1992) 176 CLR 1 FC 92/051 at 27).

The term community is usually associated with clusters of people with some loose form of membership, sense of belonging, and legacy or habit of allegiance, participation or reciprocity. For example, a common dictionary definition is ‘a group of people having cultural, religious or other characteristics in common’ (Wilkes & Krebs 1988: 226). We can, of course, talk of a ‘global community’ or ‘community of nations’, and such concepts make increasing sense as a result of globalisation and the rise of shared interests and shared problems that require shared solutions (eg climate change). However, we need to be careful to avoid becoming so loose in our use of terms and concepts that we empty them of their commonsense meanings, or they become too amorphous for analytic purposes.
Further, for some people asylum seekers are the quintessential ‘other’ in our midst, stranger at our door, or injured person passed on our journey. From this view, our response to them is a measure of our personal and collective moral, cultural and political mettle. For example, reviewing Burke’s *In Fear of Security: Australia’s Invasion Anxiety* (2001), Carmen Lawrence (2002) argues that the author

… posits the question which I regard as the crucial battleground for the hearts and minds of the Australian people: ‘Whether an “Australian” community would be thought of on the basis of a walled and insecure identity, or a generous and outward looking diversity’?

Even if we find Lawrence’s view simplistic, it is hard not to agree as a matter of general principle that asylum policy, like social policy in general, ‘presupposes social choices, which presuppose social values’ (Bulmer 1989: 165). Further, that the choices made and the values exposed are often less than ideal.

Despite the high stakes and ‘crucial’ questions – or perhaps because of them – opinion polls suggest a majority of Australians support measures like mandatory detention and offshore interception, while simultaneously accepting a large and ethnically diverse immigration intake and planned refugee resettlement program (Dodson 2005, Shanahan 2002, Betts 2001). Indeed, according to former Minister for Immigration Philip Ruddock (2002: 97), curbing asylum seekers arriving unauthorised is consistent with ‘rational compassion’, for it enables scarce resettlement places to be granted to people who in his view are often more deserving.10

Any policy that works to exclude some asylum seekers from entering Australia, and incarcerate others, sits awkwardly with John Stuart Mill’s notion of utopia, whereby ‘nothing remains sacred save the freedom to lead your life by your own lights, and

---

10 Since 1996 a cap has been put on the total number of visas granted under Australia’s refugee and humanitarian program, and numbers within this cap have been nominally allocated between three main groups: people who arrive with or without a visa and make a successful claim for asylum onshore, refugees granted entry from offshore, and persons with special humanitarian needs also granted entry from offshore. If the numbers allocated to the onshore program are exceeded in any year, the numbers allocated to the offshore special humanitarian program are reduced by a corresponding amount to avoid the overall cap being breached. Further details of the program are provided in chapter six.
nothing is forbidden which does not interfere with the freedom of others’ (in Rorty 1999: 271). Nevertheless, current measures arguably satisfy at least two criteria of ‘rightness’ in a crude utilitarian or pragmatist world-view, namely popularity and efficacy.

Critics, on the other hand, remain scathing. According to Neumann (2005a), they fall into three main schools: one that current Australian policy is an aberration and inconsistent with the basic national ethos of a ‘fair go’, a second that it is part of a seamless tradition of racism and xenophobia, and a third that concentrates on the potential harm it does, whether to the persons who are subject to it, a complicit community, or the international protection framework.11

The adequacy of these schools in describing or explaining policy developments will be cast into some relief by the findings of this thesis, if mainly in passing. Suffice here to make three observations. Firstly, the number of schools of thought on recent initiatives could be expanded to include at least three others: one that they reflect a longstanding ‘culture of control’ in overall immigration policy (Lopez 2003, Cronin 1993), another an amoral political pragmatism centred on deterring ‘boat people’ and winning elections (Marr & Wilkinson 2003, MacCallum 2002), and another an ideological objection to human rights issues intruding on policy considerations, or at least a belief that government and parliament rather than the judiciary should be the final arbiters of compliance with human rights standards (Crock et al 2006, Charlesworth 2006, Evatt 2005). Indeed, we can add a fourth if we include Neumann’s own considered view, in his recent book *Refuge Australia: Australia’s Humanitarian Record*. While he deals mainly with asylum policy pre-1973, he agrees (2004: 108) that ‘the immigration department’s “culture of control” has arguably shaped official Australian responses to refugees up to now”. However, he explains this culture as having its origins in policy makers’ perceptions of the national interest as articulated in immigration and foreign policy. For example, in his view (2004: 111),

---

11 Neumann lists Manne (eg 2004) as an example of the first school, McMaster (eg 2001) the second, and Steel (eg Steel & Silove 2001) the third.
National (self-) interest was the dominant factor influencing decisions to admit refugees [after World War Two]. Australia wanted immigrants, and was prepared to accept refugees in lieu of British migrants as long as the former met its strict selection criteria. In times of economic downturn, the migrant intake (and, by implication, the refugee intake) were lowered. National (self-) interest was also the determining factor in decisions not to admit refugees. In the case of West Papuan border crossers, Australia was concerned it would damage its relationship with Indonesia if it adopted a more liberal attitude.

According to Neumann, other factors occasionally had an influence, such as humanitarian considerations and domestic public opinion, but they never overrode national interest considerations. And while he claims that the Howard government has fanned or legitimised public anxiety about asylum seekers in a way unmatched by previous governments, in his view (2004: 113) its ‘hardline approach to asylum seekers … is not unprecedented’.

The second observation is that most of the above schools of thought rely on relatively brief or potted histories of Australian asylum policy, often starting with events since the 1990s, or at best the arrival of Indo-Chinese asylum seekers in the late 1970s. It is true that a formal refugee policy was first announced only in 1977. That year the Fraser government announced several principles to govern refugee resettlement, the first being that ‘Australia fully recognises its humanitarian commitment and responsibility to admit refugees for resettlement’, and the second – in rather prescient fashion – that ‘the decision to accept refugees must always remain with the government of Australia’. However, as is evident from Neumann’s study, Australian governments had been dealing with asylum seekers for decades before this 1977 policy statement. Unfortunately, except for the work of Neumann, and to a lesser extent Price (1990a, 12 MacKellar, Minister for Immigration, Commonwealth Parliamentary Debates (CPD) (Reps), 24 May 1977, vol 105, p 1714. Policy initiatives then and now have arguably never strayed from these principles, the second no less than the first. The other two were: ‘3. Special assistance will often need to be provided for the movement of refugees in designated situations or their resettlement in Australia. 4. It may not be in the interest of some refugees to settle in Australia. Their interests may be better served by resettlement elsewhere. The Australian government makes an annual contribution to the UNHCR, which is the main body associated with such resettlement’. 
1990b) and York (2003), accounts of these dealings that might provide a helpful perspective in current debates are yet to be written.\(^{13}\)

Finally, while its content is more often assumed than stated, a degree of moral passion permeates through the schools. One gets an impression of a loose cosmopolitan humanitarianism, featuring principles like human dignity, human rights and liberal freedom, combined with an ethic of proximity: the view that we have a special obligation to asylum seekers who reach our shores because they are people ‘whose suffering we know is real and whom we have the capacity to assist’ (Manne 2004: 82). On the few occasions that an ethical perspective is explored in depth, it tends to have a religious (Brennan et al 2002) or Levinasian (Pugliese 2002, Manderson 2001) flavour, and feature a belief in the inherent dignity of human beings, the role of compassion in the Judeo-Christian tradition, and the value of direct contact and relationships with asylum seekers in grounding our concerns, responsibilities and identities. However, as Gibney (2004: 15) observes of most writing on asylum, the possibility ‘that the requirements of morality might be subject to different interpretations or the site of conflicting values’ is generally ignored.

**The place of this thesis**

In this context, the following chapters represent a step back and a step sideways, as preparation for what will hopefully be considered a modest step forward.

The step back involves revisiting the values that have guided Australian asylum policy makers over the past half-century or more, drawing on archived government files to source information on the 1940s to the early 1970s, and interviews with former political leaders and senior public servants information on the period since. Further, it involves pursuing this task with a fairly simple research question in mind, namely what seems to

\(^{13}\) According to Neumann (2004: 107), ‘a critical and nuanced history’ of Australia’s asylum record, one that is ‘attuned to the complexity of the past’, has a number of advantages over those who ‘make rhetorical references to the past in order to condemn or endorse the present’. These include enabling us to ‘be better able to criticise the present on its own terms (rather than in terms of supposed genealogies which only ever allow the past to have one outcome)’. It is a view shared by this writer.
be going on here? Or more precisely, what do the policy makers themselves seem to think they are on about? The assumptions, interpretations or theories of the abovementioned schools of thought serve as a backdrop and foil for this task, but none are consciously used as a point of entry to the data, or prism through which it is filtered.

The step sideways involves exploring for comparative purposes the values that guide two other groups of leaders when considering asylum issues, namely leaders of the European Commission and the Jesuit Refugee Service (JRS). The sources respectively comprise documents and interviews, and the research question is again fairly simple: what are the similarities and what are the differences?

The step forward involves reflecting on the values of all three sets of leaders with a third research question in mind, namely what might we make of all this? Or more precisely, how might we lift discussion of asylum out of the trenches and turn it in a direction still able to unsettle our sense of who we are and what we can do as individuals and a community, but without straying so far from the concerns of the political leaders that we lose them in the process? In pursuing this task, the assumption is that it is desirable to work with things they are likely to find familiar and acceptable, and to be sensitive to the demands and constraints imposed on moral agency by context. In other words, to ‘start with where they’re at’, ‘look for what binds’, and ‘build on the good’. The ethics of care intuitively seems a promising framework for dialogue – for example, most people seem to like to think of themselves as caring and responsible – and is the vehicle chosen for investigation.

**METHODS AND METHODOLOGY**

As will be evident from the above, the thesis starts as a work of exploration and ends in reconstruction. There is a place in academia for constant criticism and deconstruction, aimed at exposing hegemonic and repressive views of the world. However, this thesis does not fall into that genre. Its concern is to understand the meaning asylum policy
making has for the individuals who do it, and to imagine a way in which they can proceed which might accommodate both their ethical and political responsibilities.

In regard to understanding, the aim is to chart good value or mind maps of the three groups of leaders studied. It is not claimed that these maps will necessarily constitute the ‘whole story’ or the ‘one and only true picture’. The ‘Doctrine of Immaculate Perception’, as van Maanen (1988: 73) terms naïve realism – the idea that we can accurately capture or present objective reality – runs into difficulty in the face of life’s complexity and the interfering presence of the observer’s own processes of perception and judgment. In the case of this writer, for example, experience as a social worker, Jesuit, aid worker in Africa and public servant has no doubt all left an imprint on how he hears and sees things. Nevertheless, accepting the possibility of different interpretations is not the same as accepting that all interpretations are equal, and the analysis here aims to be strong on measures of both validity (eg evidentiary support, credibility) and relevance (eg power to shed light on a situation, utility). If nothing else, it aims ‘to get an honest story honestly told’ (Geertz 1988: 9).

In regard to imagination, the aim is to engage in a positive way with the abovementioned value maps, using the ethics of care to reframe and rephrase their moral content and reach. Of course, the risk in such reconstruction is that the result will be dismissed by political leaders as unrecognisable or unworkable, and by critics as too

14 The work is in this sense one of ‘thick’ rather than ‘thin’ description. Brewer (2000: 39) describes the difference between the two as follows: ‘Thin description is mere gloss, a bare report of the “facts” independent of intentions or circumstances, whereas thick description represents a thorough account, taking in the context of the phenomena described, the intentions and meanings that organise them, and their subsequent evolution or processing’. The concept of ‘thick’ and ‘thin’ description can be traced to the philosopher Gilbert Ryle (1971, ch 37). However, it is perhaps more commonly associated with the anthropologist Clifford Geertz, who, building on Ryle, drew a further distinction (1973: 27) ‘between “inscription” (“thick description”) and “specification” (“diagnosis”) – between setting down the meaning particular actions have for the actors whose actions they are, and stating, as explicitly as we can manage, what the knowledge thus attained demonstrates about the society in which it is found, and beyond that, about social life as such’.

15 As Plummer (2001: xi) argues, ‘The world is constituted through multiple refracted perspectives: it is indeed a ‘plural world’, one that is constantly changing and never fixed, and one where meanings are always being negotiated. In such a world, meanings and truth never arrive simply’.
accepting of the status quo. The issue of what might reasonably be asked of ethics in a public policy context is therefore critical, and will be considered as a precursor to discussing the ethics of care. However, one point is worth making at the outset. In some ‘hard-headed’ policy or academic circles, introducing moral concerns can lead to a person’s views being dismissed as mere emotional rhetoric. Nor is anyone impressed by moral smugness or self-serving cant. However, developing general frameworks within which social and economic policy can be examined, and which take account of the ends of policy and deal with the moral dimension of human affairs, is a longstanding tradition in social science research. Further, as Bulmer (1989: 171) suggests, ‘the answer is not to discard a moral dimension altogether, but to combine it with an adequate theoretical and methodological structure’.

Engaging with the sources

In her book *reading the Holocaust*, Inga Clendinnen (1998: 138) suggests that the greatest disability of a certain writer on the Nazi assault on Europe’s Jews is that

He is not curious about these men and what they did, because he believes he already knows why they … did as they did. He details their actions, but as an enraged prosecutor: ‘Look what they are doing!’ The ‘Why?’ is already determined: these men were Germans, and therefore heirs to a deep-rooted, pathological anti-Semitism …

The writer was reminded of this comment when starting to read through government documents on the drafting of the Refugees Convention and finding himself reacting with an ‘aha, yes!’ experience whenever ‘nuggets’ of comment were found that seemed to substantiate the view that racism lay at the core of Australia’s involvement. It was a salutary lesson in the ease with which received wisdom or pre-determined interpretative prisms can shape our analysis of material, in this case a prism acquired during the writer’s early schooling in Australian history.16

16 To stay with the mining analogy, the feeling was one of alighting on a particular seam of gold and wanting to pursue it out of excitement and the prospect of a good story, but conscious that in the process other seams of a different sort might get overlooked, not to mention the surrounding bedrock.
A danger of a different sort came from the writer’s experience as a public servant, including time helping develop, explain and justify government asylum policy. Working in such a position it is easy to become convinced of the merits of a government’s approach, and indeed to some extent performance in the job depends on it. A similar dynamic exists in many organizations and forms of work.

The lesson was not so much the need to bring to the sources a mind wiped clean of memory, experience and predilections – as if we could – but rather one marked by caution and, as Clendinnen suggests, curiosity: to ask questions rather than make assumptions, avoid hasty judgment and over-simplification, and be open to the possibility that the documents and interviews might yield or lend to narratives – ways of bringing ‘some kind of intelligibility or coherence to a life’ (Plummer 2001: 185) – that might surprise, or at least have greater nuance than hitherto portrayed.  

The narratives explored in this thesis are of course not the only ones that exist about asylum. As Clendinnen (2006) says elsewhere, ‘There is always one counter-story, and usually several, and in a democracy you will probably get to hear them’. There is, for example, no account here of the values and views of asylum seekers themselves. Some might consider this a flaw in the research design, but the groups selected for study remain extremely important. Political leaders are a centre of power and authority in society. As normally astute readers of public moods, what they think important is probably going to also be thought important by many in their community. Nor do they merely mirror public opinion. The information they provide and the pictures they paint

17 This should not be taken as implying a need to suspend critical inquiry and a healthy scepticism. However the main data sources – confidential policy files and in-depth one-to-one interviews – do not lend as well to subterfuge as much as other possible sources, such as media performances. Further, while the interviewees can be expected to be trying to present themselves and their time in office in a favourable light, they are unlikely to put themselves in a position where they might be ‘shown up’ or ‘found out’ by a large gap being observed between their rhetoric and their action.

18 As Denzin (Denzin & Lincoln 1994: 575) notes, ‘Action, feminist, clinical, constructivist, ethnic, critical and cultural studies researchers … all share the belief that a politics of liberation must always begin with the perspectives, desires and dreams of those individuals and groups who have been oppressed by the larger ideological, economic and political forces of a society or a historical moment’.

12
help construct how we imagine and discuss asylum seekers,¹⁹ and the structures they establish, whether in the form of remote detention centres or well-organised resettlement programs, how we relate to them. Through what they say and do they can inspire and embody the ‘better angels’ in our nature, as Abraham Lincoln described our virtuous habits and emotions, as well as our less illustrious ones.

As mentioned earlier, the values of three sets of leaders are explored: Australian, European Commission, and Jesuit. The Commission leaders are a form of control group, being associated with a supra-national rather than national project, though one still tied to the various governments and publics of European Union members. The JRS leaders are a second control group. They speak from a different place to political leaders, being men of a religious vocation and universal church rather than the holders of public office in a pluralist and democratic state or union of states. As people who work with asylum seekers in the field, and advocate for them, they can be expected to bring to asylum issues different values or value priorities than the political leaders, but ones no less cogent in their appeal or legitimacy, and therefore no less worthy of being taken into account in ethical and political calculation.

To explore the values guiding Australian asylum policy from the 1940s to the early 1970s, the writer reviewed 209 central agency files held by the National Archives of Australia (NAA). Relevant files of more recent date are relatively few in number, presumably because departments have yet to arrange their transfer to archives, or they remain active, or cannot be accessed due to rules governing the release of cabinet documents. Those examined were selected using key-word searches of the NAA’s electronic database, and included files from the departments of immigration, external affairs (foreign affairs), attorney-general’s, external territories, and prime minister and cabinet. The records of debate in both houses of parliament were also examined. Notes

¹⁹ To quote Blommaert & Verschueren (1998: 24), leaders help organise ‘the structure and distribution of knowledge and ideas about, as well as perceptions and impressions of social phenomena, and simultaneously furnish ways of speaking about these phenomena’. In the Australian asylum context, writers to discuss the images and language created or sanctioned by politicians and the media include Kampmark (2006), Klocker & Dunn (2003), van Acker & Hollander (2003), Leach (2003), Mares (2001), and Pickering (2001).
were taken in a form that allowed the data to be ordered by date and department, to enable a better feel for how issues unfolded and possible differences in agency views.

To cover the years since, and obtain a more personalised insight, interviews were conducted with eight people who had been integrally involved in making and implementing asylum policy during this period. They included four former immigration ministers, one former prime minister, and three former senior immigration public servants. There have been fourteen immigration ministers in the thirty-five years from 1971 to 2006. Between them the four immigration ministers interviewed held office for fifteen of those years, at intervals that span most of it. The three immigration officials included a former secretary of the department, a former deputy secretary, and a former first assistant secretary. Between them they held these positions for nearly sixteen years, again at different intervals. While some were willing to be identified, others weren’t, or wanted to vet the way in which they were reported.20 A decision was therefore taken to preserve the anonymity of all, and when quoting from interview transcripts to use simply the identifiers M1 to M5 in the case of ministers and PS1 to PS3 in the case of public servants.21

The interviews were semi-structured, with open-ended questions being funnelled to suit the main areas of inquiry, and semi-standardised to aid comparison (Plummer 2001, Shaw & Gould 2001). On average they ran for nearly an hour and a half, with the shortest being one hour and ten minutes and the longest nearly two hours. The general line of questioning was as follows, with some minor variation occurring in the manner and order of asking, and the nature and extent of further probing:22

---

20 The latter request was seen as presenting logistical rather than methodological problems, since if time allowed and all had been willing, going back to interviewees would have been a useful additional means of validating the writer’s reporting and interpretations.

21 These identifiers reflect the order of interview rather than the order of office, as a further means of preserving interviewee anonymity. Any references to gender are standardised in the masculine for the same reason.

22 The former public servants were asked to reply with the views of the ministers they had worked for in mind, as well as their own. An outline of the questions was included in the letter sent to all prospective interviewees inviting their participation in the study. While this may have reduced the spontaneity of replies, in practice no interviewee appeared to have rehearsed their thoughts to any great extent.
• Why do asylum issues arouse so much passion?
• What are the things that mattered most to you in asylum policy?
• How did you judge success?
• Did you experience any value dilemmas or moral conflicts in policy and, if so, how did you resolve them?
• What role did your emotions play?
• What values / emotions do you think dominate public attitudes to asylum? What did you seek to encourage?
• Who are the main stakeholders / constituencies in asylum policy?
• How accurate do you consider the following views of Australian asylum policy?
  – ‘Australian asylum policy reflects the targeting of scarce resources with care and compassion: it is based on rational compassion’.
  – ‘Politics and pragmatism rule asylum policy: tough words win votes and tough policies work’.
  – Australian asylum policy is dominated by a culture of control: generosity and compassion is limited to those who play by the rules’.
  – ‘The treatment of the “other” is an indication of the health and security of nations as well as individuals: Australia’s treatment of boat people continues to be based on racism and fear – how else can you explain why it is so tough and uncompromising?’

Interviews were conducted with four JRS leaders, including the former head of its international office, its Asia-Pacific office, its East Timor office, and its Australian office. Between them they had held these positions for over twenty years. All were Jesuit priests and Australian citizens. The interviews averaged one and a quarter hours, with the shortest being slightly less than one hour and the longest an hour and twenty-five minutes. The questions were similar to the above, but with JRS rather than government values as the focus of inquiry. None of the leaders objected to being identified, but for purposes of consistency they too are kept anonymous, and are referred to in the analysis as simply J1 to J4.

In the case of European Commission leaders, the sources of data were speeches, media releases, and various other Commission documents. The years 1999 to 2004 saw efforts
by the Commission and European Union (EU) members to establish a common EU asylum policy, with general responsibility for progress being assigned to the Commissioner for Justice and Home Affairs. Attention was therefore devoted to statements during this period by this Commissioner, together with statements by the President of the Commission and the Commissioner for External Affairs. Since the data was all sourced from publicly available documents, no effort is made to conceal the source of quotes.

Making sense of the data

There are, needless to say, a variety of ways in which we might read and interpret the various types of documents gathered for this study, beyond extracting information to suit our particular purposes. Crotty (1998: 109), for example, suggests we can take an empathic, interactive or transactional approach: the first involving ‘listening’ to the author ‘speaking to us’, the second engaging in ‘a kind of running conversation with the author in which our responses engage with what the author has to say’, and the third constructing ‘something quite new’, in the sense of insights that emerge not from the documents – and indeed probably never even in the mind of the author – but ‘in and out of our engagement’ with them.

In view of the desire to map the values that policy makers themselves say guide asylum policy, this study adopts the empathic approach. Here, as Crotty (1998: 109) says,

We attempt to understand the author’s standpoint. It may not be our standpoint; yet we are curious to know how the author arrived at it and what forms its basis.

In the case of the historical documents, after ordering them by date and department, a fairly straightforward but detailed reconstruction of how particular events unfolded was used to illumine values, in the form of what was overtly said or implied to be of value, the criteria used to make and evaluate policy decisions, and other arguments or explanations used when proposing or defending them. As explained later, for the purpose of this study values are defined generically as the things people consider important or desirable. This can include, for example,
… conceptions of desirable states of affairs that are utilised in selective conduct as criteria for preference or choice, or as justifications for proposed or actual behaviour (Williams 1970: 442).

The writer did not dig too deep for hidden meanings, as might be expected in, say, a hermeneutical style inquiry. Given the authors were writing internal, confidential papers for the information and action of ministers or other officials, it was thought reasonable to assume they would be relatively explicit in their meanings and intentions, if not always their assumptions.23 However, in line with the general notion of a hermeneutic circle,24 there was an expectation that knowing the details of a series of individual events – for example the circumstances surrounding Australia’s accession to the Refugees Convention, its 1967 Protocol, and the 1967 Declaration on Territorial Asylum – would shed light on core themes, and that divining the core themes would in turn shed light on the significance of the individual events.

In the case of the interviews, close reading and content analysis based loosely on grounded theory – which is really less a theory than ‘a general methodology for developing theory’ (Strauss & Corbin 1998: 158) – was employed to help order the data and elicit descriptions of values, broad themes and explanatory propositions.25 Since

23 Documents are not necessarily transparent or faithful representations of decision-making processes, and other forms of analysis (eg literary analysis) might be concerned to assess their rhetorical features, role in organisational settings, and so forth (Atkinson & Coffey 1997). However, this does not negate the point just made. Further, since the documents in question are now publicly accessible, their use by this writer can easily be checked for its veracity.

24 Once associated mainly with the exegesis of religious texts, Okrent (1988: 161) explains the concept of the hermeneutic circle in the following way: ‘Our knowledge claims in regard to the meaning of a whole text or of the meaning structure of some society will be supported by evidence supplied by our knowledge of the meaning of particular sentences or acts. On the other hand, our knowledge claims in regard to the meanings of those individual elements will be supported by and justified in terms of our knowledge of the meaning of the entire structure’.

25 Conceived originally by Glaser and Strauss (1967), grounded theory refers to a qualitative approach to data analysis, in which concepts, explanatory propositions and theories are developed from the bottom up rather than imposed; that is, they emerge from a careful observation and systematic sifting of the data, including typically through an initial deep reading, the arrangement of the data into categories, topics, themes, etc, their saturation with examples, the identification of patterns and relationships within and between different sets of data, data classification (eg into a typology, taxonomy or model), and the accounting for any data that doesn’t fit or seems at odds with the above. As originally envisaged, it
interviewees were asked similar questions the first step in analysing the data was to consider the responses question by question, again with an eye for not just what was said overtly about values, but their potential presence in the shape of criteria, explanations, rationalisations, and so forth. Categories of data were identified, coded and clustered by question and interviewee in a tabular format. Coding then continued inductively within and across questions, with codes being tested and refined until they seemed to fit the data well and were supported by a variety of quotes, anecdotes, or counts of how often something was mentioned. As the inductive process continued, codes became more conglomerate, abstract and theory oriented, until core codes or categories emerged that not only subsumed but also appeared to help explain the ones they contained. When writing up the results of the analysis, these core codes were used to help structure the discussion, serving both as summary titles for basic value contours, and windows to a more subtle and detailed description of value content.

A few examples can be used to illustrate the process. For instance, when asked about his experience of value conflicts, M2 replied,

Oh yeah, I mean immigration confronts you with personal value conflicts and moral dilemmas all the time. I used to deal personally with about 1000 cases a week. Not all refugees obviously, but across the broad spectrum. And you had to take some pretty tough decisions. Every part of you was screaming out, ‘Let these people stay’, or ‘Let them in’. And then you had to say to yourself, ‘Well, righto, what is the logic, what is the responsible position for so doing?’ I mean, yeah, there were conflicts all the time.

involves a process of theoretical sampling or continuous interplay between analysis and data collection, whereby ‘the analyst jointly collects, codes, and analyses his data and decides what data to collect next and where to find them, in order to develop his theory as it emerges’ (Glaser & Strauss 1967: 45; see also Strauss & Corbin 1990, 1998). However, in this study, while some reflection and preliminary coding took place between interviews, time constraints made for a relatively tight schedule, and analysis really commenced only once all had been completed.

According to Brewer (2000: 108), grounded theory is widely accepted in ethnography, but ‘not necessarily in pure form and often just as lip service’, not least because is often associated with naïve realism. However, it would seem compatible with a critical and reflexive ethnography provided analyses are modest in their truth or reality claims, sensitive to the influence of the mindset of the researcher and the social interactions that occur during data collection, and willing to accept that a story telling disposition is likely to exist in both the researcher and the people being studied.
He went on to give an example of being particularly drawn to the plight of a family he met when visiting a refugee camp in Thailand, and having to consciously resist the impulse to override departmental selection procedures and tell officials to grant them entry. In this instance coding sought to reflect both the existence of a felt tension between personal impulses and public responsibilities – coded ‘virtue values versus political values’26 – and its resolution via resort to what was coded ‘administrative fairness / impartiality’. As the process of induction continued, these two codes were put first under more general ones, respectively titled ‘decision dilemmas / tensions’ and ‘adhering to rules and orderly procedures’, and then all next under a code titled ‘making proper public policy decisions’, which centred on the dilemmas facing leaders and how they would chart their way through them. This was in turn ultimately put under a core descriptive cum explanatory code titled ‘good governance’, one of the two basic values, languages or conceptual frameworks that were found guiding policy maker approaches to asylum issues.

To take another example, most policy makers made comments relating to racial or religious discrimination in asylum issues. For the most part, these involved direct statements about the importance of non-discriminatory attitudes and practices in policy formulation and administration, and of governments working to counter discriminatory attitudes in the general public. The codes ‘non-discrimination’ and ‘anti-discrimination’ were used to represent these two categories of data, with both being replicated under several broader codes – for example ‘making proper public decisions’, ‘providing leadership’ and ‘shaping perceptions’ – in line with the contexts in which they were mentioned.

On occasion, coding was less straightforward. For example, when talking about what really matters in asylum policy, M4 said in a reflective aside, ‘You know, I would like everyone to be colour-blind: race and ethnic blind, religious blind’. And again later when, talking about the role of emotion,

---

26 The nature of this dilemma is explained in more detail in chapter four. Importantly, the two types of values were not seen as necessarily antithetical, but as difficult to integrate seamlessly.
I can’t stand discrimination. In all sorts of ways, I’ve seen too many wrongs, ills, disasters, calamities that flow out of discrimination. The world has been full of discrimination. Every religion at some time or other has been a perpetrator of racial or sectarian discrimination.

Since M4’s views on discrimination seemed a driving force in his generic worldview, let alone his attitudes to asylum, the codes ‘non-’ and ‘anti-discrimination’ were here replicated under a more general code titled ‘private lights’, which was in turn later put under a code titled ‘caring for asylum seekers’, representing personal dispositions and policy actions that policy makers considered vital when taking into consideration the welfare of asylum seekers.

Like several other interviewees, M4 criticised the Howard government for failing to contain anxiety and prejudice in the general community towards unauthorised boat arrivals, and indeed fuelling and exploiting it for electoral gain. For example, commenting on the statement that ‘Australia’s treatment of boat people continues to be based on racism and fear’, he said,

The government’s treatment of boat people is based on the capacity to exploit racism and to create fear. I happen to think it’s a deliberate policy, and deliberately for that purpose. It’s not racism and fear for its own sake. It’s playing on those things realising that it would be good for votes.

Not that he thought a Labor government would be much better, suggesting elsewhere that ‘both parties support the hard sort of policies today … They all read the polls and say, “Ah, these polls are supporting current policies”’.

In coding comments like these, two points were kept in mind. Firstly, the primary intention was to gain insight into policy makers’ own values in approaching asylum policy, not what they considered were the values of others, whether other policy makers or ordinary Australians. That said, an interviewee’s praise or criticism of others was viewed as a potential source of confirmation or additional insight into where their own values lay, for example in M4’s case in the importance of working to counter discriminatory sentiments in the community and instantiate non-discriminatory policies. Secondly, to the extent such speculation was of interest, M4’s basic point here was not
taken to be that discrimination per se was a value for current political leaders, but rather the pursuit of electoral advantage and the retention or gaining of political power. Pandering to racist and fearful elements in the community was merely a strategy to this end. His comments were therefore coded ‘political opportunism’, rather than say ‘discrimination’, and like others in this vein were reported when describing how policy makers conceived the nature and direction of the values that they claimed to hold personally, such as leadership, accountability, and cultural formation.

The final examples are drawn from the interviews with the JRS leaders, the analysis of which was helped by their ability to articulate their views well, and their relatively simple if profound ideas about their personal and religious identity and mission, and its implications for their approach to asylum seekers. For instance, as part of his reply to the question about what mattered most in regard to asylum issues, J1 said,

> The core value is being an expression of God in treating asylum seekers and refugees with dignity, as God respects all human dignity.

Here the coding sought to capture both the presenting value (‘respect for human dignity’) and its perceived inspiration and source (‘God’s view of man’). Both were later put under a more general code titled ‘faith based view of human dignity’. As will be seen, the JRS leaders’ approach to justice was found to also centre on this faith-based belief in human dignity and the sentiments that arise when it is abused or denied. The above code was therefore in turn placed ultimately under a descriptive cum explanatory code titled ‘building a just and humane world’, which, like the notion of ‘good governance’ for policy makers, emerged as one of two core guiding lights for the JRS leaders.

To give another example, in reply to the same question J4 told the story of a JRS leader who, when hearing of fighting coming close to a refugee camp on the Thai-Cambodian border, headed back to that camp rather than away from it, even though workers for other non-government organizations were being evacuated. To continue in J4’s words,

> Pierre, in his JRS and sort of French way, says, ‘What could I do? I had to be with the women and children’. Now he had spent ten years with these people, and to be present with them that
night, he saw as absolutely critical in terms of consistency with his presence with them on the
good days or the ordinary days. And so that whole thing of solidarity and presence and
accompaniment I think has always been central.

The code ‘accompaniment’ was chosen to represent the properties of this story, with
concepts like solidarity and presence considered among its constituent elements. As
will be seen, the value of accompaniment is rated highly by the JRS leaders, and the
analysis also enabled identification of the values by which its quality or efficacy is
judged.

Three final points about the analysis of the interview data should be made. Firstly, the
range of values in an individual, let alone a group or society, is potentially large and
capable of great subtlety. For example, if we take only the five former political leaders,
some thirteen value-based criteria were identified among their replies to the question
about how they judged success in asylum policy. These included criteria relating to
need, system abuse, absorptive capacity, effectiveness, public acceptance, international
reputation, national self-image, bipartisanship, humanitarianism, orderliness, size of
intake, impartiality, and balance in terms of overall immigration. Some of these criteria
overlap, some constitute a means as well as an end, some are more objectively
assessable than others, some are universal in nature and others particularistic, and a few
more or a few less might have been found if a different set of eyes were analysing the
data. The values, value clusters and value ordering identified in this study should
accordingly be viewed as indicative rather than definitive, and a good working model
rather than a final blueprint.

Secondly, the people interviewed are experienced in responding to questions and
arguing a case. It would be naïve to think they are not ‘masters of spin’, in the sense of
being able to present themselves and their governments or organizations in the best
possible light, if they chose to. That said, the general impression was of people
welcoming the opportunity to reflect in depth on their time in office, and in particular to
explain where they’d been coming from and how they’d gone about their business. The
length of interviews is itself testimony to this, being often held in the midst of busy
schedules. Further, what is explored in the analysis is not so much the story told by any
one leader, which is inevitably idiosyncratic, but the story of them all, in the sense of the value maps they share.27

Finally, if there is an element of interpretive charity in naming codes and describing their properties and relationships, no more was given than the writer would desire for himself, or that seems consistent with an ethical approach to research, in which a more rather than less favourable interpretation is given of others views and intentions, in circumstances where both could potentially be drawn.

Reorienting the compass

The documents and interviews shed light on the terrain in which leaders move in regard to asylum issues, their navigational markers, and their preferred language for dialogue. The work could have ended there, as a contribution to understanding and explaining the politics of asylum, or at least how key players view it. However, as noted earlier, the aim is to also offer another way of viewing or doing policy, reframing the narratives in a way both helpful and challenging for policy makers. Here the writer might seem to jump tracks, shifting from historical analysis to critical reflection. However, a better analogy is an attempt to hitch one train to another, hoping that momentum identified in one can be enlisted and enhanced in the other. In this respect the thesis falls into what Bulmer (1982) calls the ‘enlightenment’ model of applied qualitative policy research: a rather pretentious title for the work of researchers who seek simply to offer alternative formulations of problems, or new perspectives on past or current policies, whilst remaining committed to being relevant in policy terms.28

27 According to Silverman (2000), we can regard interview replies either as giving direct access to experience or as actively constructed narratives. However, it seems difficult to sustain such a sharp distinction. For example, in this instance, being former policy insiders, the political leaders clearly all have a uniquely intimate experience of policy circumstances and processes. However, it is hard to imagine them being able to reply to questions about this experience in any other than narrative form; that is, by them weaving events, reactions to events, and reflections on events together to create or imbue them with their own sense of meaning.

28 Bulmer contrasts this with an ‘empiricist model’, where researchers gather information at the request of policy makers to help inform their decisions, and an ‘engineering model’, where they direct their efforts
More particularly, the shift is consistent with practical ethics, and a move from asking questions like ‘what?’ and ‘why?’ to questions like ‘where are we going?’ and ‘is there something better?’ – a move especially desirable when we grant space to other, more confronting questions, like ‘who gains and who loses by current arrangements?’ It is inspired by the Aristotelian concept of ‘phronesis’, often translated as prudence, wisdom or commonsense, which aims to have value rationality and instrumental rationality working in tandem; that is, to have processes of reasoning and judgement dwell on ends as well as means, and be informed by a free-ranging analysis and discussion of general social values and interests as well as specific institutional objectives (Flyvbjerg 2001). In other words, a rationality where notions of what is right and good are unlikely to be a function of either principled or practical criteria alone, but a complex and contingent mix of both.

The ethics of care was selected at the outset as a natural seedbed for this type of rationality, and worth looking at as a possible framework within which to approach asylum policy. As noted earlier, the reason is partly intuitive: most people are familiar with the value and practice of care as an end and a means in personal and social relations, and if they don’t already see themselves as caring individuals and members of a caring community, would probably consider them worthy aspirations. It simply sounds like an ethics many might sign up to, even when knowing how challenging care can be in execution, and how open to always being done better.

However, the reason for exploring an ethics of care is also logical. As will be seen, it takes seriously the problems created for moral agents by context, and compared with most other ethical approaches has an unusual sympathy for the messiness of ordinary

29 For Aristotle, phronesis is one of three forms of intellectual virtue, the others being ‘episteme’ (scientific inquiry or ‘know-why’) and ‘techne’ (technical competence, or ‘know-how’). As explained by Flyvbjerg (2001: 2), ‘In Aristotle’s words phronesis is a “true state, reasoned, and capable of action with regard to things that are good or bad for man”. Phronesis goes beyond both analytical, scientific knowledge (episteme) and technical knowledge or know-how (techne) and involves judgments and decisions made in the manner of a virtuoso social and political actor’. 
life. And if messiness is a feature of personal life, it is reasonable to expect it will be even more a feature of political life, and therefore of asylum policy.

An ethics of care is usually associated with feminist thought, but contains themes common among many virtue-oriented writers. Some of its main features are summarised in the following account by Mackay (2001: 126), in which she seeks to compare it with an ethics centred on justice:

First, the ethics of care involves different moral ideas, those of responsibilities and relationships rather than rules; second, the ethics of care is concerned with concrete situations and with problems and dilemmas seen within their socio-economic setting in contrast to an ethics of justice which is concerned with the formal and abstract; finally, the ethics of care is best seen as a deliberative activity rather than as a fixed set of principles.

The ethics of care will be discussed at length later in the thesis. Suffice here to note that it is less an ethical theory than an ethical phenomenology (Robinson 1999), being focused less on developing and applying rules and principles than identifying and promoting the processes, practices and structures that characterise caring relationships. Further, that while we may associate caring relationships mainly with family and friends, the ethics of care potentially has a much broader field of concern, extending to public as well as private relationships, and relationships characterised by distance as well as intimacy, and power as well as love.

A final reason for exploring the ethics of care as a basis for asylum policy is personal. In the years the writer worked as a public servant on asylum issues, the one-dimensional caricatures of government ministers and officials that are popular among some policy critics never seemed to gel with the picture he had of himself, nor of the persons he worked with, who in the main seemed decent and well-intentioned individuals, struggling to negotiate a complex and highly charged ethical and political environment. In their own way, many did care for the plight of asylum seekers, even if it may not have seemed so to outsiders, or supported by policy outcomes. Using an ethics of care is therefore a medium for delving into this paradox: a way, so to speak, to recognise the

---

30 Mackay is here summarising points made by Sevenhuijsen (1998).
humanness of the ‘villains’ of asylum policy, while at the same time not flinch from asking what care in such an environment might really involve.

As it turns out, the data too would have led in the direction of the ethics of care, for as will be seen a ‘caring for us, caring for them’ dilemma weaves through it. In view of the preceding comments, such a finding might be considered merely to reflect the writer’s predispositions. However, supportable empirically, it can equally well be viewed as confirmation of what was previously only a theory, or as Nussbaum (2001: 12) says, ‘experience, sensitively observed’.

DEFINITIONS AND CONCEPTS

Asylum seekers typically include people from a range of circumstances, with differing motives for their movement, and differing levels of need for refuge or relief. Some will be granted asylum as persons who meet the criteria for formal refugee status set out in the Refugees Convention and domestic law, others as victims of war or torture or other misfortune, and a few as a matter of executive fiat, for example in the form of ‘political asylum’ per se.31 However, many will be judged as not in any particular danger if they

---

31 Most asylum seekers who claim protection on political grounds have their claims considered under the Refugees Convention, which provides inter alia for refugees fleeing on grounds of ‘political opinion’. However, the concept of political asylum has a much longer history than the Convention, and a grant of asylum on political grounds need not necessarily be made via the Convention, or judged according to the same criteria. In Australia, for example, provision exists in migration regulations for a Territorial Asylum visa to be issued to persons granted asylum by the Minister for Foreign Affairs (visa subclass 800). The minister’s decision is discretionary and non-reviewable, and no criteria are specified: it is purely an executive act. However, for reasons that will become clearer in chapter three, grant of this form of asylum is extremely rare, the most high profile instances being Vladimir Petrov, a defector from the Soviet Embassy in Canberra in 1954, and Ryszard Zielinski, a defector from the Polish Consulate in Sydney in 1961. In most cases, asylum is granted on Convention grounds, the application is determined by Immigration officials, and, except for applicants in offshore processing centres like Nauru, there is a right of appeal on merit to the Refugee Review Tribunal and on matters of law to the courts. For example, Chen Yonglin, a defector from the Chinese Consulate in Sydney in 2005, was refused political asylum by the Minister for Foreign Affairs but granted a protection visa by Immigration (for a brief discussion of political asylum in the context of this case, see Neumann 2005b). In a further twist, the concept of political asylum covers the grant of both territorial asylum (refuge in the territory of a state of
return to their home country, and will have their claims dismissed as undeserving of intervention by another. As put bluntly by Ruud Lubbers (2004), the former United Nations High Commissioner for Refugees (UNHCR),

At the end of the day, some asylum seekers turn out to be refugees, and some turn out not to be. National asylum systems are there to decide which among them need international protection. Those judged not to be refugees can – and probably should – be sent back to their home countries.

Part of the complexity and contentiousness of asylum, though, is that people do not always fit easily into neat legal or administrative categories, and categories do not always do justice to the merits of particular cases. Moreover, few people are likely to engage in forced or irregular migration without at least some good, often heart-wrenching reason, even if not a Convention one of a ‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a social group or political opinion’.

Further, the Refugees Convention, typically the main vehicle for asylum claims, does not actually deal with asylum. It affords one definition of who is (and who is not) a refugee and who, having been a refugee, has ceased to be one, defines the legal status of refugees and their rights and duties in their country of refuge, and sets out administrative and diplomatic details about how the Convention should be implemented. However, as UNHCR (1992: 7) notes,

refuge) and diplomatic or extra-territorial asylum (refuge in the territory of the state where the ‘offence’ was committed, eg in an embassy compound).

32 Under Article 1A(2) of the Convention, a refugee is defined as a person who ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it’ (UNHCR 1992: 58). In Australia, refinements in this definition of a refugee, and in the understanding of Australia’s protection obligations in regard to refugees, have come about through a mixture of court interpretations and parliamentary stipulations; see, for example, Germov & Motta (2003) and DIMIA (2002).
Although there are references to asylum in the Final Act of the Conference of Plenipotentiaries as well as in the Preamble to the Convention,\textsuperscript{33} the granting of asylum is not dealt with in the 1951 Convention or the 1967 Protocol. The High Commissioner has always pleaded for a generous asylum policy in the spirit of the Universal Declaration of Human Rights and the Declaration on Territorial Asylum, adopted by the General Assembly of the United Nations on 10 December 1948 and on 14 December 1967 respectively.

There is, for example, no clear obligation in the Convention that requires a state to admit a refugee, let alone an asylum seeker. The primary protective obligation is merely to observe the principle of non-refoulement; that is, to not expel or return a refugee to any place where they are again at risk of persecution for a Convention reason.\textsuperscript{34} Nor does the Convention specify what procedures should be used to consider an asylum seeker’s claims, where they should take place, or by whom.

In brief, much in regard to asylum is left to the discretion of individual states, and is dependent on their individual capacities, dispositions and circumstances.

\textsuperscript{33} In para IV(D) of the Final Act, the Conference recommends ‘that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement’ (UNHCR 1992: 56). The Preamble includes the following statement: ‘Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation’ (UNHCR 1992: 57).

\textsuperscript{34} Under Article 33 of the Convention, ‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’. In 2001, Australia was one of many states to endorse a declaration acknowledging ‘the continuing relevance and resilience of this international regime of rights and principles [the Refugees Convention], including at its core the principle of non-refoulement, whose applicability is embedded in customary international law’; see ‘Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees’, 12-13 December 2001, UNHCR Document HCR/MMSP/2001/09 of 16 January 2002. A review of the status of the non-refoulement principle as customary law (ie as an obligation for all states to observe, not just Convention signatories) can be found in Lauterpacht & Bethlehem (2001).
Asylum policy

In this context, asylum policy is not the quite the same as refugee policy, although the two are closely aligned. As Gibney (2004: 9-10) notes,

The category of the asylum seeker is in one respect narrower than that of the refugee. For any particular state, asylum seekers include only those refugees who arrive at its own borders … [However, the category] is at the same time a more expansive one than that of the refugee; unlike refugees in camps and those who gain entry through resettlement programmes (most of whom have received the UN’s imprimatur or are obviously escaping life-threatening situations like war), the status of an asylum seeker as an endangered person is typically undetermined. To be an asylum seeker an individual merely has to claim to be a refugee.

These twists bring their own complications. For example, as Gibney (2004: 10) points out, the global reach of asylum seekers today – aided by easier international travel, better communications and people smugglers – adds bite to the question: ‘Do states have a special responsibility to refugees in their own territory that justifies them giving priority to these men and women over others in danger who are further away?’ Further, if a person can gain entry to a state merely by claiming to be a refugee, is it any wonder that ‘the politics of asylum … is dominated by concerns that bogus asylum seekers are exploiting the generosity of the host country’?

Other complications will emerge in the following chapters. Suffice here to make a second point about asylum policy. At one level, it refers to the response of a state to asylum seekers, that is, to people who arrive at its borders or enter its territory and claim they are in need of protection as a result of a threat to their life or liberty. This response includes the treatment of asylum seekers both before and after a decision is made on their claims. It is, to borrow a phrase, about who is granted entry, and on what conditions.

However, while a catalogue of state responses to asylum seekers is useful – and is done recently for Australia by York (2003) – it does not engage with another level of policy, which is, to quote Colebatch (2004: 113), ‘a way of thinking and talking about the
world in which these decisions make sense’. As Colebatch notes, here policy analysis is concerned more with ‘storylines’ than story details:

> It is concerned with the multiple ways in which people (officials, politicians and the public) make sense of the world and apply ‘policy’ to it, and with making links between these discourses and finding ways of linking them.\(^{35}\)

As will already be evident, the primary interest of this thesis is the latter ‘sense-making’ aspect of asylum policy. Nevertheless, considerable historical detail on Australian and EU responses to asylum seekers, some of it little known, will emerge in the course of it.

**Values**

According to Hage (2006), ‘conservatives’ and ‘progressives’ have different views about values. In his view,

> For conservatives, values are on the side of cultural tradition, habits and customs: they are the things that one has. For progressives, values are on the side of ideals: they are the things that one pursues.

This may or may not be a valid taxonomy, depending on the context in which it is used, but in this thesis a more neutral starting position is taken. Values are viewed simply as what people judge ‘good or bad for man’ (Aristotle, in Flyvbjerg 2001: 57); that is, what they consider important or desirable for sustaining or enhancing a life, a community, or the world. As such, they can relate to either the ends or the means of action. Or as Hugman (1998: 7) puts it, there can be ‘values of “how” (the right means) and … values of “what” (the right objectives)’.

Values are expressed in positive and negative terms,\(^{36}\) exist in individuals but can be ‘social agreements’ (Oyserman 2001), and serve important discriminatory and direction

\(^{35}\) From this perspective, public policy is ‘a narrative, and policy analysis … a way of understanding it: discovering underlying meanings, linking different discourses and facilitating participation’ (Colebatch 2004: 114).

\(^{36}\)
Setting functions. Further, they typically include both a cognitive and an affective element. As Rezsohazy (2001: 16153) notes, ‘The more a value is deeply rooted, the more it … is lived intensely, arouses emotions, and mobilizes vehement energies’.  

Various problems arise in exploring and discussing values. For a start, they are not always transparent or easily described, may surface only in action, and may be rated differently according to context and circumstance. For example, we might rate trust of strangers highly when only ourself is at risk, but irresponsible and a breach of care if we are in charge of a playground of children. Similarly, we might consider a dollar donation by a poor person an act of generosity, but the same donation by a millionaire an act of meanness. Another problem is that actions may be influenced by many factors other than values, including unexpected events, making it difficult to specify causal relationships.

Exploring and discussing values in public policy may seem especially problematic, for politics is replete with values. It is full of players of different backgrounds, interests and commitments, often with different views about how the power and authority of public office should be exercised, and to what ends. Policy can lag behind, run ahead

---

36 For example, they can be expressed as things that are important or unimportant, desirable or undesirable (Kupperman 1999).

37 There may be occasions when we come to hold something as important or desirable, or the reverse, purely through logical analysis, without any emotional involvement. However, whether we then really ‘see’ the value, or can sustain the analysis without experiencing any confirmatory feeling, however fleeting, is doubtful (Kupperman 1999).

38 This might seem a strange notion if we see politics as simply a place where everybody seems to be constantly in conflict, pursuing their own interests and advantage. However, as Smith (2006) notes, ‘such a view of politics leaves out a lot. Politics often involves conflict precisely because it describes the ways in which people attempt to resolve important issues … on which values and opinions differ. They are issues that involve decisions which, no matter how carefully they are made, will leave some people unsatisfied and even exposed to harm or death. Much as we would wish it were so, there is no other way than politics to resolve such important issues … [Moreover], conflict is only part of the story. Politics is also about cooperation and compromise … [These] are different from conflict but they do not necessarily represent better ways of doing politics … Sometimes Australians want politicians to fight for important values or interests – to engage in conflict – rather than to accept compromises that result in those values and interests being watered down or lost’.

---

31
of, or help bring about changes in the values of these players, but even at the best of
times it is unlikely to ever accommodate all of them. Further, as Bridgman and Davis
(2000: 31) note, factors ranging from unexpected events to the emergence of new
personalities to timing in the political cycle can all affect the ‘rationality’ of policy
decisions:

Experience shows that the normative sequence [in policy development] is easily disrupted. The
policy dance is sometimes seemingly random movements rather than choreographed order.

The difficulties these problems present for mapping values may be overcome to some
extent by choice of methodology. For example, as noted earlier, in this study issues
relating to transparency, action and context are addressed through a combination of
historical inquiry into policy developments over a long period, and the inductive sifting
of interview data. That said, at some point we probably also need to accept that what
people say are their values is about the closest we’ll ever get to Geertz’s ‘honest story
honestly told’, and anything more is increasingly the story of the analyst.

Issues relating to causality are less easily resolved. However, this study’s interest in the
values rather than the details of asylum policy makes it as much culturally as politically
forensic. And in this regard, rather than speculate about the personal or national
qualities that might shape the choice of values, it prefers to focus on tracing their nature,
the meaning they have for the people who put them into effect, and the way in which
the value of care might be brought more to the fore. Further, it does not seek to claim
that values are necessarily critical to action, just that they are relevant and important
influences.

CHAPTER OUTLINE

Drawing mainly on the archival sources, chapter two begins the task of mapping the
values that have guided Australian asylum policy makers by examining their responses
to key developments in the conceptual and legal framework of international protection
over the past sixty years. These include the 1948 UDHR, the 1951 Refugees
Convention, the 1967 UN Declaration on Territorial Asylum, and the 1967 Protocol to the Refugees Convention.

In chapter three the focus switches from principle to practice. Again using the archival sources, it explores the values which underlay policy maker responses to three early asylum seeker situations: refugees from Asia during World War Two, defectors from Soviet bloc countries during the 1956 Melbourne Olympics, and Papuans crossing the border into Australian-administered Papua New Guinea (PNG) between 1963 and 1973, that is, between the time Indonesia took over control of West New Guinea from the Netherlands and the time PNG became responsible for its own asylum decisions.

Chapter four begins with a brief overview of asylum policy developments since 1973, with the focus on basic areas of continuity and change in Australia’s policy framework and dispositions. Using the interviews with former ministers and public servants as the primary source, the chapter then turns to again consider the whys and wherefores of the people responsible for these developments. In other words, the values they say drove or inspired them when approaching asylum policy.

Chapter five explores the values that leaders of the European Commission and the JRS bring to asylum. As noted earlier, the purpose is to provide contrast for the preceding value maps, and identify values that other key players in the global asylum scene consider worthy of consideration in policy discussions.

Chapter six considers whether an ethics of care offers a framework for asylum policy that can accommodate the political realities uncovered by the above chapters, whilst simultaneously tugging moral agents – individual and state – towards pursuing higher or more comprehensive standards of ethical and political thought and action than those that might obtain under other approaches, for example from law, the processes of accountability, or even human rights. After discussing what might reasonably be expected of ethics in a public policy context, it outlines and refines the nature of the ethics of care as developed since the early 1980s, focusing in particular on the work of Joan Tronto (1993), who does more than most to give the approach a political edge and quell any notion of it being only ‘women’s business’. The chapter ends with a
consideration of several key aspects of current Australian asylum policy, showing the kinds of questions that the ethics of care might bring to each, and the general directions in which it might have policy go.

Chapter seven provides a recap of the main findings, suggestions for future research, and final reflections.
CHAPTER TWO: ASYLUM VALUES – THE ARCHIVAL RECORD ON PRINCIPLES

In the field of asylum, as in the field of nationality, States are jealous of their sovereignty. (Rene Cassin)\(^1\)

In July 1951, representatives of Australia and 25 other countries met for several weeks in Geneva to finalize the terms of the Refugees Convention. Three years later, on 22 January 1954, as the sixth country to deposit an instrument of ratification with the UN Secretary-General, Australia enabled the Convention to come into force.\(^2\) At the related ceremony, Australia’s representative called the Convention ‘the Magna Carta of the refugee’, and spoke of the ‘moral obligations of nations to endeavour to assist’ refugees and have their problems ‘discussed and dealt with in terms compatible with the moral principles of the United Nations Charter’.\(^3\) Noting that Australia had accepted many European refugees after World War Two, and provided financial support to the International Refugee Organization (IRO) and the UNHCR, he continued,

I am glad, now, to offer further evidence of our compassionate concern with this problem by formally stating our binding adherence to a Convention which will elevate the standard of treatment of refugees to the status of international legal obligation.

Australia was therefore one of the first countries to formally embrace the Convention as a corner stone of asylum policy – hardly, it would seem, the ‘reluctant party’ suggested by Neumann (2004: 86). Indeed, Maley (2002) cites the decision to accede by the Menzies government as an example of a state acting voluntarily to constrain its own freedom of action in regard to asylum seekers, in accordance with classical liberal principles.

\(^1\) Summary Records of the UN Human Rights Commission, 13\(^{th}\) session, April 1957, HRC Doc No E/CN.4/SR.564, p 14. Cassin was a founder of the UDHR.

\(^2\) The countries before it were Luxembourg, Belgium, Norway, Denmark and the Federal Republic of Germany.

\(^3\) WD Forsyth, 22 Jan 1954, NAA A1838 855/11/11 Part 5.
However, it doesn’t take long to think that more might have been going on here than first meets the eye. For a start, only a few years earlier Australia had opposed the inclusion of a clause on the right of asylum in the UDHR, and a number of reservations were attached to its accession to the Convention. Further, the decision to accede was not made by Cabinet, nor accompanied by a media release or any public debate, all of which might be expected to have occurred if matters of significance were believed at stake. Finally, accession was not accompanied by any moves to make observance of the Convention required and enforceable under domestic law as distinct from government discretion, something which in fact did not occur until 1994, four decades later (Germov & Motta 2003).

This chapter therefore takes a closer look at the values guiding Australia’s responses to developments in the international asylum framework during the early post-World War Two decades. After revisiting the issue of a right of asylum in the UDHR, it examines Australia’s involvement in the drafting of the Convention, and the reasons for its early accession. It then turns to consider Australia’s views on the UN 1967 Declaration on Territorial Asylum, an early draft of which would have given asylum seekers more rights than the Convention, and the UN a greater say in asylum decisions. Finally, it examines the factors behind Australia’s withdrawal of the reservations it initially made on the Convention, and its agreement to extend the Convention’s coverage to refugees not only outside Europe, but also to those caused by events occurring after 1 July 1951, which is the date limit set in the Convention.

THE RIGHT OF ASYLUM IN THE UDHR

The drafting of the UDHR in 1948 took place within a difficult negotiating climate. The failings of governance that had led in quick succession to the chaos, carnage and displacement of two world wars and the Nazi holocaust made political leaders more amenable to concepts such as individual rights and minimum standards of state behaviour. However, there were a variety of views on how best to proceed, and differences were exacerbated by the emerging cold war and middle-east crisis, and the unravelling of old colonial empires. Asylum issues were embroiled in these tensions, with a million or more Eastern European refugees reluctant to go home to countries now
part of the Soviet bloc,⁴ and some half a million Palestinian refugees created by moves to establish the state of Israel.⁵

The UDHR was to be a statement of principles rather than law, but as such it was still potentially a document of moral authority. The phrasing of each article therefore became nearly as critical to UN members as if it were to be legally binding, and Article 14 on the right of asylum was no exception. The first draft provided that, ‘Every State shall have the right to grant asylum to political refugees’. This was later strengthened to become ‘Everyone has the right to seek and be granted, in other countries, asylum from persecution’. However, only a watered-down version made it through to the final document, which reads merely that ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution’.⁶ Direct reference to a right to be granted asylum had been removed. Why?

Stepping back for a moment, it is worth noting that Australia had played an active role in the UN’s founding and was a member of the UDHR drafting committee. Indeed, it initially argued for a declaration that would become a legal document rather than a

---

⁴ To the allies, these refugees may have been seekers of freedom, but to the Soviets they were quislings, traitors and war criminals, and the Soviet bloc accordingly often played an obstructive role in post-war discussions on asylum. For example, according to a 1960 New Zealand brief, ‘The Soviet bloc, of course, refuse to acknowledge that there is any flow of persons seeking asylum from any Communist country (political refugees, are, in the Soviet view, classed either as criminal or misguided). The problem with which the Declaration [on Right of Asylum] seeks to deal is therefore not acknowledged by the Soviet bloc as existing’; brief for delegation to UN General Assembly, 16th Session, Provisional Agenda Item No 38, p 2, NAA A1838 929/6/1 Part 2.

⁵ Even at the first session of the UN in 1946, Australia’s delegates reported that the debate on refugee issues had revealed deep differences in view as to the seriousness of the problem and the principles to be applied in solving it; report by the Australian delegation to UN General Assembly, Parliamentary Papers, Session 1945-46, vol 3, pp 829-77. See also Evatt, CPD (Reps), 13 Mar 1946, vol 186, p 192; Makin, CPD (Reps), 21 Mar 1946, vol 186, p 478.

⁶ The development of the provision on asylum can be seen in the multiple drafts of the UDHR reproduced in Glendon (2001). Foreshadowing the identification in the Refugees Convention of persons not considered to be deserving of international protection (Articles 1F and 33(2)), Article 14(2) continues: ‘This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations’. 
statement of principles, and was generally supportive of the recognition in the UDHR of economic and social rights as well as traditional civil and political rights. However, few UN members saw areas of traditional state prerogative as open to negotiation. The Soviets viewed any interference with national sovereignty as ‘nothing but an ideological proposition for the political capitulation of one country to a more powerful country before the economic power of that other country’. Others, including Australia, thought that if the UDHR was not to be a legal instrument, it should focus on the rights of individuals and not the corresponding duties of states (Lauterpacht 1948).

Not surprisingly, then, when discussion turned to the idea of a right of asylum both the Soviets and Australia opposed it as ‘implying an interference with matters exclusively within the domestic jurisdiction of states’ (Lauterpacht 1948: 374). As Tasman Heyes, Secretary of the Department of Immigration had put it during preparation of the Australian delegation’s brief,

> If it is intended to mean that any person or body of persons who may suffer persecution in a particular country shall have the right to enter another country irrespective of their suitability as settlers in the second country this would not be acceptable to Australia as it would be tantamount to the abandonment of the right which every sovereign state possesses to determine the composition of its own population, and who shall be admitted to its territories (in Devereaux 2001: 76).

---

7 In 1946, as leader of Australia’s delegation to the Paris Peace Conference, Evatt said Australia would propose the establishment of a court of human rights to enforce obligations created by treaties regarding citizenship, human rights and fundamental freedoms. He envisaged the right to invoke the jurisdiction of this court being extended to individuals and groups as well as states, and its judgments being accepted and enforceable not only against individuals or groups, but also against states and local agencies; press statement of 19 Aug 1946, NAA A1067 PI46/5/5/1.

8 At one point during debates over priorities and emphases on these matters, the Soviet delegate reported to his Foreign Ministry that while most representatives took the side of the United States, ‘Oddly, the representative of Australia, Colonel Hodgson, was in most cases supportive of the Soviet viewpoint’; (Tepliakov, in Glendon 2001: 46).

9 Verbatim record of the UN General Assembly, no 183, p 81 (in Lauterpacht 1948: 361, fn 6).

10 Henceforth Immigration in text and DI in footnotes.
Opposition also came from the United Kingdom, whose delegate, according to Glendon (2001: 153), swung the views of many, including the United States, when she observed that a right to be granted asylum ‘would conflict with the immigration laws of nearly every country’.

Not that the Australians, Soviets and British had to lead the attack on the proposed article. Concerned about the implications of the Palestinian refugee crisis, it was Saudi Arabia that moved that the right to be ‘granted’ asylum be diluted to ‘enjoy’ asylum, and Lebanon that a ‘right to return’ to one’s own country be added (Glendon 2001: 153). Any remaining ambiguity was removed when the United Kingdom had it clarified that the phrase ‘the right to enjoy asylum’ meant simply ‘the right of every state to offer refuge and to resist all demands for extradition’ (Morgenstern 1949: 336-7).

Lauterpacht (1948: 373-4) describes the final formula as ‘artificial to the point of flippancy’. He adds,

---

11 The Saudi delegate cautioned that the right of asylum ‘did not mean … that everyone had the right to obtain asylum in the country of his choice, although that country might not be prepared to receive him. Such a principle would be a flagrant violation of the sovereignty of the state concerned’ (in Morgenstern 1949: 336).

12 These actions reflected mixed motives, including a concern about the economic, political and security burden of hosting Palestinian refugees, a belief that the solution to the latter’s problems lay in repatriation rather than resettlement, and a desire to maintain pressure on the UN to sort out a problem they believed it had helped create and therefore had responsibility for solving. Similar motives later led Arab states to unsuccessfully oppose authorising the UNHCR to engage in resettlement activities as the General Assembly might determine (report by Australian delegation to Third Committee, Agenda Item 63, circa Dec 1949, NAA A1838 855/11/11 Part 2), and to successfully seek a provision in the Refugees Convention (Article 1D) which effectively excludes many Palestinian refugees from the protection it affords (see Akram (2002), Hathaway (1991), Robinson (1953)).

13 The United Kingdom’s delegate acknowledged that her country ‘had often had occasion to offer asylum to political refugees … but it [had] not done so under any obligation’ (in Morgenstern 1949: 336). Palfreeman (1970: 55) rightly describes the view of asylum adopted in the UDHR as ‘an act of condescension by the state’.

---
It is perhaps a matter of regret that in a Declaration purporting to be an instrument of moral authority an ambiguous play of words, in a matter of this description, should have been attempted.

However, in 1948 – and still today – there was no requirement or customary rule in international law granting refugees a right of admission. As noted recently by Justice Gummow of the High Court of Australia,

[The] right to seek asylum [in the final draft of the UDHR] was not accompanied by any assurance that the quest would be successful. A deliberate choice was made not to make a significant innovation in international law which would have amounted to a limitation upon the absolute right of member States to regulate immigration by conferring privileges upon individuals.\(^\text{14}\)

Nor were states in 1948 willing to cede any power to international organizations to secure asylum for refugees. A French proposal that ‘The United Nations, in concert with the countries concerned, is required to secure such asylum for [a refugee]’, was defeated (Morgenstern: 1949: 356, fn 1).

In brief, while the ideas of human rights, human dignity and economic and social justice are woven into the text of the UDHR, they comprise in Glendon’s (2001: 19) words,

… a glimmering thread in a web of power and interest … The Great Powers had gone along with the human rights language, but they made sure that the Charter protected their national sovereignty.

\(^{14}\) MIMA v Ibrahim [2000] HCA 55 at 137-8. He continues: ‘It has long been recognised that, according to customary international law, the right of asylum is a right of States, not of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national…Over the last 50 years, other provisions of the Declaration have [citing Brownlie] come to “constitute general principles of law or [to] represent elementary considerations of humanity” and have been invoked by the European Court of Human Rights and the International Court of Justice. But it is not suggested that Art 14 of the UDHR goes beyond its calculated limitation’.
Article 14 is just one example of their protective work. Indeed, it may be argued that by rejecting the proposal for a right of asylum, the founders of the UDHR were rejecting an obligation even in good conscience for states to grant asylum, let alone in law.

That said, Article 14 is not insignificant in the international framework of asylum policy. For in proclaiming the right of a person to seek and enjoy asylum, it begs two questions: firstly, does anyone have a duty to give effect to that right, and secondly, does a country in which a person has sought refuge have at least a minimum duty to not return them to a place where they might be persecuted? Both questions were to surface during the drafting of the Refugees Convention a few years later, even if an answer to only the latter was forthcoming. It is to the values that Australia brought to this Convention that we now turn.

THE 1951 REFUGEE CONVENTION

The founding of the UDHR was accompanied by at least some public discussion in Australia. This was not the case with the Refugees Convention, debate on which appears to have largely been limited to public servant and ministerial circles.

It did not get off to an auspicious start. By 1951, Australia had been engaged in the work of refugee relief and resettlement for over a decade, to an extent leading Price

15 According to Morgenstern (1949: 348), at the time the UDHR was drafted most European states and the United States were, as a matter of general policy, not deporting refugees to their country of origin. However, he adds, ‘This does not mean that [refugees] have a right, enforceable by action, to prevent such return’, and governments could only be exhorted to not expel or refuse admission to refugees who were unable to get permission to enter any other country.

16 Article 14 can also be viewed as an ongoing challenge to states to reflect on their moral and political culture in regard to asylum seekers. For according to the UDHR’s preamble, it constitutes ‘a common standard of achievement for all peoples and all nations’. And as Lauterpacht (1948: 369-70) explains, the idea of a ‘common standard of achievement’ does not mean that states are expected to interpret their obligations in accordance with the common intention of the UDHR’s founders – ‘assuming that there be such’ – but rather ‘according to their own lights as to the ethical rights and wrongs of any given situation’.

17 After supporting the establishment of the Intergovernmental Committee on Refugees (IGCR) in 1938 to address the problems of refugees fleeing Nazi persecution, Australia supported financially and otherwise
(1990a: 22) to claim that it had become ‘a power in international refugee affairs’. However, on reading the first draft of the Convention by the UN Ad Hoc Committee on Statelessness and Related Problems,18 a senior Immigration official said to Heyes,

My personal view is that like most UN documents the framers of this have their heads so far in the air that they are unable to get their feet on the ground. It is rather ridiculous to ask any State to subscribe to a convention which would deter it from imposing a penalty on an undesirable refugee who deliberately flouted its immigration law. To my mind it would be a definite step towards abandoning effective control over immigration to accept a convention along the lines submitted.19

the establishment in 1943 of the UN Relief and Rehabilitation Administration (UNRRA) to provide relief to displaced persons in reconquered territories and return prisoners of war and exiles to their homes; was an active member of the International Refugee Organization (IRO), which took over from UNRRA and worked mainly to resolve the problems of people in refugee camps in Europe; supported financially and otherwise the establishment in 1949 of the UN Relief and Works Agency (UNRWA) to assist Palestinians who had become refugees in the course of the foundation of Israel; and was a member of the special UN committee that led to the establishment of the UNHCR in January 1951 to provide international protection for refugees and to seek permanent solutions for their problems. The government had also for several years been supportive of the work with refugees being done by church and welfare organizations, and was itself providing services and facilities (eg temporary housing) for refugees resettled in Australia (NPC 1991, Price 1990a). While it had reservations about the supervisory powers of the UNHCR (eg Department of External Affairs (DEA) to Australian delegation to UN Economic and Social Council (ECOSOC), 2 Aug 1950, NAA A1838 855/11/11 Part 2), and sought to limit its power to intervene on behalf of refugees (eg Australian delegation to UN General Assembly to DEA, 5 Dec 1950, NAA A446 1960/66509), it played a constructive role in securing authorisation and flexibility for it to engage in resettlement activities (eg Secretary, DEA to Secretary, DI, 25 Nov 1949, NAA A446 1962/67355; report by Australian delegation to Third Committee, Agenda Item 63, circa Dec 1949, NAA A1838 855/11/11 Part 2). In 1951 it was one of five nations outside Europe selected to be on the UNHCR’s Advisory Committee. With Sweden and the United Kingdom it later co-moved that the UNHCR continue beyond its initial 3-year mandate, and in April 1958 became one of the first 24 members of its Executive Committee.

18 Later known as the Ad Hoc Committee on Refugees and Stateless Persons.
19 Horgan to Secretary, DI (handwritten note), 8 May 1950, NAA A446 1960/66509.
Heyes was more diplomatic when he passed Immigration’s final views, endorsed by Harold Holt, his Minister, to the Department of External Affairs. But the bottom line was clear:

Any article which might run counter to the established immigration policy of Australia, or which might prove embarrassing in the administration of that policy, would not be acceptable … The number of refugees that we have accepted in comparison with our total population should give a complete answer to any criticism which might be directed against Australia because of this attitude.

In the climate of the time, Immigration’s initial negative response to the draft Convention is understandable. Unlike the UDHR and the charter of the UNHCR, the Convention would place specific legal obligations on states. Moreover, while Europe was being spurred to address asylum issues because of its contiguous frontiers and long history of refugee flows, Australia had no imperative to do so, and good reasons to fudge the matter. It was geographically isolated, had an orderly settlement history, and no experience of refugee influxes apart from 15,000 or so wartime refugees during World War Two (see chapter three). Refugees from Asia posed a potential problem in light of the White Australia policy, but so far they were relatively few in number, and able to be carefully managed by the issue of temporary residence permits and tight

---

20 Henceforth External Affairs in text and DEA in footnotes.
21 Heyes to Minister for Immigration, 24 May 1950, NAA A446 1960/66509; Heyes to Secretary, DEA, 22 May 1950, NAA A1838 855/11/11 Part 2. Heyes’s suggested line of reply to criticism was detailed in a 1950 brief: ‘Not only does Australia’s overall effort in resettlement of displaced persons rank second only to the USA (omitting Israel), but when considered in proportion to its population and resources it far outranks the efforts of any other country. This has placed a very great strain upon the Australian economy’; DEA brief for delegation to the 7th session Executive Council and 5th session General Council of the IRO, comments on Agenda Item 7 (General Council), circa April 1950, NAA A446 1962/67355.
22 In its official comments on the Ad Hoc Committee’s draft, Australia noted that some articles appeared to have been drafted against the background of the traditional rights of asylum in Europe, where borders were contiguous, and said, ‘In the case of Australia, however, the overwhelming majority of refugees as defined in the draft Convention who come to Australia seek not asylum but permanent settlement. Hence they come within the scope of the provisions of immigration legislation in general. The Australian Government would regard it as undesirable that refugees should be placed in a position more favourable than that of other aliens’; extract, G.A.5/Supplementary Iem, pp 264-7, circa Nov 1950, NAA A1838 855/11/11 Part 2.
restrictions on family reunion. Further, Australia was already engaged in a huge refugee resettlement program under the auspices of the International Refugee Organisation (IRO), which was bringing its own share of social and economic problems, and could easily come unstuck.

Three main areas of difficulty were identified with the draft Convention. The first related to labour and national development, where proposed articles on non-discrimination and freedom of movement and employment appeared to cut across the two-year work contracts that Immigration was making with refugees under the IRO scheme, and under similar schemes with Italy and the Netherlands. The ability to direct refugees to work anywhere in Australia was an important plank in the government’s case for these schemes before an ambivalent public, and was considered vital from a development and industrial relations point of view. In brief, the contracts were thought necessary to win community support, ease economic and social strains, and protect the refugees from possible exploitation. Further, the IRO was in favour of them. No doubt with Australia’s concerns in mind, the Ad Hoc Committee indicated it had ‘no intention to restrict the powers of governments to attach conditions to the

23 Heyes to Minister for Immigration, 24 May 1950, NAA A446 1960/66509; Heyes to Secretary, DEA, 22 May 1950, NAA A1838 855/11/11 Part 2; Heyes to Secretary, DEA, 4 Dec 1950, NAA A1838 855/11/11 Part 2.

24 See Heyes to Secretary DEA, 6 April 1951, NAA A 1838 932/1/1 (including backgrounder on displaced person arrangements for use by Australian delegation to UN Human Rights Committee meeting). According to Heyes, the agreement between the IRO and Australia required Australia to provide employment for all the refugees fit for employment who came to Australia, and to ensure that such employment was under conditions and at rates of wage not less favourable than those enjoyed by Australians performing similar work. In the DI’s view, this responsibility could be accepted only if the government exercised control over their employment. However, as an agreement between institutions, it could not be regarded as binding on the individuals concerned, who could potentially appeal against any failure on the part of Australia to meet its responsibilities, or refuse to be bound by the general employment obligation. Each employable refugee was therefore required to enter a written undertaking to the effect that they must remain in the employment found for them for up to two years and couldn't change that employment during that period without the consent of the DI. Another condition of the IRO agreement was that Australia would not discourage refugees joining trade unions. According to Heyes, most refugees were allocated to fully unionised industries, and received commensurate benefits in terms of wages and conditions.
admission of refugees or to demand that they fulfil these conditions’. However, Australia signalled it would ensure this was the case by taking advantage of a provision that allowed states to enter reservations on certain articles.

The second main difficulty related to immigration policy, with Immigration worried that some of the proposed articles might conflict with powers and practices under existing migration legislation, included the ability to practice restrictive immigration, penalize people who entered Australia unauthorised, deport unwanted arrivals, impose and enforcing conditions on those granted entry for specific purposes, and withhold travel documents. As Immigration noted,

There are thousands of non-European refugees, and acceptance by Australia of a convention which provides that such a class of persons should not be discriminated against and should not be subjected to any penalty for illegal entry, would be a direct negation of the immigration policy followed by all Australian Governments since Federation.

The draft was also seen as introducing potential inequities or anomalies in the areas of immigration and citizenship. For example, according to Immigration, ‘refugees are to be given what amounts to practically equal status with Australian citizens, and may not be the subject of any of the discriminatory laws or practices which apply to those who are not citizens or British subjects’. Further, it complained that ‘even Australian citizens are not entitled to demand passports or travel documents as a right’, which appeared to be what was being proposed for refugees.

Of perhaps most concern to Immigration however, because of its potential implications for restrictive immigration, was the definition of a refugee. Only a year earlier, the UN had given the UNHCR a universal mandate, covering not only refugees defined by earlier international conventions, resolutions and arrangements, but basically anyone living outside their country of nationality because of a well-founded fear of persecution.

26 Cable, DEA to Australian delegation to UN, 10 Aug 1950, NAA A446 1960/66509.
27 Heyes to Secretary, DEA, 22 May 1950, NAA A1838 855/11/11 Part 2.
28 Heyes to Minister, 4 Jun 1951, NAA A446 1960/66509.
by reason of their race, religion, nationality or political opinion. No date or geographic limitation was attached to this mandate.\textsuperscript{29} A similar definition of a refugee was contained in the Ad Hoc Committee’s initial draft of the Convention. However, it included an important qualifier: refugees other than those covered by earlier arrangements needed to be refugees ‘as a result of events in Europe before 1\textsuperscript{st} January 1951’. In effect, this limited the coverage of the Convention to European refugees created by World War Two and the consolidation of the Soviet bloc.

When the Committee’s draft was considered in the UN Economic and Social Council (ECOSOC) in August 1950, Australia, the United States and France were among those who supported the limited definition, and helped defeat a proposal to make it more comprehensive. However, the latter vote was a tied one (7-7-1), and the subsequent vote to accept the Committee’s limited version was therefore at best half-hearted (7-1-7).\textsuperscript{30} Further, before agreeing to convene a conference of plenipotentiaries to finalise the draft, the UN General Assembly voted to delete the words ‘in Europe’ from the definition, restoring to it a universal though still date-limited application.\textsuperscript{31} As External Affairs noted, ‘Accordingly of course, Asian refugees are covered and this at once makes the convention very delicate for Australia’.\textsuperscript{32} Immigration put it more bluntly, arguing that it ‘constituted a direct danger to the so-called “White Australia policy”’.\textsuperscript{33}

The third main difficulty with the draft Convention related to foreign policy. External Affairs found itself in a bind. On the one hand, it was unhappy with a proposal to give

\textsuperscript{29} See UN General Assembly Res A/RES/428, 325\textsuperscript{th} Plenary Meeting, 14 Dec 1950, Annex: Statute of the Office of the UNHCR, Ch 2, Art 6(b). In 1959, the General Assembly further extended the coverage of UNHCR by authorising it to have regard to the needs of ‘refugees who do not come within the competence of the United Nations, to use his good offices in the transmission of contributions to provide assistance to these refugees’; UN General Assembly Res 1388, XIV, 20 Nov 1959.

\textsuperscript{30} UN Division to Tange, 7 Aug 1950; extract of ECOSOC report on 11\textsuperscript{th} session, Item 32 discussion, NAA A1838 855/11/11 Part 2; cable from Australian delegation to DEA, 2 Aug 1950, NAA A446 1960/66509.

\textsuperscript{31} Australia opposed this proposal, wanting the matter to be handled at the 1951 General Assembly; UN Section to Pyman, 23 May 1951, NAA A1838 855/11/11 Part 3.

\textsuperscript{32} UN Section to Pyman, 23 May 1951, NAA A1838 855/11/11 Part 3.

\textsuperscript{33} Burbidge to Secretary, DI, 20 Jul 1951, NAA A1838 855/11/11 Part 3.
the UNHCR wide powers to supervise how states applied the Convention, the volume of information it might need to provide the UNHCR, and the potential for the UNHCR to make this information public:

There could be a very undesirable increase in the volume of work involved in providing information and data to various agencies of the United Nations … The “duty of supervising the application of the provisions” is undefined and is subject to wide interpretations. For example, the High Commissioner might interfere, if he so wished, at the request of a refugee with a grievance … [In regard to reporting] If he wished, he could direct specific requests for information of an embarrassing nature. Moreover, the information which he requests, if public, might be of value to the countries of origin. In the United Nations, the Eastern European countries have often [called] for reports on the numbers and locations of refugees.34

There was also anxiety about the difficulties that Australia would experience presenting its views on the Convention in international forums. Indeed, its representative to the UN had kept quiet during the General Assembly’s discussion of the definition of a refugee, worried that an obstructive intervention would have only invited criticism of the White Australia policy and Australia’s treatment of Asian wartime refugees.35

On the other hand, when faced with a decision as to whether or not to attend the conference of plenipotentiaries, External Affairs shared the optimism of the Attorney-General’s Department36 about the prospect of amending offending articles. It was also comfortable with the idea of making reservations at the time of accession, if the need

34 Brief for the Australian delegation, Conference of Plenipotentiaries, July 1951, pp 13-14, NAA A1838 855/11/11 Part 3. The DEA also initially believed that the Convention needed a federal clause to provide for differences among state governments in Australia, eg in discriminatory legislation of a racial character and access to certain kinds of employment. However, the Attorney-General’s Department (henceforth AG’s) advised that the inclusion of such a clause would make little practical difference to Australia, unless there was an unfavourable decision on federal powers by the High Court.
35 The delegate reported that it ‘seemed most inadvisable to risk opening up any general discussion’ after India ‘referred to Australia’s generous contribution to the resettlement of European refugees but enquired whether Australia would act with the same generosity towards Asian refugees’; Australian mission to UN to Secretary, DEA, 5 Dec 1950, NAA A1838 855/11/11 Part 2.
36 Henceforth Attorney-General’s in the text and AG in footnotes.
should arise. Confidence, too, was gained from reports that the United Kingdom, Canada, New Zealand and the United States either shared Australia’s concerns about the draft, or thought them exaggerated. And while attending the conference might inflame criticism of Australia’s restrictive immigration practices, as a country of refugee resettlement it would be expected to be there. To quote Arthur Tange, the Secretary of External Affairs, if it refused it would place itself in ‘unfortunate company’.

Using arguments such as these, Tange persuaded Heyes that it was in Australia’s interests to participate in the conference. However, the two secretaries agreed that it should be

... strongly represented by persons capable of arguing the immigration position and of coping with any related issues (such as “White Australia”) that might come up.

37 The DI’s scepticism was influenced by not having had any of its comments on the initial draft of the Convention heeded by the Ad Hoc Committee; see Heyes to Secretary, DEA, 23 Apr 1951, NAA A1838 855/11/11 Part 2; UN Section to Pyman, 23 May 1951, NAA A1838 855/11/11 Part 3; Heyes to Minister, 4 Jun 1951, NAA A446 1960/66509.

38 Cable from DEA to High Commissions, 29 May 1951, NAA A1838 855/11/11 Part 3. According to the reports, the United States doubted whether its Senate would ratify the Convention, thought many European countries wanted to see how the UNHCR performed before they would consider signing, and believed that probably only Israel would be willing to sign up to the current draft; cable from Australian Embassy, Washington, to DEA, 31 May 1951, NAA A1838 855/11/11 Part 3. Canada wanted to clarify some articles, but was generally supportive of the idea of a convention, and could see no problems for their own displaced persons scheme, under which refugees were also obliged by prior contract to accept directed employment for one year; cable from Australian High Commission, Ottawa, to DEA, 31 May 1951, NAA A1838 855/11/11 Part 3. The United Kingdom said it could accept the substance of the draft, with some exceptions and some drafting suggestions; cable from Australian High Commission, London, to DEA, 20 Jun 1951, NAA A1838 855/11/11 Part 3. New Zealand said it wouldn’t attend and probably wouldn’t sign, but believed that it granted refugees practically everything sought by the Convention anyway; Burbidge to Secretary, DI, 4 July 1951, NAA A446 1960/66509.

39 According to External Affairs, ‘Australia can hardly [not attend the conference] in view of our large intake of refugees and our responsibilities as a member of the UN’; Tange to Minister for External Affairs, 15 Jun 1951, NAA A1838 855/11/11 Part 3.

40 File note by Tange on phone call from Heyes, 1 Jun 1951, NAA A1838 855/11/11 Part 3.

41 File note by Tange on phone call from Heyes, 1 Jun 1951, NAA A1838 855/11/11 Part 3; Heyes to Minister of Immigration, 4 Jun 1951, NAA A446 1960/66509.
The decision to attend was endorsed by Richard Casey, the Minister for External Affairs, after discussing the matter with Menzies.\textsuperscript{42}

**The 1951 conference of plenipotentiaries**

Australia ended up sending two delegates to the conference, Patrick Shaw from External Affairs and Dighton Burbidge from Immigration. They were provided an extensive brief, with comments on individual draft articles by Immigration, External Affairs, Attorney-General’s, Treasury, Social Services, and Labour and National Services. However, their basic riding instructions were relatively straightforward: the Convention should be seen as ultimately only of marginal importance to Australia, and any commitment in regard to the grant of asylum should be avoided:

\begin{quote}
The convention is not of direct value to Australia since it does not result in a reciprocal exchange of benefits with other countries and it does not give benefits to any section of the Australian community which it does not already enjoy … The traditional refugee problem does not touch Australia closely. Traditional rights of asylum have been developed in Europe among countries with contiguous frontiers. There have been isolated cases of asylum for Asians during the war, but it would be contrary to immigration policy to have a binding obligation written into the convention to accept the principle.\textsuperscript{43}
\end{quote}

That said, the Convention’s proposed core principle – that of non-refoulement, or the prohibition of expulsion or return of a refugee to a place where their life or freedom is threatened – was described as ‘acceptable’.\textsuperscript{44}

Much of the brief focused on conference strategy, including how the delegates might resolve Australia’s concerns about refugee work contracts and implications for

\begin{footnotes}
\item[44] Brief for the Australian delegation, Conference of Plenipotentaries, July 1951, p 12, NAA A1838 855/11/11 Part 3. According to Immigration, the concern with this draft article was not so much with the principle as with how such decisions could be made in practice, and whether the burden of proof was on the state or the asylum seeker.
\end{footnotes}
immigration policy, and how they might highlight its record of receiving and caring for refugees.\footnote{In his opening address, Shaw emphasised that Australia had taken over 200,000 refugees since the war – a figure exceeded only by the United States numerically and on a population basis twenty times that of the United States – and claimed that the IRO thought conditions for refugees in Australia were better than any other country; 5 Jul 1951, NAA A1838 855/11/11 Part 3. See also Shaw & Burbidge, report of the Australian delegation to the Conference on the Status of Refugees, 7 Aug 1951, p 3, NAA A1838 855/11/11 Part 3.} They were told ‘to be reluctant to propose amendments which might offend Asian nations’, and ‘not be prominent’ in any new move to limit the definition of a refugee to European refugees. In Tange’s words, they were...

... to proceed cautiously and to be hesitant about moving amendments of a controversial nature, but rather to rely if necessary on the fact that governments are allowed to make reservations in respect of particular articles.\footnote{Tange to Minister for External Affairs, 25 Jun 1951, NAA A 1838 855/11/11 Part 3.}

The first week of the conference did not go well for the two Australians. They did not have the influence they thought they would have as representatives of a major contributor to refugee resettlement.\footnote{Burbidge to Secretary, DI, 4 Jul 1951, NAA A446 1960/66509.} Nor were the countries that Australia usually relied on for support as supportive as hoped. For example, Canada and the United Kingdom, who had served on the Convention’s drafting committee, appeared satisfied with their work, and considered the text sufficiently flexible to accommodate their own immigration practices.\footnote{Burbidge to Secretary, DI, 4 Jul 1951, NAA A446 1960/66509. According to Burbidge, the United Kingdom delegate thought the phrase ‘in the same circumstances’ in a number of the articles ‘will be a complete let out or answer to all our objections’ (as the delegate presumably thought it was to the United Kingdom’s), while the Canadian representative thought that Canada’s practice of granting a ‘landed immigrant status’ to refugees would absolve it from recognising their refugee status.} The United States openly declared upfront that it was unlikely to sign the Convention, being contrary to domestic legislation, and claimed it already treated refugees to most of what the Convention proposed anyway.\footnote{According to Burbidge, the attitude of the United States was that, ‘We think this Convention is a good idea for everyone but the US which has a good record with regard to immigrants and it does not need any justification’. He added, ‘This view accords with ours’; Burbidge to Secretary, DI, 4 Jul 1951, NAA A446 1960/66509. Days later, the delegation reported the United States as being ‘moved to a strong statement on the lines that it would be a great mistake for any country to believe that the immigration
didn’t even send a representative, although it did issue a statement saying it ‘could not contemplate the acceptance of any provisions … which would require discrimination in favour of refugees or stateless persons as against other aliens’.50

To compound their woes, the delegates failed in their bid to secure two important concessions. One was a proposal that refugees be obliged to observe their conditions of entry, which would have assured Australia’s right to impose work contracts, and to refuse asylum to persons admitted for specific purposes unless they could establish a sur place claim.51 This proposal was narrowly defeated (6:5:11), with Burbidge attributing the result to ‘our two “supporters”’, Canada and the United Kingdom, ‘both of whom spoke ostensibly supporting it, but really assassinating it in the most delicate but effective way’.52 The second proposal was for agreement that nothing in the Convention should be deemed to confer any rights on refugees other than those enjoyed by other non-citizens. Australia argued that giving special privileges to refugees would cause ‘invidious distinctions’ between different migrant groups. However, others argued that giving refugees certain rights greater than those enjoyed by other non-

---

50 Quote from the New Zealand statement to the conference, in Burbidge to Secretary, DI, 4 Jul 1951, p 2, NAA A446 1960/66509.

51 A sur place claim occurs where an asylum seeker is able to show that, since entering a country on some other grounds, circumstances have arisen which may now justify their claim to refugee status. Australia’s amendment read: ‘The present convention shall not apply to a person who has been admitted to the territory of a contracting state for a specific purpose and who did not at the time of entry apply for permission to reside permanently therein unless such person can establish to the satisfaction of the contracting state that since the date of his admission circumstances have arisen which justify his claiming the rights and privileges intended to be secured by this convention for a bona fide refugee’; cable from Australian delegation, Geneva, 8 Jul 1951, NAA A1838 855/11/11 Part 3; Shaw & Burbidge, report of the Australian delegation to the Conference on the Status of Refugees, 7 Aug 1951, p 5, NAA A1838 855/11/11 Part 3. Australia’s willingness to recognise the potential validity of sur place claims may have stemmed from its experience of Chinese nationals seeking to stay in Australia after the Communist Party came to power in China in 1949 (see chapter three).

52 Burbidge to Secretary, DI, 4 Jul 1951, NAA A446 1960/66509.
citizens was the whole purpose of the Convention. Only Colombia expressed support, so the proposal was withdrawn.53

However, Neumann’s (2004: 84) claim that Australia was ‘comparatively isolated on account of [its] opposition to key elements of the draft Convention’ is an exaggeration. Despite moments of prickliness like those above, Shaw and Burbidge described the conference atmosphere as ‘generally quite friendly and cooperative.’54 No Soviet delegates meant no cold war tensions, and no Asian delegates meant no criticism of the White Australia policy.55 Indeed, the delegates reported a ‘noticeable appreciation of our difficulties with regard to a possible influx of coloured refugees from the Far East’.56 Further, they found that,

Due to the increasing tension in Europe, the Middle East and Asia, far greater attention was now being given by all countries [compared to the countries on the Ad Hoc Committee in early 1950] to the exigencies of national security; and this was not only stated in so many words during the discussions at the Conference, but can be clearly seen in the amendments tabled by a number of countries, and the alterations agreed to by the Conference.57

53 Cable from Australian delegation, Geneva, 5 Jul 1951, NAA A1838 855/11/11 Part 3; Burbidge to Secretary, DI, 4 Jul 1951, NAA A446 1960/66509.
54 Burbidge to Secretary, DI, 11 Jul 1951, NAA A446 1960/66509; Shaw & Burbidge, report of the Australian delegation to the Conference on the Status of Refugees, 7 Aug 1951, p 1, NAA A1838 855/11/11 Part 3.
55 Many countries were invited to the conference, but relatively few attended, and most were European. Germov & Motta (2003: 15) suggest this ‘may well have reflected the fact that … many Asian and African countries were still colonies of European powers and, hence, not able to attend’. The countries attending or represented were: Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Egypt, France, Federal Republic of Germany, Greece, Holy See, Iraq, Israel, Italy, Liechtenstein (represented by the Swiss delegate), Luxembourg, Monaco, Netherlands, Norway, Swede, Switzerland, Turkey, United Kingdom, United States, Venezuela, and Yugoslavia. The governments of Iran and Cuba were present as observers, as were several non-governmental organizations.
56 Burbidge to Secretary, DI, 11 Jul 1951, NAA A446 1960/66509.
57 Shaw & Burbidge, report of the Australian delegation to the Conference on the Status of Refugees, 7 Aug 1951, p 2, NAA A1838 855/11/11 Part 3. As Germov & Motta (2003: 15, fn 65) note, ‘One should recall that at the time the negotiations for the Refugees Convention were taking place, there had been large, forced movements of people on the creation of Israel in 1947, the partition of British India into India and Pakistan in the same period, of Chinese fleeing the new communist government in China in the
If there were divisions, it was mainly along the lines of countries of first asylum versus countries of immigration and refugee resettlement, and countries supporting a universal Convention charter versus countries supporting a charter covering only Europe. However, while debates between these camps were spirited, the greatest source of tension according to Shaw and Burbidge was the attitude of France. The United Kingdom, United States and Canada were apparently convinced that the French

... had come prepared if it were decorously possible, to torpedo the Convention with a view to having a separate and purely local European convention under the auspices of the Council of Europe, in place of a general convention under the United Nations.

This aim was attributed to the French delegate’s alleged disappointment at not being appointed as the UN High Commissioner for Refugees, and a corresponding desire to open the way for a new refugee organization, with himself at the head. According to the Australian delegates, France’s tactics were therefore ‘often little removed from straight out blackmail’, with other participants deferring to its views to avoid its withdrawal.

In these circumstances, Australia came under pressure to minimise its complaints about the Convention in case it too gave France an excuse to opt out.

same period, as well as other mass movements sparked by the disruption caused by the retreating colonial powers. Hence the European “concern” that only Europeans should benefit from the terms of the treaty may well have been “coloured” by these events.

60 The countries with boundaries contiguous to France, and especially the United Kingdom, feared that, ‘if they gave greater concessions to the refugees by signing the Convention, and France remained aloof, an influx of refugees from France, seeking more favourable conditions might reasonably be anticipated’; report of the Australian delegation to the Conference on the Status of Refugees, 7 Aug 1951, p 1, NAA A1838 855/11/11 Part 3. They therefore generally conceded to whatever France proposed ‘so that [it] should not be obliged to disassociate itself from the Convention.’
61 The United Kingdom and Canada warned Australia against taking an uncompromising attitude on amendments, as it ‘would help the French to claim that a convention embracing migrant receiving countries is impossible and thus find an excuse for abandoning the present draft convention’; cables from Australian delegation, Geneva, 8 Jul 1951, NAA A1838 855/11/11 Part 3. Further, late in the conference the United Kingdom and others rejected a suggestion by Australia that the signing process be delayed, on
At the same time, some surprising, ‘not to say startling’ developments began to unfold in favour of Australia.\(^{62}\) Firstly, and of particular importance, was a move by France to have the definition of a refugee changed to again cover only refugees as a result of events in Europe prior to 1 January 1951.\(^ {63}\) The French delegate claimed that the words ‘in Europe’ had been removed in the UN General Assembly by countries who were not interested in attending the conference or accepting the Convention’s obligations.\(^ {64}\) In his view, ‘the composition of the conference showed that the definition should be restricted so as to exclude Asian countries’.\(^ {65}\) He also referred to the possibility of Chinese refugees arriving in Australia – a clear reference to Australia’s concerns about the Convention’s effects on its immigration policy, but perhaps also to French concerns about refugees from countries outside Europe, especially former colonies, arriving similarly unwanted in France.

The United States supported the French proposal, arguing that the Convention had emerged from the situation in Europe, and that a failure to limit its coverage would open the way to unknown but potentially large numbers of refugees, especially from unsettled parts of Asia.\(^ {66}\) Like France, it may have had potential refugee-producing countries

---

\(^62\) Burbidge to Secretary, DI, 20 Jul 1951, NAA A446 1960/66509; cable from Australian delegation, Geneva, 19 Jul 1951, NAA A1838 855/11/11 Part 3; Burbidge to Secretary, DI, 11 Jul 1951, NAA A446 1960/66509.

\(^63\) Burbidge to Secretary, DI, 11 Jul 1951, NAA A446 1960/66509.

\(^64\) Cable from Australian delegation, Geneva, 17 Jul 1951, NAA 1838 855/11/11 Part 3.


\(^66\) Cable from Australian delegation, Geneva, 17 Jul 1951, NAA 1838 855/11/11 Part 3. Shaw & Burbidge claimed that the United States echoed their own thoughts when it argued that ‘it was better to make this Convention definite, even though narrower in scope, than to have a broad Convention with obligations that were not clear-cut and readily ascertainable, particularly as to the numbers and locations of refugees who might come within the Convention as a result of events occurring in the more unsettled areas parts of Asia’; report of the Australian delegation to the Conference on the Status of Refugees, 7 Aug 1951, p 3, NAA A1838 855/11/11 Part 3. This reasoning appears to have been widespread, for according to an early UNHCR legal manual, the origin of the 1 January 1951 dateline lay in ‘the desire of governments to limit their obligations to refugees who had left their countries and those who might leave
close to home in mind. So too may have other supporters of the move, such as Egypt, Columbia and Venezuela. The eventual compromise, initiated by the Swiss and moved by the Holy See, was for inclusion of a clause that allowed countries to elect whether their obligations towards refugees would be of a universal or limited nature.

Having gone to the conference concerned about the implications for the White Australia policy, Australia could hardly have wished for a better outcome. As Burbidge wrote to Heyes,

> It will be remembered that it was the omission of the words “in Europe” which made the Convention quite unacceptable to us from the point of view of restricted migration and the White Australia policy since it opened the door to refugees from Communist China, India, Pakistan and Indonesia … [If the change comes about it will] remove a large number of our objections and generally … make the Convention acceptable from that point of view.67

Secondly, while Australia may not have won support for its earlier mentioned proposals, none of the other delegations were suggesting that the Convention would limit its ability to maintain a work contract scheme, or to impose conditions on persons admitted for specific purposes. Indeed, the United Kingdom, Canada and others held that such practices, which were by no means peculiar to Australia, could freely continue.68 Further, that ‘on a proper construction’ the Convention had no impact on

---

68 According to Shaw & Burbidge, ‘At no time during the conference was any delegate heard to express the opinion that the Convention had any bearing upon either our work contract system, or our practice of admitting persons for specific purposes only, such as education, hospital treatment, business visits and tourist visits, with conditions attached to such admittance. On the contrary, many delegates stated explicitly that the Convention could not properly be regarded as purporting to affect them. It was, in addition, alleged by the United Kingdom and supported by Canada, that the term “in the same circumstances” would operate to permit the free continuance of these regular immigration practices, which are, of course, not peculiar to Australia’; report of the Australian delegation to the Conference on the Status of Refugees, 7 Aug 1951, p 9, NAA A1838 855/11/11 Part 3.
immigration policy and practices.\textsuperscript{69} Lending to this interpretation was agreement to narrow the article prohibiting discrimination against refugees, so that it referred to discrimination in the application of the Convention rather than discrimination more generally.\textsuperscript{70} According to the delegates, this development removed ‘probably the greatest stumbling block from Australia’s point of view’\textsuperscript{71} because it seemed to open the way to continue restrictive immigration, particularly when they also secured a statement in the report of the conference subcommittee examining the non-discrimination article, to the effect that, \begin{quote}
Whatever might be [the] scope of article 26 [subsequently Article 31, on refugees unlawfully in the country of refuge] the Convention does not deal either with admission of refugees in countries of first or second asylum or with their resettlement in countries of immigration.\textsuperscript{72}
\end{quote}

A third important development was a decision by the conference to limit the right of states to impose penalties on refugees for unauthorised entry or presence only in cases where the refugees were ‘coming directly’ from a place where they were at risk.\textsuperscript{73} According to Shaw and Burbidge, the addition of this clause ‘might be expected to

\begin{itemize}
\item \textsuperscript{69} Shaw & Burbidge, report of the Australian delegation to the Conference on the Status of Refugees, 7 Aug 1951, pp 5, 6, 22, NAA A1838 855/11/11 Part 3; cables from Australian delegation, Geneva, 8 Jul 1951, NAA A1838 855/11/11 Part 3.
\item \textsuperscript{70} Article 3 provides that, ‘The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin’.
\item \textsuperscript{72} Cable from Australian delegation, Geneva, 13 Jul 1951, NAA A1838 855/11/11 Part 3 (emphasis in original).
\item \textsuperscript{73} Article 31 provides that, ‘(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in the territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only apply be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country’.
\end{itemize}
operate so as to exclude most persons arriving in Australia seeking asylum’, in view of Australia’s remote location and the ability to limit the scope of the Convention to Europe. Of further comfort was agreement that the term penalty referred to punishments such as fines or imprisonment, and not expulsion or deportation. To quote Burbidge,

I consider that the right to impose penalties upon unlawful entries whether refugees or otherwise could serve as a very strong deterrent against any mass entry of refugee migrants who could thereby secure virtually permanent residence without any penalty.

Pursuing certainty in regard to the rights of unauthorised arrivals, the delegates took the opportunity to state their understanding of the relevant article. Drawing on comments by the United Kingdom, Canada, Belgium and the Netherlands, they argued that it

… in no way limited the powers of Contracting states to expel illegal immigrants, that it dealt with a state’s right to extend asylum and not with an individual’s right to demand asylum, and that the term “good cause” should be read so as to leave the widest latitude to states.

None of these understandings were challenged.

In regard to the power to expel or deport lawfully admitted refugees, Attorney-General’s had expressed concern about a phrase that prevented deportations except ‘in

---

76 Burbidge to Secretary, DI, 11 Jul 1951, NAA A446 1960/66509. See also Shaw & Burbidge, report of the Australian delegation to the Conference on the Status of Refugees, 7 Aug 1951, p 12, NAA A1838 855/11/11 Part 3.
78 Article 32 provides that, ‘(1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order. (2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of nationals security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons
pursuance of a decision reached in accordance with due process of law’. According to the department, if this meant the quasi-judicial approach to administrative decision-making of the United States, it would not be compatible with the Australian tradition, where the power to expel a non-citizen was vested in a minister of state responsible to parliament rather than the courts for the manner in which they exercised this power.79 However, according to Shaw and Burbidge,

During the debate the United Kingdom made it clear that deportation is an administrative process, and not a hearing before a tribunal at all, and that this was the meaning that was attributed to ‘due process of law’.80

Not so clear was the power to deport lawfully admitted refugees on grounds of ‘public order’, a term open to a potentially wide range of interpretations. Australia sought reassurance that it would retain its power to deport not only refugees convicted of certain criminal acts, but also refugees who had become a charge on public funds, for example residents of charitable or mental institutions. However, while some conference participants interpreted the term broadly, others gave it a more limited meaning, and no clear picture emerged.81

specially designated by the competent authority. (3) The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary’.

79 Brief for the Australian delegation to the Conference of Plenipotentiaries, July 1951, pp 11-12, NAA A1838 855/11/11 Part 3.

80 Shaw & Burbidge, report of the Australian delegation to the Conference on the Status of Refugees, 7 Aug 1951, pp 12-13, NAA A1838 855/11/11 Part 3. According to the delegates (at p 23), the United Kingdom explained that ‘its view of “due process” was “appearing before a competent authority” rather than a legal hearing with a right of appeal’. Australia made a statement to the effect that its practice was the same as that of the United Kingdom.

81 Shaw & Burbidge, report of the Australian delegation to the Conference on the Status of Refugees, 7 Aug 1951, p 12, NAA A1838 855/11/11 Part 3. Australia preferred the term changed to ‘public welfare’; cable from DEA to Australian delegation, Geneva, 11 Jul 1951, NAA A1838 855/11/11 Part 3. Migration legislation at this time provided for the deportation of any person not born in Australia who, within five years of arrival became an inmate of a mental asylum or public charitable institution. According to Shaw and Burbidge, the United Kingdom and Canadian delegations believed that ‘“grounds of national security or public order” interpreted in the Anglo-Saxon and European sense gives the widest possible powers’; cable from Australian delegation, Geneva, 8 Jul 1951, NAA A1838 855/11/11 Part 3. However, the view
Yet another pleasing development for Australia was to find it was not alone in its concerns that the Convention might lead to onerous reporting obligations and intrusive UNHCR supervision. As a result of such concerns, the word ‘any’ was dropped from the undertaking to provide information and statistics to the UNHCR, the reporting obligation was clarified as being only to the UNHCR and not any other agency involved with refugees, and the article on cooperating with the UNHCR was removed from the list of articles on which no reservations would be permitted.

Finally, a number of conference participants, including the UN High Commissioner for Refugees, assured Australia that if it thought the official record of discussion was insufficient, and it continued to have doubts about the interpretation of non-core later grew that it could not be interpreted as including public indigence, and Australia made a reservation to this article at the time of accession; Nutt to Secretary, DEA, 12 Dec 1952, NAA A432 1974/11015 Part 1. See also cables from Australian delegation, Geneva, 12 & 13 Jul 1951, NAA A1838 855/11/11 Part 3; Shaw to Secretary, DEA, 3 Mar 1953, A432 1974/11015 Part 1; UNHCR to Australian delegate to the UN, 1 Apr 1953, NAA A518 AJ856/1/3.

82 According to Shaw and Burbidge, ‘other countries shared our unwillingness to be obliged to devote a lot of time to the provision of data for the High Commissioner’; report of the Australian delegation to the Conference on the Status of Refugees, 7 Aug 1951, p 11, NAA A1838 855/11/11 Part 3.

83 Under the draft of Article 35, states were obliged to provide the UNHCR ‘in the appropriate form any data, statistics, and information requested’ concerning refugees. Australia proposed to the delegates from the United Kingdom and Canada that ‘any’ be dropped, but they were reluctant and agreed instead to change ‘any’ to ‘necessary’. However, when the issue came up for general discussion, most countries preferred Australia’s original suggestion; see Shaw & Burbidge, report of the Australian delegation to the Conference on the Status of Refugees, 7 Aug 1951, p 9, NAA A1838 855/11/11 Part 3. Article 35(2) was changed to read: ‘In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning: (a) the condition of refugees, (b) the implementation of this Convention, and (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees’.

84 The Australian delegates sought clarification from the High Commissioner for Refugees of what ‘supervising the application’ of the Convention meant; cable from Australian delegation, Geneva, 19 Jul 1951, NAA A1838 855/11/11 Part 3. The High Commissioner promised a response, but the writer was unable to locate it on the files examined.
articles, it ‘should have free recourse’ to the expediency of reservations. The only articles on which these could not be made related to the definition of a refugee, non-discrimination, freedom of religious practice and religious education, free access to courts of law, non-refoulement, and implementation of the Convention in administrative and diplomatic terms (with the exception of the above-mentioned article on relations with the UNHCR).

From Australia’s point of view, the final results of the conference were therefore quite favourable, and certainly better than first appeared likely. Shaw and Burbidge did not have to vote against any of the articles in their final form, and abstained only on those subject to interpretive articles of their own which were yet to be considered by the conference. Concern about the Convention’s compatibility with immigration policy declined once the option of limiting its coverage to European refugees was introduced, and was further diminished by a statement recording that the Convention did not cover issues relating to the entry or admission of refugees. Australia’s ability to control the number and source of refugee migrants, to direct them to specific locations and employment, and to maintain the temporary resident status of anyone admitted or allowed to stay for a specific purpose, including asylum, no longer appeared under threat.

A few concerns persisted, the main one being an obligation to issue travel documents to refugees, and to grant them a right of return to Australia. Australia and Canada had

---

86 See Article 42 of the Convention.
88 Heyes to Secretary, DEA, 18 Jul 1951, NAA A1838 855/11/11 Part 3.
89 Shaw & Burbidge, report of the Australian delegation to the Conference on the Status of Refugees, 7 Aug 1951, pp 20-21, NAA A1838 855/11/11 Part 3. Article 28(1) provides inter alia that, ‘The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such
tried to amend this provision to allow a state to refuse a travel document to a refugee in circumstances where it would also refuse it to a national, but had been unsuccessful.\textsuperscript{90}

For these and other reasons the delegation chose at the end of the conference to not make a general statement about Australia’s position on the Convention, pending further deliberation back in Australia.\textsuperscript{91} Nevertheless, they felt sufficiently positive to cable home the following message:

\begin{quote}
The only respect in which the convention has not been remoulded to our satisfaction or be capable of acceptance by use of reservation is that it does in some respects give refugees more favourable treatment than that given to other aliens. This is a fundamental purpose of the convention but in light of your brief and your support for the position taken by New Zealand you may feel that this militates against acceptance.\textsuperscript{92}
\end{quote}

\begin{itemize}
\item \textsuperscript{90} Cable from Australian delegation, Geneva, 12 Jul 1951, NAA A1838 855/11/11 Part 3.
\item \textsuperscript{91} Cable from Australian delegation, Geneva, 20 Jul 1951, NAA A1838 855/11/11 Part 3.
\item \textsuperscript{92} Cable from Australian delegation, Geneva, 20 Jul 1951, p 2, NAA A1838 855/11/11 Part 3. According to Shaw & Burbidge, ‘As to the granting to refugees of treatment better than that granted other aliens, which was given by New Zealand as one of the reasons why the convention could not be regarded as acceptable, … our attempts to have this specifically negatived in the Convention failed completely. Almost every delegate pointed out that this was the whole purpose of the Convention, to give refugees better treatment, in a number of respects, than that accorded to aliens generally. In some Articles, the rights secured to refugees were to be similar to those enjoyed by nationals, while the opening sentence of Article 4 [now Article 7(1)], states: “Except where this Convention contains \textit{more favourable} provisions a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally”. Our proposed amendment would have been a direct negation of this proviso, and was not given any support whatever. It would appear that, if Australia is to ratify the Convention, this situation will have to be accepted’; report of the Australian delegation to the Conference on the Status of Refugees, 7 Aug 1951, p 13, NAA A1838 855/11/11 Part 3 [emphases in original].
\end{itemize}

Matters on which the Convention obliges a state to treat refugees no less favourably than nationals include religious freedom, artistic rights and industrial property, access to courts, any product rationing arrangements, elementary education, public relief and assistance, and most matters of labour legislation and social security (Articles 4, 14, 16, 20, 22, 23 and 24 respectively). Article 7(1) obliges states to accord refugees the same treatment as is accorded to non-citizens generally, except where the Convention obliges them to treat them more favourably.
The 1954 accession

Australia’s deliberations on whether to accept the Convention were in fact to last another two and a half years. The delay can be attributed partly to an unfavourable political and security environment. For example, the difficulties encountered in repatriating wartime refugees (see next chapter) were fresh in policy-makers minds. Concern was also growing about possible asylum seeker influxes as a result of the communist insurgencies that were occurring in several Asian countries and the dispute between Indonesia and the Netherlands over West New Guinea (now the Indonesian province of Papua, previously called West Irian or Irian Jaya). Factors like these no doubt encouraged a senior External Affairs official in July 1952 to urge that the Convention be scrutinised for any ‘undertaking to keep refugees who might come here in the event of war’.  

However, the main reason for the delay appears simply to have been difficulties in finalising the reservations that Australia would apply on accession, with Immigration continuing to want immigration law and practice totally quarantined from Convention influence. Its caution frustrated other departments, with External Affairs describing its concern over travel documents and the right of expulsion as ‘trite and legalistic’, and

93 See, for example, ministerial statement on Dutch New Guinea by Casey, 6 Feb 1952, NAA A5104 14/2/1 Part 2.  
95 See, for example, Heyes to Secretary, DEA, 14 Sep 1951, NAA A1838 855/11/11 Part 3; Shaw to Secretary, DEA, 29 Sep 1952, NAA A1838 855/11/11 Part 4; summary table of departmental views, circa Dec 1952, NAA A1838 855/11/11 Part 4; Nutt to Secretary, DEA, 12 Dec 1952, NAA A432 1974/11015 Part 1; Shann to Australian delegation to UN, 8 Jan 1953, NAA A1838 855/11/11 Part 4; Shaw to Secretary, DEA, 23 Feb 1953, NAA A518 AJ856/1/3; Heyes to Secretary, DEA, 15 May 1953, NAA A1838 855/11/11 Part 4; Acting Secretary AG to Secretary, DEA, 6 Jul 1953, NAA A1838 855/11/11 Part 4.  
96 Handwritten comment on Shaw to Secretary, DEA, 3 Mar 1954, NAA A1838 855/11/11 Part 4. The obligation on travel documents was consistently opposed by the DI on the grounds that it would concede a right to refugees not shared by Australian nationals, and might enable a refugee to defeat the deportation provisions of immigration law; see, for example, Nutt to Secretary, DEA, 12 Dec 1952, NAA A432 1974/11015 Part 1; Acting Secretary, AG, to Secretary, DEA, 6 Jul 1953, NAA A1838 855/11/11 Part 4. The following compromise was devised: ‘In order to go so far as possible towards observing the spirit of
Social Services arguing that its desire to retain the right to deport refugees who had become inmates of mental asylums or charitable institutions was potentially counterproductive, since it deterred them from availing themselves of early treatment or help, ‘which would be highly desirable if they are to avoid becoming complete charges upon the State’.  

Once agreement was reached to enter interpretive reservations on articles relating to a refugee’s freedom of employment and movement in Australia (Articles 17, 18, 19 and 26), and substantive reservations on articles relating to the issue of travel documents and the expulsion of lawfully admitted refugees (Articles 28 and 32), Immigration had no further reason to prevaricate. Further, the UNHCR had come courting Australia, 

the Convention and the wishes of the Office of the High Commissioner for Refugees (which sought issue at least in individual cases), the existing Certificate of Identity form would be issued in the form of a booklet similar to the Convention document but without carrying a guarantee of re-admission and it will not purport to be issued in pursuance of the Convention. It would be issued “in individual cases where we have no objection to doing so”; DEA to Australian delegation to UN, 7 Sep 1954, NAA A1838 855/11/11 Part 5.  

Rowe, Director-General of Social Services, to Secretary, DEA, 23 Mar 1954, NAA A1838 855/11/11 Part 4. He continued, ‘It also seems somewhat contradictory to expect refugees to become assimilated into the general population yet deny them some long-term care which is available to members of that population’.  

The interpretive reservation provided that, ‘The Government of the Commonwealth of Australia understands that none of the obligations with regard to refugees stipulated in Articles 17, 18, 19 and 26 of the Convention precludes: a) the imposition of conditions upon which a refugee may enter the Commonwealth or any of its Territories where the entry is made for a specific purpose; or b) the making of arrangements with a refugee under which he is required to undertake employment under the direction of the Government of the Commonwealth of Australia for a specified period after his entry into the Commonwealth of Australia or any of its Territories’. See Casey, minute paper for the Executive Council, ‘Convention Relating to the Status of Refugees’, 14 Dec 1953, NAA A1838 855/11/11 Part 5.  

The substantive reservation in regard to Article 28 provided that, ‘The Government of the Commonwealth of Australia makes a reservation with respect to the provisions contained in paragraph 1 of Article 28 of the Convention and does not accept the obligations stipulated in this paragraph but is prepared to recognise travel documents issued by other Contracting States pursuant to this Article’. The reservation in regard to Article 32 provided that, ‘The Government of the Commonwealth of Australia makes a reservation with respect to the provisions contained in Article 32 of the Convention and does not accept the obligations stipulated in this Article’.
wanting it to be a model for other refugee resettlement countries.\textsuperscript{100} External Affairs put a two-page submission to Casey in November 1953, recommending accession. As arguments in support of the move, it did little more than draw his attention to the purpose of the Convention, the importance placed on Australia’s accession by the UNHCR, and the protection afforded Australia by the ability to limit the Convention’s scope to Europe and to make reservations.\textsuperscript{101} It can be assumed that Casey consulted Menzies before agreeing, but the issue was obviously not considered important enough to warrant Cabinet consideration. The instrument of accession, covering the territories of Norfolk Island, Papua, New Guinea and Nauru as well as Australia, was lodged with the UN Secretary-General on 22 January 1954.\textsuperscript{102}

To sum up, Australia left the 1951 conference of plenipotentiaries reasonably confident that it could continue business as usual, and in 1954 acceded to the Convention being sure it could because of its reservations. The Convention seemed a relatively harmless accoutrement to existing refugee resettlement arrangements. Australia was too remote for European refugees to come uninvited, and those who were invited could be under contract. In the case of refugees from Asia, Australia still had the option of granting them only temporary entry, or if their numbers grew too great barring entry altogether. As Shaw noted in 1955,

\textit{At the time of drafting the Convention, the Department of Immigration made it clear that Australia could be a party only because the proviso ‘events in Europe’ obviated the danger to us of being faced by a flood of Asian refugees and, secondly, because of our great distance from...}

\textsuperscript{100} Shaw to Secretary, DEA, 29 Sep 1952, NAA A1838 855/11/11 Part 4; Shaw to Secretary, DEA, 23 Feb 1953, NAA A1838 855/11/11 Part 4; Shaw to Secretary, DEA, 3 Mar 1953, A432 1974/11015 Part 1; Shaw to Minister for External Affairs, 23 Nov 1953, NAA A1838 855/11/11 Part 5.

\textsuperscript{101} Shaw to Minister for External Affairs, 23 Nov 1953, NAA A1838 855/11/11 Part 5.

\textsuperscript{102} See ‘Accession of Australia to Refugees Convention: remarks of the permanent representative of Australia’, 21 Jan 1954, NAA A1838 855/11/11 Part 5. Australia’s reasons for acceding may be compared to those of New Zealand: ‘Some Convention obligations (particularly those relating to the admission and deportation of refugees) … present practical and policy problems for any country of immigration … It was a reasonably important element in the New Zealand decision to accede … [that the Convention] applied only to a very restricted number of aliens (world war II refugees). Any problems of policy or implementation therefore assumed insignificant proportions for us’; cable from Department of External Affairs, New Zealand, to delegation to UN, 6 Dec 1966, NAA A1838 932/4/10 Part 1.
Europe it was unlikely that a refugee would find his way to Australia as a country of first asylum.103

The desire to ‘keep Australia white’ influenced consideration of the Convention, in the form of the desire to ensure restrictive immigration practices could be maintained. However, this should not lead to hyperbole or a misunderstanding of Australia’s core aspirations. For example, it is simply untrue to claim, as Brennan (2003: 16) does, that Australia acceded to the Convention ‘presuming that there would never be a need to admit non-white refugees to Australian shores’. Rather, the primary objective was to ensure that the grant of asylum to any refugee, white or non-white, would be on terms set by Australia, and that these terms would be enforceable. Yes, Australia restricted the scope of the Convention to Europe, but, as will be seen in chapter three, it granted temporary entry to thousands of Asian asylum seekers during World War Two, and let many Chinese on temporary entry permits stay after the communist party took control of China in 1949. Further, despite having failed to repatriate all Asian wartime refugees post-1945, in July 1953 Cabinet agreed ‘on humanitarian grounds’ to Australia being used as a temporary evacuation centre for thousands of Asian and Eurasian refugees in the event of another regional emergency.104 And yes, when Shaw and Burbidge were at the conference of plenipotentiaries, they scrutinized all articles ‘in the light of their possible application to refugees from Asia and our immigration policy in regard to Asiatics generally’.105 However, they did so with reference not to their exclusion, but ‘to their conditions of admission, and the traditional objection to granting them naturalization’.

103 Shaw to Legal Adviser, 24 Nov 1955, NAA A1838 855/11/11 Part 5.

104 The decision was in response to British and American planning for an occasion in which citizens of their own countries, plus non-citizens likely to be in danger, would need to be evacuated from countries such as Hong Kong, Taiwan, the Philippines, Malaysia and Japan; Cabinet decision no 733 of 2 Jul 1953 and related submission no 463 of 8 Jun 1953, ‘Evacuation of United Kingdom and United States citizens and others to Australia in the event of an emergency in South-East or East Asia’, NAA A4905 463. Approximately 9,000 Asians and Eurasians were thought potentially involved. The offer was conditional on the British and Americans undertaking to remove all the evacuees admitted to Australia, unless permission had been given for them to remain.

Put briefly, Australia’s basic aim was to ensure that when it granted asylum to refugees it didn’t really want, it would not be obliged to keep them permanently.106 And while this was particularly true of non-whites, by the early 1950s the welcome to European refugees was also wearing thin. For example, in August 1954, after representations from the UNHCR, Heyes got ministerial approval to allow refugees in countries with which Australia had assisted passage schemes, such as Germany, Holland, Italy, Austria and Greece, to be eligible for these schemes on the same basis as the nationals of these countries. However, it was on the understanding that only ‘token numbers’ would be accepted, and they would need to comply in every respect with other migrant selection conditions, including the categories of workers being recruited. In Heyes’s view, the gesture was worthwhile because it would avoid the potential loss of ‘good material’, as well as the goodwill Australia had earned by its contribution to the IRO’s displaced persons scheme. But he emphasised that it was only a gesture, on account of ‘a feeling in Australia that we had just about reached saturation point for the time being in the number of refugees we could accept’.107

The decision to sign up to the Convention should not, however, be viewed as inconsequential. It elevated the standard of treatment of Convention refugees in Australia and its territories to the status of international legal obligation. Further, either at the conference of plenipotentiaries or in the Convention text, Australia indicated its acceptance of two basic principles in asylum practice, namely that a refugee should not be sent back to a place where they have a well-founded fear of persecution for a

---

106 In both instances, those allowed to stay were issued only temporary visas initially, valid for 5 years. Access to permanent residence became available only after a relaxation of immigration regulations in 1956.

107 Heyes to Acting Minister for Immigration, 18 Aug 1954, NAA A446 1960/67512. See also Heyes to Greenhalgh, 28 Oct 1954, NAA A446 1960/67512; Heyes to Wall, 28 October 1954, NAA A446 1960/67512. Heyes explains the view that Australia had reached ‘saturation point’ in terms of having ‘already played a part second to none in accepting and absorbing refugees from Europe’, and these refugees having proved ‘generally less stable’ than the nationals of countries from which Australia was seeking migrants ‘due to the very difficult conditions under which they were forced to work and live during the war and post-war periods’. In conveying the Minister’s agreement to DI officers overseas, Heyes set an upper limit of five per cent on the refugee component of the total migrant intake, asked that no publicity should attend the arrangement, and stressed that the DI was ‘not anxious’ to encourage the selection of ‘this category of migrant’.
Convention reason (non-refoulement), and that the circumstances of a person could change while they were away from their country, to an extent that they now qualified for refugee status (sur place claims).

It may be argued that codification of the non-refoulement principle merely reflected existing practice among states (Weis 1953), technically applied only to refugees covered by the Convention, and left unresolved the treatment of asylum seekers who might be turned back at Australia’s borders, as opposed to those who gained entry, authorised or otherwise. As put by Robinson (1953: 163),

Art. 33 concerns refugees who have gained entry into the territory of a Contracting State, legally or illegally, but not to refugees who seek entrance into this territory … If a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck.108

Nevertheless, accession obligated Australia to provide a minimum standard of protection and treatment to at least one group of asylum seekers, against which it could be held to account. Further, in the case of those who fell outside Convention obligations, it opened itself to a standard of comparison which, as will be seen in chapter three, influenced its handling of asylum seekers in PNG in the 1960s.

Similarly, while Neumann (2004: 82) is probably right when he says that Australia wanted to avoid situations in which it provided refuge ‘to people who [had] entered the country on tourist or student visas’, by recognising sur place claims it was accepting

108 He continues, ‘It can’t be said that this is a satisfactory solution of the problem of asylum. It is less favourable than the provision of Art. 3(3) of the 1933 Convention which provided that Contracting States “undertake(s) in any case not to refuse entry [emphasis in original] to refugees at the frontiers of their country of origin”. It is, however, somewhat more favourable than Art. 5 of the 1938 Convention according to which the parties undertook “not to reconduct refugees to German territory unless they have been warned and have refused, without just cause, to make the necessary arrangements to proceed to another territory or to take advantage of the arrangements made for them with that object”’. He notes (at p 163, fn 275), ‘It was expressly stated in the Conference [of Plenipotentiaries] that the Convention does not deal with the admission of refugees into countries of asylum or with the circumstances in which a State may refuse asylum. The Conference explicitly put it on the record that the possibility of mass migration is not covered by Art. 33. The Ad Hoc Committee decided to delete the Chapter on admission considering that the Convention should not deal with the right of asylum’.
that there might be occasions when it had to, at least until such time as the need for protection no longer existed.

THE 1967 DECLARATION ON TERRITORIAL ASYLUM

An opportunity to reflect on asylum principles arose again during a decade of efforts in the UN to draft a document expanding on the references to asylum in the UDHR. These began in 1957 when Rene Cassin, a founder of the UDHR, presented a draft declaration to the UN Human Rights Commission, providing among other things for a universal application of the principle of non-refoulement and a greater role for the UN in the grant of asylum.\(^{109}\)

When Cassin’s draft was circulated, it drew strong criticism from Immigration on three main grounds: firstly, the codification of a universal obligation of non-refoulement ‘would create very serious difficulties’ in the administration of migration legislation;\(^{110}\) secondly, any limitation on Australia’s right to grant asylum or deport an alien could be a potential problem for security purposes and a source of political embarrassment (a view shared by ASIO);\(^{111}\) and thirdly, UN prescription of the conditions on which it would be obligatory to grant asylum would intrude on national sovereignty. Attorney-General’s shared the latter view, describing the role proposed for the UN as being ‘in the prevailing international temper, quite unrealistic’.\(^{112}\) According to a former Australian representative to the Human Rights Commission,

\[\text{It is … true that there are persons of standing who argue that an international solidarity, based upon growing material inter-dependence and increasing means of communication amongst the peoples of the world, has become established, and that the ‘anarchy of national sovereignties’}\]

\(^{109}\) Cassin had failed to secure such a provision in regard to UN involvement in asylum when the UDHR was being negotiated in 1948. He was destined to fail again this time.

\(^{110}\) Heyes to Secretary, DEA, 18 Nov 1958, NAA A432 1963/3273 Part 1.

\(^{111}\) Director-General ASIO to Secretary, DEA, 18 Nov 1958, NAA A432 1963/3273 Part 1; Heyes to Secretary, DEA, 18 Nov 1958, NAA A432 1963/3273 Part 1.

\(^{112}\) Whitlam to Secretary, AG, 26 Dec 1958, p 4, attachment to Bailey to Secretary, DEA, 21 Jan 1959, NAA A1838 929/6/1 Part 1. See also Whitlam to Secretary, AG, 11 Dec 1959, NAA A1838 929/6/1 Part 1.
cannot much longer resist the pressure of such conditions. But the late Dr Mervyn Jones, an eminent international jurist who was formerly a member of the legal department of the United Nations, speaking out of his insight and experience, has answered this question by saying that ‘the observed fact is that not only are national sovereignties resisting such pressure but are stronger, and more impatient of external limitations, today than at any other point in history’ … The negative results of discussion in the United Nations [eg on the right of asylum and principles that should govern the grant of asylum] rather give point to the thesis of Dr Mervyn Jones that ‘international law can only be strengthened and developed amongst nations between who a real social solidarity exists’.113

The Department of Territories114 too had a say, arguing that if Australia accepted the declaration it should not do so on behalf of its territories, as it had in the case of the Refugees Convention. In its view, refugees were adequately safeguarded by existing territory laws and, with the exception of PNG, the territories were ‘too small to be seriously considered in practice as places of asylum’. Further, it didn’t want to prejudice the wishes of the indigenous populations:

In Papua and New Guinea, and also in Nauru, we are governing in trust for a native population. On this account the entry of persons is so controlled that the wishes of the people will not be found by them to have been prejudiced when they eventually achieve the right to make their own decisions as to who will and who will not be admitted.115

The idea of ceding authority over asylum to a higher authority won little support among other states as well, and the proposed role of the UN was pruned in subsequent drafts.116 Perhaps as compensation, a proposal was passed in October 1959 by the UN’s Legal Committee, and later the General Assembly, to have the International Law Commission codify the principles and rules of international law relating to the right of asylum. Australia abstained from the vote in the Legal Committee, but supported the resolution

113 Whitlam to Secretary, AG, 26 Dec 1958, p 5, attachment to Bailey to Secretary, DEA, 21 Jan 1959, NAA A1838 929/6/1 Part 1.
114 Henceforth Territories in the text and DT in footnotes.
115 McCarthy to Minister, 13 Mar 1958, NAA A452 1957/3700. See also Secretary, DT, to Secretary, DEA, 19 Mar 1958, NAA A452 1957/3700.
116 Article 2(2) of the final Declaration provides that, ‘Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State’.
in the Assembly. At the time of the Committee vote, External Affairs told its mission that ‘we have no enthusiasm for codification in [the] field of asylum’, and instructed it to ‘either oppose [the] resolution if there are sufficient responsible states also opposed or otherwise abstain’. The vote was 63-1-12, with Australia among the twelve who abstained, others being Soviet bloc countries, Cambodia, Turkey and Mexico. However, the mission reported that most states voting in favour of the resolution did so on the grounds that,

... it in no way limited the discretion of the Commission to decide when and how to take up the matter, and did not commit them to any views on the substantive question of whether codification of the law of asylum was desirable or possible ... [They preferred to vote for a] largely superfluous resolution rather than to offend those Latin American countries who claim the subject is of real concern.

Australia supported the resolution in the Assembly because it saw the logic of this reasoning, and because it did not like the company it was keeping in abstaining.

One of Australia’s concerns about the draft declaration was thus removed. However, Immigration continued to fret about the provision on non-refoulement, on the grounds that it expanded the non-refoulement obligation in the Refugees Convention, and was in conflict with section 21 of the new Migration Act 1958, which gave the government the power to require whoever brought a person unlawfully to Australia to remove them. In its view, agreeing to the universal application of the non-refoulement principle was tantamount to agreeing to a right of asylum. As the Secretary of Immigration put it,

I do not agree with the suggestion that this article is in substance merely a reiteration of Article 33 of the Convention relating to the Status of Refugees, to which Australia is a party. I consider that there is a great deal of difference between the obligation incurred by agreeing to extend a privilege to a specially designated group of persons (as defined in the Convention) limited in numbers and readily ascertainable, and that which results from the granting of a general right to anybody to seek and receive asylum in Australia as a right, provided he has a well-founded fear

---

117 Cables from DEA to Australian mission to UN, 2 Oct 1959 & 30 Nov 1959, NAA A1838 929/6/1 Part 1.
118 UN representative to Secretary, DEA, 15 Oct 1959, NAA A1838 929/6/1 Part 1.
119 Secretary, DEA, to Secretaries, DI & AG, 28 Oct 1959, NAA A1838 929/6/1 Part 1.
Nor was he happy about a provision even of moral suasion:

The said Section [s21] is essential to the plan of entry control embodied in the Migration Act, and I feel that this Department must very strongly oppose the incurring of a binding international obligation, or any support by Australia for a recommendation that could be interpreted as imposing a moral obligation, the effect of which would be to weaken the control over entry into and stay in Australia sanctioned by Parliament by its passing of the Act so short a time ago.121

Other concerns of Immigration included the belief that Australia, because of its remoteness, would have more difficulty than other countries in verifying asylum seeker claims,122 and that if it conceded a right of asylum, other countries might ‘divert’ or ‘dump’ refugees on Australia.123

However, by late 1962, it was difficult for Immigration to sustain its opposition. Attorney-General’s was advising that there was no legal conflict between the declaration and the Migration Act, and that it would have no legal force anyway.124

120 Nutt (acting Secretary) to Secretary, DEA, 3 Jun 1960, NAA A1838 929/6/1 Part 2.
121 Nutt to Secretary, DEA, 3 Jun 1960, NAA A1838 929/6/1 Part 2.
122 Nutt to Secretary, DEA, 3 Jun 1960, NAA A1838 929/6/1 Part 2. According to Nutt, ‘I think that the Australian delegation might point out the considerable difference between countries such as those of Europe which have common frontiers with other countries, and a country such as Australia which has no such common frontiers, and can be reached only after a comparatively long journey by sea or air. Whereas in Europe a claim by a person seeking asylum would normally be capable of fairly prompt investigation, and in fact his arrival at a frontier would bear some at least of the indicia of a person fleeing from persecution, this situation would not obtain in the case of arrival in Australia by sea or air of a person who simply alleges that he is a refugee and is unable to produce either any or any adequate documentation to support his claim’.
123 Nutt to Secretary, DEA, 3 Jun 1960, NAA A1838 929/6/1 Part 2. See also brief for Australian delegation to the UN General Assembly, 16th session, Aug 1961, NAA A1838 929/6/1 Part 2, & brief for 17th session, Aug 1962, NAA A1838 929/6/1 Part 2.
124 Brazil, minutes of meeting, 29 Nov 1962, p 2, NAA A432 1963/3273 Part 1. See also Lyons to Secretary, DEA, 24 Dec 1959, including attachment Whitlam to Secretary, AG, 11 Dec 1959, NAA A1838 929/6/1 Part 1. According to AG’s, the DEA delayed sending comments on the draft declaration
Further, External Affairs was now keen to support it to prevent Australia being isolated in the UN, and avoid the adverse publicity that continued opposition would attract, with links inevitably being made to the White Australia policy. In its view, Immigration was also not doing Australia justice, on the grounds that the government had already ‘adopted and acted upon the generally accepted practice of granting asylum on the basis of well-founded fear of persecution’. Attorney-General’s agreed, noting that External Affairs had primary responsibility for asylum issues, and that Australia’s attitude should be determined on more than migration considerations.

Immigration continued to argue that ‘from a strict immigration point of view’ it would be better to abstain, but eventually ceded the final decision to External Affairs. Expecting that a vote might be held any day, in November 1962 External Affairs secured agreement to support the declaration from its then acting Minister, Robert Menzies.

As it turned out, debate in the UN on the declaration dragged on for another five years, with the final version not being adopted by the General Assembly until 1967. In the interim, domestic concerns kept surfacing. One related to the treatment to the UN for awhile because it ‘was unable to reconcile [AG’s] views with those of Immigration’; Principal Legal Officer to Assistant Secretary, 16 May 1960, NAA A432 1963/3273 Part 1. See also Dobson to Secretary, DEA, 24 Nov 1960, NAA A1838 929/6/1 Part 2, where the Australian delegation to the UN reports that the United Kingdom thought Australia ‘is worrying unduly about the draft Declaration’.

125 Forsyth to Acting Minister for External Affairs, 30 Nov 1962, NAA A1838 929/6/1 Part 2.
128 Forsyth to Acting Minister for External Affairs, 30 Nov 1962, NAA A1838 929/6/1 Part 2.
129 Further amendments, symbolically important but legally inconsequential, included the addition of the phrase ‘including persons struggling against colonialism’ to paragraph 1 of Article 1, which says that asylum granted by a state to persons entitled to invoke Article 14 of the UDHR shall be respected by other states (Australia opposed this amendment but, the amendment having been carried, voted in favour of the paragraph as a whole), and of paragraph 3 to Article 1, confirming that that it is up to the receiving state to evaluate whether grounds exist for granting asylum.
130 Declaration on Territorial Asylum, GA Res 2312 (XXII), 22 UN GAOR Supp (No 16) at 81, UN Doc A/6716 (1967).
of unauthorised arrivals making an asylum claim. The standard procedure was for Immigration officials to make a cursory assessment, and if unsatisfied with the evidence supplied by the person, send them away, often within hours of their arrival. The department acknowledged that it was ‘impossible to really check’ whether a claim was well founded in such a short period, but complained that ‘once such people are off the boat [it is] practically impossible to get them out of the country’. External Affairs admitted to a similar problem in PNG in regard to unauthorised arrivals from West New Guinea. Neither department wished to create conditions that might encourage unauthorised entry, for example an obligation to grant provisional asylum pending a full investigation of every claim. However, they were also sensitive to the possibility that ‘if present immigration policy and practice continued, [it would] leave the government open to appeals to the United Nations under Human Rights and criticism in Parliament for bad faith’.

Another concern was that while the declaration would not provide for a right of asylum, in practice it might have this effect, with asylum grants occasionally being a fait accompli. For as Attorney-General’s rather prophetically observed,

131 DT, record of meeting of 16 Aug 1966, NAA A452 1963/1517. See also AG’s record of the same meeting, NAA A432 1963/3273 Part 1: ‘They [the DI] state that the practice is to send stowaways and ships crews away from Australia sometimes within 12 hours even of arrival, after the most cursory examination of their grounds for asylum. It is not the policy of the Immigration Department to allow those persons to stay for a temporary period while their claims are investigated. To do so would be impractical the Department says. If the Declaration expects this kind of consideration of refugee claims, Immigration question whether it would be right for Australia to support the Declaration when its practice would not be what is expected of it’. See also Harders to Secretary, DEA, 24 Aug 1966, NAA A1838 929/6/1 Part 3; Heydon to Secretary, DEA, 7 Sep 1966, NAA A1838 929/6/1 Part 3.

132 DT, record of meeting of 16 Aug 1966, NAA A452 1963/1517; Hook to Secretary, DEA, 13 Oct 1965, NAA A 1838 929/6/1 Part 3; Ballard to Secretary, DEA, 25 Aug 1967, NAA A1838 929/6/1 Part 3. Under pressure from the UNHCR to support the declaration (Brazil to Secretary, DEA, 13 May 1963, NAA A1838 929/6/1 Part 2), and not wanting to vote against it ‘in company with Portugal alone’ (DT, record of meeting of 16 Aug 1966, NAA A452 1963/1517), DEA’s brief for the Australian delegation to the 20th session of the UN General Assembly advised the delegation to vote for the adoption of the declaration, but to not take a prominent role in the debate ‘in view of the delicate situation regarding refugees from West Irian entering East New Guinea’; circa Oct 1965, NAA A1838 929/6/1 Part 3.

133 DT, record of meeting of 16 Aug 1966, NAA A452 1963/1517.
It will often happen that the only state prepared to accept the person seeking asylum is the one in which he was being persecuted. In that event, the only way of satisfying the principle in Article 3 that he shall not be compelled to return to the place of persecution [ie the principle of non-refoulement] will be to allow him to remain in Australia.\textsuperscript{134}

Further, unlike the Refugees Convention, the provisions of which were limited to asylum seekers in Australia, the declaration also explicitly covered asylum seekers ‘at the frontier’, which would complicate the option of simply turning people away.\textsuperscript{135}

In these interim years, the reassurances provided by Attorney-General’s were vital in sustaining Australia’s support for the declaration. For example, in its view Immigration’s practices in regard to unauthorised arrivals could be defended on the grounds that it was ‘implicit … that the onus is on the person seeking asylum to establish his case’.\textsuperscript{136} Further, it pointed out that grant of provisional entry was not a required procedure under the declaration: the UN working group had said only that ‘the right of States to evaluate asylum was a right to be exercised in good faith and in a non-arbitrary manner’. In this respect, it noted that Immigration was on record ‘as saying that where a strong prima facie case is established, the applicant would be allowed to stay pending a final decision’, and that in PNG procedures had ‘been set up under which persons judged to be genuine refugees are allowed to remain in the Territory’.\textsuperscript{137}

\textsuperscript{134} Brazil, minutes of meeting, 29 Nov 1962, p 1, NAA A432 1963/3273 Part 1. AG’s gave similar advice the following year: ‘While the Article [Article 3] does not in terms recommend that the persons to whom it refers should be granted entry, I understand that in many cases permission to enter and remain would in fact be the only way of carrying out the recommendation embodied in the Article’; Brazil to Secretary, DEA, 13 May 1963, NAA A1838 929/6/1 Part 2.

\textsuperscript{135} Brazil to Deputy Secretary, AG, 24 Oct 1967, NAA A432 1963/3273 Part 2. Article 3(1) provides that, ‘No person … shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution’.

\textsuperscript{136} Harders to Secretary, DEA, 24 Aug 1966, NAA A1838 929/6/1 Part 3.

\textsuperscript{137} Brazil to Deputy Secretary, AG, 24 Oct 1967, NAA A432 1963/3273 Part 2. The view that provisional entry was unnecessary was not unanimously held in AG’s, with one officer arguing that, ‘Except in the case of the obvious fraud, these matters cannot be decided with such speed. Moreover, I do not think they should be. If they are, we run the risk of turning back, at the frontier, a genuine applicant for asylum who will then have to return to face possible imprisonment or death. This is a risk Australia should not run and need not run. If it does and the thing turns out badly … Australia will be in
Similarly, in regard to concerns about non-refoulement and possible conflict between the declaration and the *Migration Act*, Attorney-General’s had this to say:

If the Article [Article 3 on non-refoulement] were being proposed as the subject of a binding legal obligation, or if it were being put forward on the basis that at international law persons have an individual right to non-refoulement in the circumstances referred to, it would be unacceptable to Australia, on my understanding of the Australian position. However, none of these conditions seem to apply. The Declaration is hortatory in character and not mandatory. It sufficiently recognises that the grant of asylum is an act of sovereignty on the part of the State and that individuals have no rights in this regard. In my view, there is no legal conflict between Article 3 and the *Migration Act* 1958. Indeed there could not be, since the Declaration would have no binding legal force. The practice recommended in the Article would, it seems, be relevant to the exercise of the powers in relation to entry, etc, contained in the Act. However, this is in general in accord with what I understand to be the position in Australia – namely that the accepted practices on the grant of asylum are to be taken into account in the exercise of control over the entry of persons into Australia. Of course it is for Australia to decide whether a particular person has established genuine grounds for asylum, and, if he has, whether in all the circumstances he should be granted asylum.138

In the context of such legal advice, Australia’s representative to the UN, Sir Kenneth Bailey, saw fit to emphasise in final discussions on the declaration that

… the right of asylum constitutes one special aspect only of entry of people from other countries. The right of asylum, to repeat, is the right of a State which no other State may question, to provide a home if it so wishes, for persons who seek entry from other lands in their search for refuge and protection from persecution and prosecution in their homeland.139

138 Brazil to Secretary, DEA, 13 May 1963, NAA A1838 929/6/1 Part 2.  
That said, perhaps worried that his department’s legal advice might encourage a sense of complacency among officials, and a lack of diligence in asylum assessments, the Secretary of Attorney-General’s wrote to his colleagues in Immigration, External Affairs and Territories, saying that Australia’s view of the legal effect of the declaration may not be shared by all. Further, even if it were shared, it would not spare Australia from criticism for any failure to give effect to its provisions. As he put it,

The distinction between principles to which Australia has subscribed and provisions by which Australia is legally bound is likely, it seems to me, to be regarded as a fine one and as not affording a substantial defence to the criticism.140

Later, describing the idea of a ‘quick assessment’ of the asylum claims of unauthorised arrivals as ‘not a completely happy one’, Attorney-General’s cautioned Immigration, saying ‘that any evaluation made in particular cases will of course have to be made in good faith’.141

How much care Immigration did take in its assessments can be only a matter of conjecture. However, it is relevant that in 1961 its Secretary chastised the Chief Migration Officer in Adelaide over his handling of an inquiry by a Polish seaman about staying in Australia, saying that,

Any approach from a non-resident who is a national of a communist country for permission to stay in Australia should be regarded as having possible ‘political asylum’ implications, even though no formal request for ‘political asylum’ as such is made.142

140 Hook to Secretary, DEA, 13 Oct 1965, NAA A1838 929/6/1 Part 3. Hook concluded, ‘I do not wish to be taken as suggesting that Australia should not vote in favour of the adoption of the Declaration. I do suggest, however, that … it would be advisable for Australia to give the same consideration to the proposed Declaration as it would give to a proposed international agreement or convention’.

141 Brazil to Deputy Secretary, AG, 24 Oct 1967, pp 1,5, NAA A432 1963/3273 Part 2.

142 Nutt (acting Secretary) to CMO Adelaide, 9 Jun 1961, NAA A6980 S250089.
THE 1967 PROTOCOL

Between 1945 and 1965, Australia contributed about eighty-five million pounds to international refugee agencies. It also resettled some 300,000 refugees, comprising about sixteen per cent of all settlers and forty-one per cent of assisted migrants during this period (ACFOA 1966: 7, 9). The refugees were almost exclusively of European origin, including some 14,000 displaced from China, and were selected by immigration officials according to migration as well as humanitarian criteria. As the Minister for Immigration, Hubert Opperman, noted in 1966,

Our [refugee] policy, while it is administered on humanitarian grounds, has also to pay heed to the necessity of viewing refugees in relation to national migrants so that the overall intake is balanced in both occupational categories and national groupings (ACFOA 1966: 9).

For much of this period, the Refugees Convention was a largely forgotten accessory to Australia’s contribution to international protection arrangements.

The removal of the geographic limitation and reservations

A reassessment of its potential role was sparked only in January 1962, when the UNHCR wrote to External Affairs, pointing out that about two-thirds of the then thirty-three signatories to the Convention had chosen the option of extending the term ‘refugee’ to a person whose status as such arose ‘as a result of events occurring in Europe or elsewhere before 1 January 1951’, and enquiring whether Australia might follow suit by withdrawing its geographical limitation to the Convention.143

The letter prompted External Affairs to inquire about the asylum practices and Convention experience of other like-minded countries. These inquiries indicated there was not much to be alarmed about. For example, after meeting with the United Kingdom’s Home Office, it was reported that,

143 McIver to Secretary, DEA, 31 Jan 1962, NAA A1838 932/3/1 Part 6 (emphasis in original).
British practice [in regard to asylum] appears to be influenced by a number of factors, historical and international, as well as domestic. Within broad limits it seems fair to say that it is applied with a great deal of elasticity and perhaps some pragmatism.\textsuperscript{144}

However, little further happened until May 1963, when in view of an impending visit by the UN High Commissioner for Refugees, Felix Schnyder, Peter Heydon, who had replaced Heyes as Secretary of Immigration, wrote to Attorney-General’s for advice on two questions: firstly, ‘whether, if Australia were to withdraw its present geographical limitation to its ratification of the Convention, it would be thereby obliged to grant resettlement opportunities to refugees without regard to ethnic origin’, and secondly, whether ‘the admission of refugees is a matter for discretionary decision by Australia, and … is not regulated by the Convention’.\textsuperscript{145} Heydon noted that the Convention forbade discriminatory treatment, but also that the High Commissioner was on record as saying that the Convention ‘regulates the rights and duties of refugees in their countries of residence; it does not regulate the admission of refugees nor their right to asylum’. Attorney-General’s confirmed this understanding:

\begin{quote}
The provisions of the Convention … do not impose any obligation to grant entry … There is simply no obligation to grant resettlement opportunities. This is the position, irrespective of whether a ‘refugee’ is European or of some other description.\textsuperscript{146}
\end{quote}

The position of unauthorised arrivals was not directly addressed, although Attorney-General’s noted that, ‘Article 32(1) [which prohibits the expulsion of a refugee save on grounds of national security or public order] is limited to “refugees” lawfully in Australia’.

Schnyder’s visit also spurred Immigration to reflect on whether the reservations to the Convention that it had insisted on a decade earlier were still needed. It had little hesitation in offering up the interpretive reservation that had protected its right to impose work contracts on refugees granted entry under the IRO’s displaced persons

\textsuperscript{144} Kevin to DEA, 9 Mar 1962, NAA A1838 1606/1 Part 1; Hartley to Secretary, DI, 9 Apr 1962, NAA A432 1962/3102.

\textsuperscript{145} Heydon to Secretary, AG, 22 May 1963, NAA A432 1974/11015 Part 1.

\textsuperscript{146} Lyons to Secretary, DI, 3 Jun 1963, NAA A432 1974/11015 Part 1.
scheme, since the scheme had ended. However, it promised only to think further about the other interpretive reservation, aimed at protecting its right to impose residency conditions on persons granted entry for specific purposes. This was despite receiving advice from Attorney-General’s that it was superfluous, since the articles on which it had been entered all referred to a person ‘lawfully’ in the country of asylum, and would therefore not apply ‘to a person who has overstayed the period for which he was admitted or authorised to stay or who had violated any other condition attached to his admission or stay’.

Immigration was also hesitant about removing the substantive reservation on Article 32, aimed at protecting Australia’s right to expel refugees lawfully in Australia for reasons other than national security or public order. Its concern here was primarily procedural: it had been a long time since any refugee had been deported for being a charge on public funds, so it was relaxed about offering up this power, but uncertain whether it required a change to the Migration Act.

---

147 Paragraph (b) of the reservation made to Articles 17, 18, 19 and 26 of the Convention stipulated that Australia understood that these articles did not preclude ‘the making of arrangements with a refugee under which he is required to undertake employment under the direction of the Government of the Commonwealth of Australia for a specified period after his entry into the Commonwealth of Australia or its Territories’.

148 Paragraph (a) of the reservation made to Articles 17, 18, 19 and 26 of the Convention stipulated that Australia understood that these articles did not preclude ‘the imposition of conditions upon which a refugee may enter the Commonwealth of Australia or any of its Territories where the entry is made for a specific purpose’.

149 Lyons to Secretary, DI, 3 Jun 1963, NAA A432 1974/11015 Part 1.

150 As noted previously, Article 32(1) provides that, ‘The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order’. The Article 32 reservation read: ‘The Government of the Commonwealth of Australia makes a reservation in respect to the provisions contained in Article 32 of the Convention and does not accept the obligations stipulated in this Article’.

151 Heydon to Secretary, AG’s, 22 May 1963, NAA A432 1974/11015 Part 1. The power in question was section 13(c) of the Migration Act, which provided that where an immigrant was, within five years after entry into Australia, an inmate of a mental hospital or public charitable institution, the minister could order his deportation. Heydon also sought advice on the possibility of following in Ireland’s footsteps in making an interpretive reservation which specified that Australia understood the terms ‘public order’ (Article 32(1)) and ‘in accordance with due process of law’ (Article 32(2)) to mean respectively ‘public
substantive reservation on Article 28, which freed Australia from the obligation to issue a refugee a travel document, or re-admit any who had been issued with such a document after their departure.\footnote{The Article 28 reservation read: ‘The Government of the Commonwealth of Australia makes a reservation with respect to the provisions contained in paragraph 1 of Article 28 of the Convention and does not accept the obligations stipulated in this paragraph but is prepared to recognize travel documents issued by other Contracting States pursuant to this Article’.} And this time, the advice from Attorney-General’s only added to Immigration’s concerns. For in its view, if the reservation was removed the obligation to issue a travel document and permit re-entry along the lines prescribed in the Convention was clear.\footnote{Lyons to Secretary, DI, 4 Jun 1963, NAA A1838 932/3/1/1 Part 2. In this particular paper, AG’s is commenting on an identical provision in the 1954 Convention on the Status of Stateless Persons.}

However, despite Schnyder’s visit, again little happened. The times were not conducive to change. In September 1964, Cabinet rebuffed a package of moderate immigration reforms put forward by Opperman on the grounds that it might ‘give the impression of significant relaxation and reduction of Australia’s [restrictive] immigration policy’.\footnote{Cabinet decision no 483, ‘Review of Non-European Policy’, 15 Sep 1964, and related submission no 407, 1 Sep 1964, NAA A4940 C3966. Opperman proposed that non-Europeans in future be eligible for admission in limited numbers as immigrants with permanent residence status, and for naturalization after five years in the same way as Europeans, and that non-Europeans already in Australia on temporary permits be eligible to qualify for permanent residence status and naturalisation after five years. When writing up Cabinet’s decision, EJ Bunting, Secretary of the Department of the Prime Minister and Cabinet, told Menzies that he had initially considered only ‘a curt decision, limited to a statement that the recommendations were not approved’, but ‘that would have been devoid of atmosphere’ and would not have done justice to the Cabinet discussion; Bunting to Menzies, 18 Sep 1964, NAA A4940 C3966. He continued, ‘It is much better for future reference, and for the information of the Immigration Department, that I should convey at least some of the background’. His final version of the decision includes the statement, ‘The Cabinet felt that the proposals put forward could do no other, if approved, than give the impression of significant relaxation and reduction of Australia’s immigration policy. The Cabinet made it clear that it was not prepared to approve or permit such a result … The Minister is to understand that his}

policy’ and ‘in accordance with a procedure provided by law’. The AG’s advised that no reservation was needed, arguing that while not all existing grounds for deportation in the Migration Act could be considered ‘grounds of national security or public order’ (where it interpreted ‘public order’ as covering ‘any conduct contrary to the criminal law or to public morals’), there were probably other ways around this problem; Lyons to Secretary, DI, 3 Jun 1963, NAA A432 1974/11015 Part 1.\footnote{Lyons to Secretary, DI, 3 Jun 1963, NAA A432 1974/11015 Part 1.}
For similar reasons, Australia resisted pressure from the UNHCR to accede to the Convention on the Status of Stateless Persons, which had come into force on 6 June 1960. More generally, the government continued to refuse to countenance any limitation to its immigration powers. As External Affairs explained in June 1965, the reservations were designed to eliminate any interpretation … which might have the effect of compromising the authority of the Government … to control the admission of persons into Australia, to exercise jurisdiction over such persons, or to expel persons to whom entry into Australia has been allowed but whose continued presence in Australia has shown itself to be undesirable.

In Australia’s eyes, the number of refugees it was still resettling as part of its migration and humanitarian program – some 38,050 in the five years from July 1960 to June 1965 – was sufficient defence against any criticism of its contribution to alleviating global refugee needs.

That said, pressure for change was growing, with non-government organizations, churches, and the leader of the opposition, Gough Whitlam, all criticising the government for its arms-length approach to international instruments like the Refugees Convention. This criticism was especially strong in 1965, which had been designated by the UN as International Cooperation Year. In June of that year, External Affairs therefore revived the Convention review process that had begun in 1963, suggesting that a ‘concerted effort’ be made to update Australian attitudes, and proposing that the geographic limitation and all reservations be removed. Its motives were pragmatic and

[administrative] discretion … continues, but that it should, of course, be exercised in strict accordance with immigration policy objectives and without public policy announcements’.

155 This Convention did not contain the date and place limitations of the Refugees Convention, which were believed to be ‘essential to preserve the country’s immigration policy towards non-European people’; Coles, internal DEA minute, 11 Feb 1965, NAA A1838 932/3/1/1 Part 2; see also Hoyle to Norris, 21 Jun 1965, NAA A1838 932/3/1/1 Part 2. It also contained the same troublesome obligation on travel documents as appeared in the Refugees Convention.

156 Hoyle to Norris, 21 Jun 1965, NAA A1838 932/3/1/1 Part 2.

157 Opperman, CPD (Reps), 12 Oct 1965, vol 48, p 1714. All were either Eastern European or stateless, and were a mix of those nominated by relatives or friends and those selected by the DI.

158 Secretary, DEA, to Secretary, DI, 24 Jun 1965, NAA A1838 932/3/1/1 Part 2.
presentational: it would remove the pressure for such changes being exerted by the UNHCR and local groups, align Australia with ‘reputable countries’ in international forums, and help fend off potentially radical changes to the Convention being mooted by African and Asian members of the UNHCR’s Executive Committee (ExCom).

Some ‘complications’ had arisen in the form of West New Guinean asylum seekers in PNG, however, in the department’s view the principle of non-refoulement probably already had universal application as part of international customary law, and the Convention’s 1951 date limitation would still exist.

A few months later, Opperman agreed to the removal of both the geographic limitation and the reservations his department had been prepared to remove in 1963, namely the interpretive reservations to Articles 17, 18, 19 and 26, and the substantive reservation to Article 32. The move didn’t seem likely to affect Australia’s ability to grant or refuse asylum, to select refugees for resettlement, or to expel (under Articles 31 and 32) any

159 Conybeare to Goig, 23 Aug 1965, NAA A1838 932/3/1 Part 6; background notes by Conybeare for meeting, 23 Aug 1965, NAA A1838 932/3/1/1 Part 2. In the former, Conybeare notes that, ‘countries with which we would wish to be associated’ (eg Belgium, Denmark, the Federal Republic of Germany, the Netherlands, New Zealand, Sweden, Switzerland, the United Kingdom) had adopted the less restrictive declaration, leaving Australia ‘grouped with such countries as Brazil, France, Italy, Portugal and Turkey in supporting the restrictive alternative’.

160 Heydon to Secretary, DEA, 29 Oct 1965, NAA A432 1974/11015 Part 1. Ever cautious, Immigration wanted to have the removal of the interpretive reservation to Articles 17, 18, 19 and 26 accompanied by an explanatory memorandum ‘to safeguard the Australian Government’s authority over persons entering the country for a specified purpose and length of time’, an idea which probably came from a suggestion two years earlier by AG’s, when withdrawal was first mooted by the DI. At that time, AG’s had advised that it ‘should be accompanied by a statement to the effect that the withdrawal does not signify that Australia no longer maintains that the Articles do not apply to persons entering for a specific purpose; on the contrary, the reservation is being withdrawn because the clear meaning of the Convention is to the effect set out in the reservation’; Lyons to Secretary, DI, 3 Jun 1963, NAA A1838 932/3/1/1 Part 2. However, in March 1967 the DI told the DEA not to worry about the memorandum, having come to the view that it ‘is not directly relevant or essential’; Secretary, DI, to Secretary, DEA, 8 Mar 1967, NAA A1838 932/3/1 Part 7.

When Opperman agreed to the changes on the Refugees Convention, he also agreed to Australia acceding to the Convention relating to the Status of Stateless Persons, subject to a reservation on the article relating to travel documents (the same as in the Refugees Convention). A decision on accession to the Agreement relating to Refugee Seamen was deferred pending a review of the experience of other countries.
refugees who arrived unauthorised. The minister decided to keep the reservation on Article 28 relating to travel documents, although Immigration promised to reconsider the matter after a review of the experience of countries that had accepted the obligation. Its concern now centred on the automatic right of re-entry prescribed for a refugee, arguing that it placed them in a better position than other non-citizens in Australia, and undermined its deportation powers.161

As it turned out, External Affairs chose not to immediately seek the agreement of its own minister to the proposed changes, waiting until October 1967 to do so. Much of the delay can be attributed to Territories and the PNG Administration being slow to endorse the move,162 and External Affairs being unwilling to push them. As will be seen in the next chapter, all three agencies were preoccupied with the challenges being posed by asylum seekers in PNG, and careful about anything that might affect their management of the situation.

When External Affairs finally did seek its minister’s approval, it put the case in ‘no-harm-done’ type terms. That is, Australia could still take ethnicity into account when choosing refugees for resettlement purposes, the reservations were either no longer necessary or the same ends could be achieved by other means, and the obligations that Australia would incur did not conflict with Australian legislation and practice.163 The minister, Paul Hasluck, remained unconvinced, and he requested further information:

Please resubmit showing what advantage accrues to Australia if your recommendation is accepted and what advantage or disadvantage there is if we do nothing. Apart from the fact that

---

161 Attorney-General’s argued that the expulsion power in Article 32 would allow the government to deport and withhold re-entry rights from any refugee of concern. However, Immigration could see no reason to change its existing procedure, whereby a non-citizen wishing to travel abroad could apply for a Certificate of Identity as a travel document, but had to apply separately for a re-entry permit, the issue of which could be considered apart from the issue of the Certificate of Identity; Heydon to Secretary, DEA, 5 Oct 1965, including attached record of meeting, 1 Sep 1965, NAA A432 1974/11015 Part 1; Heydon to Secretary, DEA, 29 Oct 1965, NAA A432 1974/11015 Part 1.


the interested departments have reviewed an earlier decision I am unable to see the reason why action should be taken.  

This time, External Affairs argued that the changes would enhance Australia’s international image and find favour with the UNHCR. Further, if it refused, it would be difficult to explain why. Hasluck thought the case ‘marginal’, but gave his approval, and the UN was formally advised of the decision on 1 December 1967. The changes were announced publicly late the following year in connection with 1968 being the International Year for Human Rights and the 20th anniversary of the UDHR.

Considerations of international comity may have nudged Hasluck over the line, but it was the no-harm-done type reasoning that led him to its edge. The same was of course true of Immigration. For example, on being told by the Australian mission to the UN that the changes were purely ‘technical’, the Journal de Geneve in Switzerland wrote to the department asking,

Does the Australian Government, as a consequence of this waiver [of the geographic limitation], envisage to take, as an example, refugees from Asia who escape their country because of war or who are victims of political disturbances?

In his reply, Heydon explained that ‘the necessity for the reservations has ceased to exist’, and it was ‘preferable that accession to an international Convention of this kind should as far as possible be without qualification’. He then added,

The Convention is concerned with the status of refugees in their countries of residence. It does not impose on member Governments an obligation to admit refugees from countries whether inside or outside Europe.

---

167 Hasluck, CPD (Reps), 17 & 19 Sep 1968, vol 60, pp 1140, 1353.
On a softer note, he continued,

In accepting its obligations under the Convention, as just described, the Australian Government would not, with respect to refugees residing in Australia, be influenced by such matters as the ethnic origin of the refugees. Furthermore, Australia will continue to include in its migrant intake the maximum number of refugees, consistent with its immigration policies generally and in accordance with its continuing role of assisting refugees in which it has been active in the post-war period.169

The reservation on travel documents remained in place. However, Immigration’s concerns on it too were at last subsiding. Countries like the United Kingdom and New Zealand had reported having no difficulty with the article.170 Further, Opperman’s successor, Bill Snedden, had told the department as early as February 1967 that he could see no reason for the reservation.171 When in late 1968 it finally put a recommendation to him for its removal, he therefore had no hesitation approving it.172 The arguments used to explain the move were familiar: pressure from the UNHCR, Australia the only country with such a reservation, difficulty explaining it, and no real harm done.

Once more, however, External Affairs moved slowly, waiting until August 1970 before seeking its minister’s approval.173 The delay was again linked to the implications for handling Papuan refugees in PNG. In 1969 Australia had refused to allow two of the refugees to attend the UN General Assembly to protest against the act of self-determination undertaken that year in West New Guinea under UN auspices. If the reservation had not been in place, Australia would arguably have been obliged to issue the pair travel documents.174 According to the 1970 submission, the

… political significance [of the travel issue] is now much diminished but a decision to withdraw the reservation should be taken with these circumstances in mind.

174 Secretary, DEA, to Secretary DET, 28 Jul 1969, NAA A1838 932/3/1 Part 7.
William McMahon, the new Minister for External Affairs, must have thought the risk of further embarrassment low, as he agreed it could be removed. With Prime Minister Gorton’s agreement the issue was not taken to Cabinet, and after the UN was advised the decision took effect on 11 March 1971.

Australia’s obligations under the Convention were finally free of reservations and geographic limitation. They had come to be viewed as obsolete or dispensable in the interests of domestic and international goodwill, or their objectives achievable by other means, at negligible cost to immigration powers and practices. The removal of the geographic limitation was important symbolically, in that it involved Australia formally accepting that the principle of non-refoulement was universal in application; that is, that it applied to non-European as well as European refugees. However, in practice the principle was already viewed as part of international customary law. Besides, as Attorney-General’s noted in 1968, the more important issue from Australia’s point of view was that the obligation not to refoule a refugee

… does not … affect the basic principle that a party to the Convention has the legal right at its frontiers to refuse any person entry into its Territory.177

176 UN Legal Counsel to UN members, 26 Mar 1971, NAA A432 1974/11015, Part 3.
177 Body to Secretary, DI, 1 Aug 1968, NAA A432 1974/11015 Part 1. Body was responding to an incident where the DI had deported for criminal offences two Yugoslavs to Yugoslavia who had come to Australia via Italy as migrants, but had been recognised by Italy as refugees. In response to a UNHCR protest, the DI sought to justify its action on the grounds that the non-refoulement obligation applied only to cases of refugees engaged in border crossing, and not cases involving the expulsion of refugees after they had been lawfully admitted to Australia (where it saw only Article 32 as being relevant). Both UNHCR and AG’s advised that this interpretation was wrong, with AG’s making it clear that Article 33 extends Article 32 obligations to cover refugees illegally as well as legally in the country, and countries where, if expelled, the person’s life or freedom would be threatened for a Convention reason. See also Secretary DI to UNHCR, 28 Feb 1968, NAA A432 1974/11015 Part 1; UNHCR to Secretary DI, 20 Mar 1968, NAA A432 1974/11015 Part 1.
Acceding to the Protocol

Despite the above developments, like every other signatory, Australia’s Convention obligations were technically still subject to the Convention’s date limit, that is, to refugees ‘as a result of events occurring in Europe or elsewhere before 1 January 1951’. Unlike the geographic limitation, the text of the Convention contained no option in regard to the date limit, for example allowing a signatory to commit to extending the terms of the Convention to refugees caused by events after as well as before January 1951.

By the mid-1960s, this date limit was an increasing problem for the UNHCR and refugee advocates in view of the ongoing nature of forced and irregular migration. Further, a discrepancy existed between the UNHCR’s legal mandate under the Convention and its administrative mandate under the UNHCR statute, which imposed no date or place limits on the competence of the High Commissioner. When the two instruments were adopted, their application had been similar in view of the refugee populations at the time. However, with the emergence of new asylum situations in Africa and Asia, the number of people falling outside the Convention’s coverage was rising. The UNHCR could intervene on their behalf under the provisions of its statute, but it wanted the authority of the Convention to back it up. It was also concerned about regional agreements on refugees emerging that would undermine the standing of Convention as a universal document.

In April 1965, the UNHCR convened a meeting of legal experts in Bellagio, Italy, to consider ways to remedy these problems. The group proposed a Protocol, a stand alone legal instrument that would enable states to remove the Convention date limit without undergoing the cumbersome process of revising or adopting a new Convention, and that would carry more clout than a UN recommendation or resolution. A draft of the

178 Article 1B(1)(b) of the Convention.
proposed Protocol was circulated to Convention parties by the UNHCR, and a final version was accepted by the General Assembly on 16 December 1966. It came into force on 4 October 1967, once the first six countries had acceded to it.

When they had received a draft of the Protocol two years earlier, in October 1965, all departments were sympathetic to its general aim. They had a few reservations, centring on the implications for asylum seekers in PNG, restrictive immigration, and the financial needs of the UNHCR, especially when Australia’s preferred aid focus now lay in south-east Asia, and on programs such as the Colombo Plan. However, none of these seemed insurmountable. There would still be no obligation to grant asylum or resettle a refugee, and the onus of proof would still be with the asylum seeker to establish their refugee status. Nor was there any immediate proposal to increase financial contributions to the UNHCR. Removal of the date limit would entrench the universal nature of the principle of non-refoulement, but, as noted earlier, there was a view that the principle already existed in customary law anyway. Chinese ship deserters and stowaways who could establish a need of refuge seemed likely to be the

182 After the appointment of Prince Sadruddin Aga Khan as the High Commissioner for Refugees, Australia believed that the UNHCR became not only more sympathetic to involvement in Afro-Asian refugee issues, but willing ‘to accept more complete responsibility for welfare rather than confining itself to the “pump-priming” role of stimulant to wider international aid’; DEA internal note for meeting of 14 July 1967, NAA A1838 932/4/3 Part 2. Hasluck directed the DEA to ‘resist any attempts to expand the activities of UNHCR either into new areas or into new fields of work such as aid programmes or undertaking a general responsibility for welfare of refugees’; ‘Minister’s comments’ of 1 July 1966, attachment to Watson to Body, 31 Oct 1966, NAA A1838 932/4/10 Part 1. He asked the department to ‘be particularly careful not to become involved through our support of the UNHCR in African aid programmes’ (emphasis in original), and to peg financial contributions to the UNHCR at their current level. As noted, the reasons for this directive relate mainly to the desire to focus Australian aid efforts on Asia, and to channel aid through existing programmes and agencies such as the Colombo Plan rather than the UNHCR.
main group to benefit.\textsuperscript{183} However, as unauthorised arrivals they could potentially be deported to a country willing to take them, and if none offered, then the precedent had been set in the early 1950s of granting refuge when the only alternative was return to communist China.\textsuperscript{184} Contrary to what some might expect, a scenario of ‘invasion’ by Asian asylum seekers does not seem to have been envisaged.\textsuperscript{185} Even if it were, it was probably viewed as able to be dealt with by turning people away before they entered Australian territory, or as falling outside Convention obligations, since its founders had put on record that mass migration was not covered by the non-refoulement obligation.\textsuperscript{186} Moreover, the draft Declaration on Territorial Asylum, which was nearing finalisation, included an explicit exception to the principles of non-refoulement and non-rejection at the frontier in the case of mass influxes.\textsuperscript{187}

Aware that other countries were also generally sympathetic to the Protocol,\textsuperscript{188} Hasluck decided that Australia should at least support it in principle. However, at a meeting of ExCom, it was explained that this support rested on two assumptions: that the onus of proof was on the refugee, and that states were under no obligation to grant resettlement

\textsuperscript{183} This is the only group mentioned in Immigration documents seen by the writer, although the possibility of an African obtaining entry and then claiming asylum was mooted at one stage by AG’s; file note by Taylor, DEA, 8 Nov 1966, NAA A1838 932/4/10 Part 1.

\textsuperscript{184} See chapter three.

\textsuperscript{185} No such scenario was canvassed in any of the documents surveyed by the writer.

\textsuperscript{186} An AG’s file of the time (NAA A432 1974/11015 Part 2) contains an extract of Robinson’s (1953) comments on non-refoulement and rejection at the frontier, which were quoted earlier in this chapter.

\textsuperscript{187} Article 3 of the Declaration provides that, ‘(1) No person … [entitled to invoke Article 14 of the UDHR]… shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution. (2) Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons. (3) Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting to the persons concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State’.

\textsuperscript{188} The DEA canvassed the views of some twenty-one countries on the draft, concluding that, ‘Reaction amongst these countries seems to have been at best luke-warm, many not having considered the proposals at all … There seems to be no strong opponents to the principle involved’; Watson to Petherbridge, 12 Oct 1966, NAA A1838 932/4/10 Part 1.
opportunities. The UNHCR affirmed this understanding. According to a record of the meeting,

... [UNHCR’s legal adviser, Paul Weis] confirmed that the burden of proof lay with the person seeking asylum. It was, however, obvious that the asylum-seeker could not provide foolproof evidence relating to events which had occurred in another country, so that, where the facts appeared plausible, the Government concerned gave him the benefit of the doubt. The Convention contained no obligation to admit refugees for resettlement. The obligations that would be imposed by the Protocol would be applicable only to the country in which the refugee found himself, just as were those imposed by the Convention.189

Hasluck accordingly agreed that Australia should vote for the Protocol in the UN General Assembly,190 where, as noted earlier, it was accepted by resolution in December 1966.

Immigration, Territories and Attorney-General’s continued to have no real objection to Australia acceding to the Protocol.191 As Immigration noted,

[The Convention and Protocol relate only] to the status of people already in the country of the Contracting State. The absence of the limitation of time and place thus [has] no significance.192

Nevertheless, another six years would pass before Australia would formally commit itself to the Protocol. Why so long?

189 Provisional summary record of the 147th meeting, ExCom, 3 Nov 1966, UNHCR Doc A/AC.96/SR.147 GE.66-15605, p 13, NAA A1838 932/4/10 Part 1. The discussion of the draft ended with Australia and United Kingdom moving that it be submitted to ECOSOC and the General Assembly, where further discussion could take place about the specific text.


191 Booker to Minister for External Affairs, 27 Oct 1967, NAA A1838 932/3/1 Part 7; DEA cable to Australian representatives in United States, Canada, United Kingdom and New Zealand, 15 May 1968, NAA 1838 932/3/1/5 Part 2. The DT was prepared to accept it ‘as long as Australia would have some say in refusing an unacceptable representative of the UNHCR being stationed in the Territories’; Taylor, note for file, 8 Nov 1966, NAA A1838 932/4/10 Part 1. The UNHCR’s statute (para 16) provides that the High Commissioner consult governments as to the need for appointing a representative to their country, and specifies that any appointee must be approved by the government of the country concerned.

Initially, the reason may have been that External Affairs simply saw little benefit in Australia moving faster than anyone else. As one official noted in April 1968, in regard to a draft submission to Hasluck recommending accession,

I have been resting on this. My concern has been that so few States have so far acceded and why should we be “out in front”.193

However, later that year, after checking again the views of other countries,194 and with the number of accessions rising to fifteen, the department finalised its submission.195 It gave three main arguments in favour of the move. Firstly, to not do so ‘would leave Australia open to charges that while it was prepared to agree to the Convention applying to Europeans it was unwilling to agree to the protection of the Convention applying to Asians and Africans’. Secondly, accession would remove the discrepancy between the Convention and the UNHCR’s statute. Thirdly, in view of Australia having accepted more than 300,000 refugees since 1945, and 1968 being International Year for Human Rights, it ‘would strengthen Australia’s claim to interest in the welfare of refugees and possibly have a marginal effect in attracting additional accessions to the Protocol, to which the UNHCR attaches considerable importance’. The no-harm-done argument was also reiterated:

The Attorney-General’s Department has advised that the provisions of the Convention … are concerned with the status of refugees in their countries of residence and not with determining entry conditions or in imposing any obligations for the resettlement of refugees, and that the extension of the Convention to non-Europeans did not conflict with Australia’s immigration policy. Similarly, accession to the Protocol would not involve any difficulties in this regard.

The submission made no mention of the situation in PNG, which is puzzling, since planning was underway there for a possible influx of asylum seekers after the proposed act of self-determination in West New Guinea in 1969, related questions were being

194 Cable to Australian representatives in United States, Canada, United Kingdom and New Zealand, 15 May 1968, NAA 1838 932/3/1/5 Part 2.
asked in Parliament, and assurances were being made that any asylum claims would be considered on their merits and in full regard to international conventions on refugees. Not surprisingly, Hasluck therefore asked for another note specifically on the implications of the Protocol in regard to PNG. More legal advice was obtained and drafting was underway when ministerial changes intervened, with Gordon Freeth replacing Hasluck as Minister for External Affairs. The question of accession was then essentially shelved until the Whitlam government came to power four years later.

The cause of this hiatus is a matter of speculation. For example, Price (1990b: 11) claims it was because of fear that Australia ‘might be landed with any number of Papuans or West Irianese who might take small boats to the Torres Strait Islands and claim they were refugees seeking asylum’. However, as will be seen, if any fear existed it was of a mass influx into PNG following the 1969 act of self-determination, not into

---

196 See, for example, CPD (Reps), 22 Aug 1968, vol 60, p 443.
197 CPD (Reps), 22 Aug 1968, vol 60, p 443.
198 Brazil to Osborn, 28 Nov 1968, NAA A1838 929/6/1 Part 4. Brazil’s advice covered key issues such as who determines refugee status, the obligation to accept refugees, and the ability to restrict their political activities and freedom of movement. He identified areas where care would need to be exercised (eg restrictions on refugee political activities and where they could settle) and responsibilities might increase (eg in the event of a mass influx), but generally inferred that Australia’s existing practices in PNG were consistent with Convention and Protocol obligations.
199 Unsigned, undated draft submission, circa December 1968, NAA A1838, 932/3/1/5 Part 3. Efforts to clarify the nature of obligations and identify possible safeguards for national sovereignty and government discretion dominate the discussion, eg the draft notes that states have a ‘legally unfiltered discretion’ as to whether or not they receive or reject refugees seeking asylum, but points out that if no other country is willing to take them, the non-refoulement obligation may effectively override their wishes: ‘it might not be a matter of [Australia] deciding to give them asylum but of being obliged to do so’. It also suggests that even if Australia and PNG didn’t accede to the Protocol, ‘it would be very difficult on humanitarian grounds alone to argue that, because [they] were not legally bound by the Protocol, the provisions of the Refugees Convention need not be applied to West Irian refugees’. Nevertheless, it raises the possibility that Papuans engaged in subversive activity before the UN-mandated 1969 act of self-determination could be held as acting contrary to the purposes and principles of the UN, and thus excluded from Convention protection under Article 1F(c).
200 This is despite an update on the legal advice being sought in 1970; McPherson to Brazil, 10 Sep 1970, NAA A432 1974/11015 Part 3; Shand to Secretary, AG, 5 Mar 1971, NAA 432 1975/11015 Part 3; Brazil to Secretary, DFA, 26 Mar 1971, NAA A1838 932/3/1/5 Part 3.
Australia, and this fear rapidly abated when the influx didn’t happen. Moreover, with Australia being the administrator of PNG, it had a convenient and Convention-consistent\textsuperscript{201} ejection chute down which it could potentially send any Papuans who might arrive unauthorised on the mainland (and which it used when a small number of Papuan asylum seekers landed in the Torres Strait in 1969).

Neumann (2004: 85-6) offers another explanation. In his view, accession would have meant acknowledging the universality of the Convention’s definition of a refugee, and so would have ‘contradicted Australia’s restricted immigration policy’. Further, it would have meant conceding ‘that many of the West Papuan border crossers were refugees in the terms of the Refugee Convention, and would therefore have implicitly invited the UNHCR’s involvement in solving the West Papuan refugee problem’. However, this too is unconvincing. As noted earlier, Immigration was willing to accept the Protocol as early as 1965, on the understanding that it would not impinge on immigration powers. From then on the ball was in the court of External Affairs. Further, by the late 1960s racially based restrictive immigration practices were being dismantled,\textsuperscript{202} and the possibility of accepting thousands of Vietnamese refugees was mooted as early as 1970.\textsuperscript{203} Nor is there any obvious reason why accession would have required Australia to change its view that most Papuan border crossers were moving for economic or tribal rather than Convention reasons, especially after the UN High Commissioner for Refugees stated in 1969 that he was satisfied with the way Australia

\textsuperscript{201} See Article 32.
\textsuperscript{202} See, for example, Cabinet submission no 713, ‘Report on immigration to Australia of non-Europeans and persons of non-European descent’, 15 May 1972, and related decision no 1071 of 12 Jul 1972. According to the submission, the number of non-Europeans entering or permitted to remain in Australia for residence had totalled about 9,500 a year since 1967, and between 1966-71 a total of 17,354 non-Europeans had settled in Australia. This included 5,048 admitted on the basis of their qualifications or contribution, 5,495 on the basis of family relationships, and 6,811 following temporary entry. Persons of mixed descent admitted over the same period totalled 27,167, including 111 being granted entry on the grounds that they were suffering hardship through discrimination in their country of origin.
\textsuperscript{203} See for example, Harry to Secretary, DEA, 14 Jan 1970, NAA A6980 S250089; Shann to Casey, 26 Jan 1972, NAA A6980 S250089; Spurr to Miller, 27 Apr 1972, NAA A6980 S250089; Henderson to Australian Embassy, Saigon, 9 May 1972 & 2 Jun 1972, NAA A6980 S250089; Waller to Armstrong, 26 Oct 1972, NAA A6980 S250089; Armstrong to Minister for Immigration, 23 Nov 1972, NAA A6980 S250089; Secretary, DFA, to Minister for Foreign Affairs, 28 Jan 1973, NAA A6980 S250089.
was handling them.\textsuperscript{204} And since the Convention does not prescribe how refugee status
determination should occur, Australia would have been free to continue its existing
determination procedures. Finally, since as early as 1966 Australia was of the view that
its actions in PNG were consistent with the Convention, and was less concerned about
the UNHCR becoming involved there than was Indonesia, or for that matter indigenous
PNG leaders as the time of self-government came closer (see next chapter).

A more plausible explanation lies in a combination of three factors. Firstly, it is likely
that External Affairs decided that keeping Indonesia happy\textsuperscript{205} and maintaining the
power to refuse travel documents to Papuan refugees were worth more than the
international kudos Australia would gain from accession. That said, these factors
became less important as tensions eased after the 1969 act of self-determination, and by
1973 External Affairs was to argue that while formal extension of the Convention to
PNG

\dots could create opportunities for West Irian separatists to publicise their cause and for
embarrassment to Indonesia \ldots [this was] not sufficient reason for Australia to maintain a major
reservation to one of the principal humanitarian conventions.\textsuperscript{206}

Secondly, as momentum grew towards PNG independence, there was a commensurate
desire – indeed constitutional responsibility – on the part of Australia\textsuperscript{207} to defer to the
views of PNG’s indigenous political leaders, or at least to not take decisions that might

\textsuperscript{204} Cable from Consulate-General, Geneva, to DEA, 22 Jan 1969, NAA A452 1968/5721. The role of the
UNHCR in PNG is discussed more in the next chapter.

\textsuperscript{205} In 1971 the Australian Ambassador to Indonesia claimed that Indonesia’s objective was ‘always to
keep the [Papuan refugee] issue away from international doctrines relating to refugees and to avoid
considering matters in the light of the international conventions on refugees’; Body, note for file after
discussions with Australian Ambassador to Indonesia, 21 May 1971, NAA A432 1974/11015 Part 3.

\textsuperscript{206} Cumtes to Minister for Foreign Affairs (draft submission), 16 Jan 1973, p 8, NAA A1838 932/3/1/5
Part 3.

\textsuperscript{207} This was especially true of Territories; see, for example, record of meeting, 9 Mar 1973, NAA A1838
932/3/1/5 Part 3, where the DET requested that a submission on accession to the Minister for Foreign
Affairs be deferred until the matter was put to the Territory Administrator’s Executive Council. See also
pre-empt theirs, since they would be the ones bearing the consequences. And the issue of accession was neither high on the agenda of PNG’s leaders, nor one that they would quickly resolve after independence. In November 1973, when Immigration Secretary, RE Armstrong, asked Al Grassby, Labour’s new Minister for Immigration, to endorse Snedden’s 1968 decision in favour of accession, he explained,

The Department of Foreign Affairs indicated recently that accession to … the Protocol was … delayed because of problems confronting PNG but PNG’s Chief Minister has now informed the Prime Minister that no further international agreements should be entered into by Australia on PNG’s behalf in the immediate future. The way is therefore now clear for accession to take place subject to your approval. The situation from an immigration viewpoint has not changed since 1968.

Finally, nothing was happening within Australia to lend urgency to the issue and override these foreign and territory policy considerations. The number of people applying for asylum was low, and the procedures for handling requests that had been put in place in 1956 (see next chapter) were working well enough from an administrative point of view. Also, if Australia was going to accede, it wanted to do so on behalf of its territories as well, as it had done in 1954 in regard to the Convention. External Affairs could have forced the issue, giving PNG the option of reviewing its position after it had become independent, but this would have prejudiced PNG’s

---

208 Australia handled PNG’s international relations until PNG became self-governing in December 1973, but consultation with the Administrator’s Executive Council on matters such as accession to international conventions was required from at least early 1970; Granger to Doig, 3 Apr 1970, NAA A1838 932/3/1/1 Part 3. In October 1971, the Administrator’s Executive Council stipulated that at independence the PNG Government reserved the right to review its position in regard to conventions and agreements that had been extended to it by Australia; Petherbridge to Wright, 26 Oct 1971, NAA A1838 932/3/1/3. Asylum seeker and refugee issues involved matters of domestic policy (eg policies towards non-citizens in PNG) as well as foreign policy, and the former were under PNG’s control for at least a year before self-government; DFA, record of meeting, 9 Mar 1973, NAA A1838 932/3/1/5 Part 3.

209 On gaining independence, PNG declined to accede to the Protocol until 1986, and then only with significant reservations.


211 DFA, record of meeting, 9 Mar 1973, NAA A1838 932/3/1/5 Part 3.

212 Cumes to Minister for Foreign Affairs (draft submission), 16 Jan 1973, p 8, NAA A1838 932/3/1/5 Part 3.
future relations with Indonesia and was opposed by Territories. In brief, in the absence of clear need, and with a succession of ministers and a drift in political leadership, momentum stalled and inertia prevailed.

The change of government in December 1972 rejuvenated the process, especially when Whitlam instructed that Australia should become party to as many human rights conventions as possible to mark the celebration of the 25th anniversary of the UDHR on 10 December 1973. Foreign Affairs (the new name for External Affairs) began reworking its 1968 submission, employing the same justifications for acceding – avoiding accusations of racial discrimination, overcoming the discrepancy between the UNHCR’s statute and the Convention, building on Australia’s post-war record in refugee resettlement – but this time adding that while it may create some difficulties in PNG,

... these would not be major problems and would be outweighed by accession to a principal humanitarian convention, accepted by many other countries in the world.

However, in July 1973 Whitlam, in his role as Minister for Foreign Affairs as well as Prime Minister, pre-empted his department by scrawling ‘Ratify 1951 Protocol’ in the margin of a different submission on PNG asylum issues. To meet his deadline of 10

---

213 DFA, record of meeting, 9 Mar 1973, NAA A1838 932/3/1/5 Part 3.
214 Freeth was replaced in late 1969 by William McMahon, with Les Bury replacing him in early 1971, and Nigel Bowen replacing him in late 1971.
215 Secretary, DFA, to Secretary, AG’s, 25 Jan 1973, NAA A1838 932/3/2 Part 2; Flood to Minister for Foreign Affairs, 27 Nov 1973, NAA A1838 932/3/2 Part 2. One of the first initiatives of the Whitlam/Barnard interim government in December 1972 was to ratify the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Within a year the new government had also acceded to the Convention on the Status of Stateless Persons, the Convention on the Reduction of Statelessness, and the Hague Agreement and Protocol relating to Refugee Seamen.
216 Cumes to Minister for Foreign Affairs (draft), 16 Jan 1973, p 9, NAA A1838 932/3/1/5 Part 3.
217 Handwritten note on Woolcott to Minister for Foreign Affairs, 18 Jul 1973, NAA A1838 932/3/1/5 Part 3. In this submission, pending ratification of the Protocol Whitlam agreed that Australia should continue to ‘act as if’ the Convention applied in PNG, and endorsed recommendations by the PNG Cabinet and Foreign Affairs to grant asylum to one Papuan rebel and deport several others. These
December, and with relevant ministers having already indicated their support, he waived the need for Cabinet approval.218 The Governor-General endorsed the move on 4 December219 and the instrument of accession was lodged with the UN on 13 December, only three days late.

The journalist Maximilian Walsh once wrote that the White Australia policy was breached

… by a streak of benevolent liberalism in Sir Peter Heydon, a totally unexpected strain of political activism by Sir Hubert Opperman, and a cynical lucky dip into departmental ideas by Harold Holt.220

Here, asylum policy was breached by the reforming zeal and penchant for grand gestures of Gough Whitlam. And in many respects, it was only a grand gesture.221 The application of the Convention in Australia remained at the discretion of government until 1980, when direct reference was first made to it in domestic legislation, to the effect that refugee status could be granted if the Minister for Immigration determined in writing that the applicant was a refugee according to the Convention and Protocol. Indeed, the definition of a refugee in the Convention and the rights conferred by accession become overtly justiciable or enforceable under Australian domestic law only in 1994, with an amendment to the *Migration Act* to the effect that a criterion for a protection visa was that the applicant was a non-citizen to whom Australia had deportees were viewed as excluded from Convention protection because of their alleged criminal activities in Papua.

218 Whitlam to Willesee, 5 Dec 1973, NAA A1838 932/3/1/5 Part 3.
219 DFA minute to the Executive Council, 4 Dec 1973, NAA A1838 932/3/1/5 Part 3.
220 ‘How the White Australia policy was breached’, *Sun-Herald*, 23 May 1971, in NAA A446 1971/75761. According to Walsh, Holt had opposed the measures to relax the White Australia policy when first proposed to Cabinet by Opperman in 1964. However, after becoming Prime Minister in January 1966, he was ‘looking for something to distinguish the Holt regime from the Menzies era’, and called for ideas from his ministers. Opperman and Heydon re-submitted their 1964 proposals, which were taken up ‘mainly because there were not any other bright ideas around’.

221 The number of government-sponsored refugee and humanitarian entrants during the Whitlam years of 1972-1975 fell to an average of 1,418 per year compared to an average of 5,141 during the previous ten years (York 2003: 134).
protection obligations under the Convention and Protocol (Germov & Motta 2003). This should not, however, diminish the significance of Whitlam’s decision to accede to the Protocol. Australia’s obligations under the Convention were now formally unlimited both geographically and date-wise, and a matter of international law as well as goodwill.

CONCLUDING COMMENTS

According to some writers (Nicholls 1998, Cronin 1993), Australia lacks a firm framework for asylum policy, especially in the absence of a national mythology of providing refuge for political dissidents like that in England, or of hope for the poor and oppressed like that in America. However, this chapter suggests otherwise. After World War Two, Australia joined other states in creating a broad framework of principles and laws that clarify many aspects of how refugees should be treated, including the principle of non-refoulement and the rights they are owed in a country of refuge.

Unfortunately, it is a framework that is silent on many other issues of importance to asylum seekers, including their right of entry to a country of potential refuge, refugee determination procedures, and the length of residence they can be afforded. It is a framework of minimum standards, and of gaps and exclusions in legal obligation, as much as political commitment or cultural sentiment. Nevertheless, it remains a framework, and perhaps the more durable for it. Designed to preserve flexibility in how states interpret and implement their asylum obligations, it lets policy makers keep one eye on what minimum standards they must meet, and the other on what they can get away with.

In helping establish this framework, Australia’s actions bear out Rene Cassin’s observation, quoted at the start of this chapter, that ‘in the field of asylum, as in the field of nationality, States are jealous of their sovereignty’. It acceded to the Refugees Convention and Protocol, and voted in favour of the right of asylum in the UDHR and the Declaration of Territorial Asylum, only when convinced that its immigration powers and practices would not be put at risk, and that the grant of asylum would remain a state prerogative. The protection of sovereignty was the hurdle these developments in the
international framework of asylum principles had to jump before Australia was willing to embrace them.

Other values were also at work. For example, humanitarian considerations were present during Australia’s involvement in the Convention process, including in its acceptance of principles relating to non-refoulement and sur place claims. Racist and communitarian sentiments were also present, notably in the form of the desire to safeguard restrictive immigration. However, the intention was not necessarily to refuse refuge to non-Europeans in genuine need of it, but to ensure that Australia had the power to not let them stay any longer than necessary, and to not have a grant of asylum automatically equated with a grant of permanent residence.

Foreign and territory policy considerations were also important, although they could potentially work in different directions. For example, while sensitivity to general international expectations worked in favour of Australia’s participation in the Convention, sensitivity to Indonesian and PNG attitudes delayed its participation in the Protocol.

In this context, it bears reiterating that Australia’s attitudes to asylum in this period were never entirely uniform or monolithic in nature. In the same way that Gurry and Tavan (2004) show how archival records of the White Australia policy invite nuances in interpretation of government attitudes, and recognition of differences of view within the public service, so too do the archival records on asylum policy. Tensions existed between departments in their approach to asylum principles, and the pace at which they were willing to accept international developments in the area of protection. Immigration was usually ultra-cautious, but was willing to accept the Protocol much more quickly than External Affairs once confident that powers over the grant of asylum were fundamentally not at risk. Attorney-General’s was usually fairly relaxed, confident that developments were either legally non-binding, or embodied sufficient flexibility to safeguard Australia’s interests. External Affairs often found Immigration’s views frustrating and embarrassing to defend internationally, but they too occasionally had reasons to delay acting in ways of potential benefit to asylum seekers.
Indeed, when Immigration Secretary Peter Heydon wrote in 1970 that Australia ‘has consistently and deliberately avoided accepting the idea of political asylum’, he did not explain its reserve in terms of a fear of losing sovereign powers over immigration. Rather, he attributed it to a desire to avoid ‘situations of tension with governments from which political refugees flee’.222 Why he would say this becomes clearer in the next chapter, where evidence of the influence of foreign policy considerations on asylum issues becomes even stronger.

222 Heydon to Minister for Immigration, 23 Apr 1970, p 7, NAA A6980 S250089. According to Heydon, ‘The Australian Government has consistently and deliberately avoided accepting the idea of political asylum. We have never admitted that we need to take a positive attitude about it … Initiation of a policy on political asylum would probably be for the Minister for External Affairs especially as our reserve on the matter has been based on avoidance of situations of tension with governments from which political refugees flee’. See also Heydon to McGinness, 31 Mar 1970, NAA A6980 S250089. Heydon was commenting on an article on Australia’s asylum policy by Palfreeman (1970).
CHAPTER THREE: ASYLUM VALUES – THE ARCHIVAL RECORD ON PRACTICE

What is often said of men may well be said of policies – no policy is an island. Every policy is part of a wider mosaic of the goals and objectives which a nation sets itself. (AJ Forbes, Minister for Immigration, 1972)

In the previous chapter, a study of Australia’s participation in post-World War Two international instruments on asylum, including the Refugees Convention, revealed a strong desire to preserve sovereign powers over immigration, extending to power over the grant and conditions of asylum. Among the more obvious motives was a desire to maintain selective or restrictive immigration practices, which at the time included practices aimed at keeping Australia white.

During these early post-war decades Australia also had to respond to numerous ‘real life’ asylum situations, in which matters of policy principle were put to the test. In this chapter we examine several of these situations, seeking further insights into the values political leaders brought to them. The chapter begins by considering Australia’s response to asylum seekers during World War Two, many of whom were Asians. It then turns to examine how asylum issues were handled during the 1956 Melbourne Olympics, which took place in a time of international tension due to the cold war and communist activity in the region. Finally, it explores how Australia managed the flow of asylum seekers from West New Guinea into PNG, from the time of West New Guinea’s transfer to Indonesian control in 1963 to when Australia withdrew from PNG after it became self-governing in 1973.

WARTIME REFUGEES

During World War Two, some 15,000 people from neighbouring countries sought asylum in Australia, including about 6,000 non-Europeans, mostly Chinese, Indonesians

---

1 ‘Immigration policies for Australia’, address to the Australian and New Zealand Association for the Advancement of Science, Sydney, 14 Aug 1972, pp 1-2, NAA A5882 CO1076.
2 As noted in the previous chapter, West New Guinea is now the Indonesian province of Papua, also previously known as West Irian or Irian Jaya (and sometimes also called West Papua).
and Malays. Some were crew of ships stranded in Australian ports, others evacuees from East Timor, PNG and the Pacific Islands, and still others people who arrived unannounced in naval craft or by other means. It was Australia’s first experience as a country of first asylum, and as a country of asylum for Asian refugees, at least in any numbers.

All of the refugees were granted temporary residence, irrespective of race, and often in ad hoc fashion. After the war Arthur Calwell, the Minister for Immigration, claimed their entry was allowed ‘in the interests of humanity’ and ‘purely on compassionate grounds’, but in the circumstances there was really little alternative. The refugees were allowed to find employment, and many were assisted with housing and allowances for basic necessities, including child endowment (King 2005). However, while the government was open to the possibility that any of the European refugees of good character might eventually gain permanent residence, the sanctuary provided to the non-Europeans was on the understanding that they would stay only as long as the war lasted. As Calwell later complained,

In 1943, Cabinet decided that all the refugees should leave Australia by 1945. However, in 1945, Cabinet said, in effect, ‘Well, conditions are still disturbed in the world. We shall allow the refugees to remain until June 1947’ … I gave some exemptions for various purposes after 1947, but all the time, I indicated to the persons concerned that a final date for their departure had to be fixed … They are not staying here permanently. I repeat that. A time had to be fixed,

---

1 In 1949 the Minister for Immigration put the number at 5,473 (Calwell, CPD (Reps), 9 Feb 1949, vol 201, p 61), however Blackburn (2001: 103) puts the number at 6,269. The latter estimate seems likely to be the more accurate, going by Immigration figures on the overall number of non-Europeans admitted during the war years, which spiked considerably compared to previous years (see Palfreeman 1967: 149).

2 Where possible, the non-Europeans were issued a certificate of exemption from the dictation test, as was the practice in regard to the entry of other non-Europeans for a limited period, eg for business or study (the dictation test at that time being the method used to screen out people who were unwanted immigrants without being overtly discriminatory). However, in view of the variety of means and places of arrival of the refugees, some were never issued with this certificate, a fact that, as noted below, was later to become a legal stumbling block to the government when it sought to remove the refugees after the war.

3 CPD (Reps), 9 Feb 1949, vol 201, p 60.

4 CPD (Reps), 9 Jun 1949, vol 202, p 811.

and if I had not been so considerate, I would have none of the problems and none of the headaches that I have since acquired.  

After 1945, most of the wartime refugees did in fact leave Australia, although in some cases from what seems to have been forceful persuasion and despite possible new risks in their homelands. For example, in what the government itself described as ‘an extremely delicate’ operation’, around 1,400 Indonesians were repatriated in November 1945 on the Esperance Bay, escorted by HMAS Arunta and armed guards. According to the government, ‘the great majority had been actuated by political motives’ in leaving their ships or refusing to carry on work for the Netherlands authorities, and it was ‘not therefore disposed forcibly to return them to their own territory’. Indeed, it claimed to have given them the option of ‘deportation to some Australian territory’ – presumably PNG – rather than the Dutch East Indies. Nevertheless, it was ‘insistent that they should comply with Australian immigration laws and this meant that they had to leave Australia’. By 1949 Calwell was to claim that,

Since the conclusion of the war, we have repatriated 3768 Indonesians [all to ‘republican territory’], including 1000 women and children. Very few had to be deported; practically all of them went willingly. There were 1587 Chinese, the vast majority of whom voluntarily returned to their own country. There were 100 Malays, most of whom returned voluntarily … The Australian Government not only repatriated these persons after the war, but it also paid the cost of doing so … Australia has expended approximately 100,000 pounds in this way. The Government has used Manoora for repatriating refugees, and also Esperance Bay. Marella has carried refugees to Manilla, and Cheshire has been used in repatriating Chinese.

However, Calwell’s ‘headaches’ derived less from these repatriations than the government’s efforts to remove some 900 Asians and Eurasians who sought for various

---

8 CPD (Reps), 5 July 1949, vol 203, p 1942.
10 Calwell claimed that he ‘refused to send the Javanese back to be mishandled by the Dutch’; CPD (Reps), 5 Jul 1949, vol 203, p 1946.
11 CPD (Reps), 9 Feb 1949, vol 201, p 61.
reasons to stay permanently in Australia. Despite the government gaining unfettered power to remove them by passing the War-Time Refugees Removal Act in July 1949, and sustained efforts by Calwell to do so, many ultimately achieved their goal, due mainly to three factors: public support, legal challenges, and the election of the Menzies government in December 1949, which opted for a less confrontational approach than its predecessor.

Many of the values thought at stake in the effort to remove these wartime refugees can be seen by comparing comments made about them in parliament by various political

---

12 The figure of 900 is taken from Palfreeman (1967: 37), drawing on departmental figures. However, estimates vary, eg in 1949 Calwell spoke of 800 refugees still in Australia (CPD (Reps), 5 Jul 1949, vol 203, pp 1932 & 1953), while in 1950 Holt said there were about 600 (CPD (Reps), 24 Feb 1950, vol 206, p 96). Commentators (eg York 2003, Price 1990a, Palfreeman 1970) put the number between 600 and 1,000.

13 Many had developed attachments in Australia, including through employment and marriage, or faced uncertain and precarious situations on return to their places of pre-war residence. Sympathy for their cause came initially from church groups, concerned, for example, about family break-ups (Dodd 1964), but also grew amongst the media, unions and others; see, for example, editorial, West Australian, 15 Dec 1948, NAA A433 1959/2/25; Secretary, Building Workers Industrial Union to Minister for External Affairs, 16 Sep 1949, NAA A1838 932/1/1; Federal Secretary, Australian National Committee for the UN to Minister for External Affairs, 13 Sep 1949, NAA A1838 932/1/1; petition to the UN Secretary-General from Australian wives of Chinese residents subject to deportation under the War-Time Refugees Removal Act 1949, 20 Sep 1949, NAA A1838 932/1/1.

14 The best known case involved Mrs Annie O’Keefe, an Ambonese woman, where the High Court uncovered technicalities in the Immigration Act relating to her not having sat and failed a dictation test, and the length of time between her arrival and the attempt to deport her, that prevented her deportation and those of other wartime refugees, as well as rendered ineffective the certificates of exemption granted many others; see CPD (Reps), 9 Feb 1949, vol 201, pp 56ff. The Immigration Bill 1949 and War-Time Refugees Removal Bill 1949 were designed to address the problems uncovered by the High Court; see CPD (Reps), vol 202, pp 806ff. Even after this legislation came into effect on 12 July 1949, DI officials reported that many of the wartime refugees had ‘dug in their heels’, and care was being taken to follow correct deportation procedures because of the risk of further court appeals; internal DI note, 12 Aug 1949, NAA A446 1962/67351; Heyes to Tange, 20 Oct 1949, NAA A1838 932/1/1. In December 1949, in Koan Wing Lau v Calwell, involving some forty-eight Chinese wartime refugee appellants, the High Court upheld the validity of the War-Time Refugees Removal Act and related amendments to the Immigration Act.
leaders, with comments made about the people being resettled in Australia under the refugee resettlement scheme that the Labor government had initiated in 1947 in conjunction with the IRO. Significantly, the latter scheme had cross-party support, and facing an ambivalent public, leaders on both sides of parliament were working hard to have Australians welcome the new arrivals. Among other things, they stressed the quality of those selected and their importance to Australia’s defence and development. They also appealed to ‘true’ Australian qualities like the ‘fair go’, neighbourly sentiment, and pride in helping to relieve Europe’s humanitarian problems. To quote the Labor chairman of the Immigration Advisory Council, The most serious difficulty of all is that of conditioning the Australian mind to acceptance of the immigrants … The Parliament of the Commonwealth and the Australian Government have a duty to ensure that the frightening isolationist talk shall not take hold of the people, and lead them astray about the wisdom of the migration policy … Our principal concern in migration is .. conditioning the minds of Australians to an acceptance of the newcomers as Australians and to giving them a ‘fair go’ after their arrival here.

It was a different story for the wartime refugees, of whom little good was said, of they or their supporters, and who became a source of political sniping and wedge politics.

As summarised in Table 3.1, to allow the wartime refugees to stay in Australia was portrayed as threatening public values relating to immigration, law, security, public

---

15 The leaders surveyed included the Labor leaders Chifley, Calwell and Haylen (chairman of the Immigration Advisory Committee), the Liberal leaders Menzies and Holt, and the Country Party leader McEwen.

16 See, for example, Calwell, CPD (Reps), 6 Oct 1948, vol 198, p 1280; Calwell, CPD (Reps), 8 Sep 1949, vol 204, p 141; Holt, CPD (Reps), 19 Feb 1953, vol 221, p 145.

17 Haylen, CPD (Reps), 15 Jun 1949, vol 202, pp 998, 1000. See also Calwell, CPD (Reps), 28 Nov 1947, vol 195, p 2927.

18 Only the independent member for Bourke, Mrs Blackburn, openly urged the government to grant permanent residence to all of the wartime refugees, claiming that it would follow British tradition; CPD (Reps), 30 Jun 1949, vol 203, pp 1881-4, 1953. Her attempt to move an amendment to the War-Time Refugees Removal Bill 1949 that would have given the refugees rights of appeal also failed; CPD (Reps), 5 Jul 1949, vol 203, pp 1949-50.
morality, welfare, national development and national character, while resettling refugees under the IRO scheme was portrayed as consistent with or strengthening these values.

Table 3.1: Values in the political debate on wartime refugees

<table>
<thead>
<tr>
<th>Wartime refugees</th>
<th>Resettled refugees</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>a) values threatened if let stay</strong></td>
<td><strong>a) values enhanced by arrival</strong></td>
</tr>
<tr>
<td>Immigration policy integrity (eg breach White Australia policy, set bad precedent)</td>
<td>Immigration policy integrity (eg selected, screened)</td>
</tr>
<tr>
<td>Law (eg exploit legal loopholes, challenge immigration law)</td>
<td>Law (eg consistent with immigration legislation)</td>
</tr>
<tr>
<td>Security (eg ‘fifth columnists’, attract more unauthorised arrivals, open ‘floodgates’)</td>
<td>Security (eg boost defence capacity, satisfy other countries that empty spaces are being developed)</td>
</tr>
<tr>
<td>Public morals (eg law-breakers, war-dodgers, ships’ deserters, suspect health and morals, communists, recalcitrants)</td>
<td>Public morals (eg freedom-lovers, fine personal qualities, law-abiding)</td>
</tr>
<tr>
<td>Welfare (eg undeserving, reneged on obligation to leave, abusing Australia’s hospitality)</td>
<td>Welfare (eg deserving, victims of Nazi camps or Stalinist tyranny)</td>
</tr>
<tr>
<td>National development (eg import labour, cultural, racial, social problems)</td>
<td>National development (on contract, orderly: numbers varied with economic &amp; social conditions)</td>
</tr>
<tr>
<td>National character (eg supported by hypocrites, sentimentalisits, seekers after cheap labour, communists, opportunists)</td>
<td>National character (eg supported by true Australians: generous, humane, compassionate, tolerant, responsible)</td>
</tr>
<tr>
<td><strong>b) values enhanced if let stay</strong></td>
<td><strong>b) values threatened by arrival</strong></td>
</tr>
<tr>
<td>Immigration policy integrity (eg may lessen international criticism of White Australia policy)</td>
<td>Nil</td>
</tr>
<tr>
<td>Public administration (eg legislation permits ministerial discretion, benefits of merit-based decisions)</td>
<td></td>
</tr>
<tr>
<td>Family unity, humanitarianism</td>
<td></td>
</tr>
</tbody>
</table>

Table 3.2 provides a sample of the different ways in which the groups were portrayed. It contains two statements by Calwell, one in 1949 about eleven Chinese wartime refugees who were about to be deported, the other in 1948 about 425 Yugoslavs coming to Australia after four years in a refugee camp in Egypt.
Table 3.2: Contrasting images: wartime refugees and resettled refugees

‘During the last three years and more, these people have been asked repeatedly to put their affairs in order pending a return to their homeland … Methods other than that of securing the offenders and placing them on a boat or aircraft have been ineffective … They hold the immigration laws of this country in contempt and evade and defy them in ways that would not be tolerated by any country in the world. Many of the Chinese who now form the hard core of resisters to our immigration laws are not, of course, new law breakers. They reached Australia as ships’ deserters who refused to go to sea again and left all the risks of war-time ocean transport to their more courageous countrymen and allies … Sympathy with this particular group of Chinese is wasted. Their attitude in war and peace is in sharp contrast to that of their fellow countrymen who, as merchants, traders and students, are in Australia legitimately and are held in high esteem by the Australian community’.19

‘When the migrant ship Wooster Victory arrives in Melbourne on Monday it will bring realisation to the dreams and hopes of an exceptionally gallant band of migrants … It is a tribute to their mettle that they have not only survived these hardships, but have flourished and are in excellent health, eager to start life again in a new land. They should make a valuable contribution to Australia. Most of the men were formerly small farmers, industrious and experienced. The wives and older girls are exceptionally skilled in fine embroidery, weaving and lace-making – their peasant gala costumes are models of delicate workmanship – and the children look like real Australian bush kiddies – strong, tanned and healthy’.20

The government’s efforts to remove the wartime refugees attracted widespread criticism in overseas as well as domestic circles, with External Affairs being particularly concerned about damage to Australia’s standing in the region (Gurry & Tavan 2004, Blackburn 2001). However, the Prime Minister, Ben Chifley, chose to back Immigration over External Affairs, on the grounds, according to one observer, that it was easier for Australians to ‘appreciate Mr Calwell’s single-mindedness than Dr Evatt’s concern for a good neighbour policy’ (in Dodd 1964: 26).

And for Calwell, there certainly didn’t seem to be any sense of concern about Australia’s international reputation, on one occasion stating,

19 Press statement of 24 Aug 1949, NAA A1838 932/1/1. In a rare defence of the wartime refugees, Menzies at one stage in debate on the War-Time Refugees Removals Bill painted a different picture:

‘There was a time during the war when we shared a common danger with these people. They had all met the shock of the enemy’s attack long before we had. Many of them served in the armed forces. Nevertheless, they are now to be lumped together as something that must be “removed” from Australia’; CPD (Reps), 16 Jun 1949, vol 202, p 1139.

I am answerable to the people of Australia and to the people of no other country for my actions as Minister of Immigration. The elected representatives of the Australian people by a unanimous vote recently approved fresh legislation to enable the immigration policy, which has had the unqualified support of the overwhelming majority of the people of this country, since Federation, to be fully implemented … No threat or criticism or pressure by foreign nations will deter me from giving effect to the expressed will of the people of this country who alone have the right to determine who shall be admitted to our shores and on what conditions they may be permitted to remain.  

Nor was this an area where Calwell had much time for the views of the judiciary. For example, after the High Court’s decision in a case involving the proposed deportation of a Mrs O’Keefe and her children – which exposed a loophole in the Immigration Act later closed by the War-Time Refugees Removals Act – he argued that ‘as the result of legal interpretation, Australia has for the first time in her history the core of a problem that has caused so much tragedy, bloodshed and murderous strife in other countries’.  

Not that he was alone in his criticism of the court’s decision. The leader of the opposition, Robert Menzies, also expressed displeasure that the judges had chosen to focus on legal detail rather than parliamentary intent. As he put it,

The decision of the High Court – a majority decision – produced a result that none of us had ever thought of before. It produced this state of affairs: that the act meant something that no one in the Parliament ever understood it to mean in the course of 48 years of administration.

---

21 Calwell to Coughlan, Chairman, Australian Citizens’ Committee, 7 Oct 1949, NAA A1838 932/1/1. In Parliament Calwell stated, ‘It would be tantamount to abdicating a sovereign right if we failed to take action that would show conclusively that it is solely for the Government of Australia to say who shall enter our shores and under what conditions they shall be permitted to remain’; CPD (Reps), 9 June 1949, vol 202, p 814. The view that Australian immigration policy was a purely domestic affair was a universal refrain, endorsed, for example, by Chifley (eg CPD (Reps), 26 May 1949, vol 202, pp 210-11; CPD (Reps), 31 May 1949, vol 202, pp 297-8); Evatt (eg CPD (Reps), 7 Sep 1949, vol 204, p 25) and Menzies (eg CPD (Reps), 15 Feb 1949, vol 201, pp 269-70).

22 ‘White Australia policy: Mr Calwell says he will maintain it’, The Age, 24 Mar 1949, NAA A433 1950/2/25.

23 CPD (Reps), 5 Jul 1949, vol 203, pp 1939-40.
In the government’s eyes, humanitarian principles were one thing, public administration clearly another. For example, again of the O’Keefe case, Calwell said,

Mrs O’Keefe and her children are not important; it is the precedent that is important. If we allow these people to stay we shall open the flood-gates to any Asiatics who want to come here.24

And more generally,

It is impossible to run a government policy of this kind unless it is run entirely impersonally. If we were to allow compassionate considerations to influence our judgment we should never refuse entry to this country to anybody from the poverty-stricken countries to the north of us … We do not adopt compassion towards these peoples, in the mass, simply and solely because they are out of sight, and, apparently, ‘out of sight is out of mind’. But when a particular case crops up, the Opposition says, ‘Let them come in’. If such people are already in the country, the Opposition says, ‘Let them stay’. If we keep on establishing precedent after precedent of that kind very soon we shall have all precedents and no policy.25

24 CPD (Reps), 9 Feb 1949, vol 201, p 63.
25 Calwell, CPD (Reps), 5 Jul 1949, vol 203, p 1937. Concessions in one area were believed to have implications in others, eg speaking of his refusal to allow Australians of Chinese origin to bring their spouses to Australia, Calwell said, ‘If I agree that refugees who were washed up on these shores during the war may remain here, how can I deny to Australians of Asiatic origin, to whom we have given all the rights and privileges of Australian citizenship, the right to bring in their wives and husbands from Asiatic countries?’; CPD (Reps), 5 Jul 1949, vol 203, p 1941. Calwell’s view of good administration was supported by Haylen, Chairman of the Government’s Immigration Advisory Council: ‘It is all very well to make excursions into spirituality and liberalism – spelt with a small “l” – but the Minister’s job is to administer the law. If too much publicity has been given to the way in which the law has been administered, it is the fault not of the Minister but of those who have seized the situation in order to obtain cheap emotional effects. Clergymen have decorated their sermons with appeals about humanity, when next door are seething slum, the inhabitants of which are much closer to them than are the evacuees who are being sent back to their own countries in accordance with the arrangement into which they themselves entered. It is beside the point for people who adopt a hypocritical, super-sensitive attitude to the White Australia policy to charge the Minister with committing an administrative faux pas. Such attacks may do very well for a press story or to adorn a sermon, but deep in the hearts of all Australians is a feeling that we should make no concession on the White Australia policy’; CPD (Reps), 12 Oct 1949, vol 205, pp 1264-6.
However, if the wartime refugees created difficulties for the government, they also created difficulties for the opposition. For while the Liberals and the Country Party agreed with the government on the broad outline of immigration policy, they were conscious of the damage being done by the zeal with which Calwell was prepared to enforce it. Rather than defend the refugees as a group, they therefore took up individual cases, and advocated the minister use his discretionary powers to smooth the sharper edges of the law and reduce adverse publicity.\(^{26}\) In their view, the circumstances of the wartime refugees were exceptional, and decisions about their future should give weight to values other than merely the integrity of immigration policy, such as compassion, family unity,\(^{27}\) and international opinion. Speaking, for example, on the O’Keefe case, Menzies praised Calwell’s work in resettling refugees from Europe, but added,

That fine work … can be marred hopelessly if, at the same time … the Minister takes administrative steps which are calculated only to raise up hatred against [the White Australia policy] and to put it under unnecessary challenge in other parts of the world … A sound policy … must be applied by a sensible administration, neither rigid nor peremptory, but wise, exercising judgment on individual cases, always remembering the basic principle but always understanding that harsh administration never yet improved any law but only impaired it, and that notoriously harsh administration raises up to any law hostilities that may some day destroy it.\(^{28}\)

\(^{26}\) See, for example, Menzies, CPD (Reps), 9 Feb 1949, vol 201, pp 67-8, CPD (Reps), 16 Jun 1949, vol 202, pp 1133ff, CPD (Reps), 5 July 1949, vol 203, p 1940; McEwen, CPD (Reps), 16 Jun 1949, vol 202, p 1148; Holt, CPD (Reps), 9 Feb 1949, vol 201, p 60. Dodd (1964: 53) reports a public opinion poll in January 1948 about fourteen Malay seamen about to be deported, in which fifty-seven per cent of those surveyed said they should be allowed to stay, with only thirty per cent agreeing that they should be sent home. He notes (at p 36) that the war historian CEW Bean was among many respected church and community leaders critical of the deportations, accusing the Government of ‘trying to enforce national policy by applying pre-war methods which the war has for two reasons rendered obsolete or worse: treating men who were our allies as our enemies, and the changed nature of the relationship between East and West’.

\(^{27}\) ‘If the administration of any law results in the law of God being destroyed, that is bad administration. If the administration of a law breaks up families, then such administrative acts cannot be supported’; Spender, CPD (Reps), 23 Feb 1950, vol 206, p 82.

\(^{28}\) CPD (Reps), 9 Feb 1949, vol 201, pp 67-8. Alluding to the many opportunities provided by the *Immigration Act* for the exercise of ministerial discretion, Menzies added (CPD (Reps), 16 Jun 1949, vol 202, p 1137), ‘The possession of a discretion usually means that [Calwell] could say to himself: “Are
Nevertheless, open to accusations of being soft on the White Australia policy, in July 1949 the opposition voted with the government to pass the *War-Time Refugees Removals Bill*, addressing the legal loopholes exposed by the O’Keefe case and others, and allowing deportations to proceed. In debate on the bill, Menzies criticized only its ‘internationally offensive’ title, and noted that it still imported the scope for ministerial discretion by using the word ‘may’ rather than ‘shall’ in the phrase, ‘The Minister may make an order for the deportation of a person’.

It was left to External Affairs to try to explain to an international audience and other interested parties how the new legislation could be reconciled with the UDHR, which the UN had passed only six months earlier. Rather than try to claim that it was purely a matter of domestic jurisdiction (since the UDHR relates to domestic matters), or that the UDHR was not legally binding (since inference might be drawn that the new legislation would be forbidden if it were), officials agreed to say simply that ‘what is being done is not contrary to the Declaration’. However, while this may have become the departmental line, their political masters were not always so diplomatic, with Evatt openly declaring that,

---

30 CPD (Reps), 5 Jul 1949, vol 203, pp 1950-1.
31 Internal note to Tange, 4 Oct 1949, NAA A1838 932/1/1.
32 See, for example, Tange to Federal Secretary, Australian National Committee for the UN, 17 Oct 1949, NAA A1838 932/1/1.
There is no relationship between the Declaration of Human Rights, or any clause of it, that I am aware of and the exercise by a country of its national right, which has always been recognised in every country, to determine the composition of its own people.\(^33\)

On passage of the *Removals Act*, Immigration resumed its efforts to deport the remaining wartime refugees.\(^34\) However, after two months, presumably to avoid negative publicity in the run-up to the federal elections in December, Calwell quietly told his department to cease action pending further notice,\(^35\) although in public he continued to defend the removal program. By contrast, Menzies campaigned on the promise that a Liberal government would consider the claims of any wartime refugee wanting to stay on their merits.

As it happened, the government did change, and Harold Holt, the new Minister for Immigration, announced that while there would be no change in administrative procedures or the White Australia policy, the wartime refugees would not be deported except in special circumstances.\(^36\) Efforts to deport a few individuals on grounds of poor health, character or security concerns continued,\(^37\) but most were eventually

\(^{33}\) CPD (Reps), 7 Sep 1949, vol 204, p 11.

\(^{34}\) The Act came into effect on 12 July 1949. It contained a sunset clause, limiting the power to issue deportation orders under it to twelve months (although actual deportation could occur after that period). This was believed sufficient time to complete deportations, whilst making it clear that the Act was limited to only wartime refugees and was not intended to have a more general application against Asians who came to Australia under the normal operation of the *Immigration Act*; Calwell, CPD (Reps), 5 Jul 1949, vol 203, p 1967.

\(^{35}\) Heyes to State CMOs, 9 Sep 1949, NAA A446 1962/67351. During those two months, 529 deportation orders were issued under the *War-Time Refugees Removal Act* and another 102 under the *Immigration Act*. There were multiple arrests and at least nine Chinese were deported to PNG; see, for example, Heyes to State CMOs, 8 & 25 Jul 1949, NAA A446 1962/67351; memo to SMO, 23 Aug 1949, NAA A446, 1962/67351; petition of 20 Sep 1949 to the UN Secretary-General from Australian wives of Chinese residents subject to deportation, NAA A1838 932/1/1; Heyes to Tange, 20 Oct 1949, NAA A1838 932/1/1.


\(^{37}\) These efforts were complicated by the communist takeover in China, and it is not clear how successful they proved; see, for example, Burbidge to Heyes, ‘Entry of Chinese nationals into Hong Kong en route
allowed to stay – although still subject to restrictions\(^{38}\) – and a few with Australian family who had been deported were allowed to return.\(^{39}\) The matter received little further media attention. As Menzies had predicted, a few acts of administrative discretion were a small price to pay for keeping immigration policy out of the spotlight.

A similarly discrete approach was adopted to the 600 or so Chinese students, business people and diplomatic staff\(^{40}\) on temporary permits who claimed asylum after the communists came to power in 1949 (Price 1990a). Every effort was made to find them an alternative sanctuary, for example in Taiwan, Hong Kong or Singapore, but where these efforts failed, Holt allowed them to stay, although still only on temporary permits.\(^{41}\) Thereafter, any Chinese admitted for temporary residence who later sought asylum were generally granted it, with the number rising to approximately 850 by 1958.\(^{42}\) However, to avoid Australia acquiring a reputation for leniency, any asylum seekers who entered unauthorised (e.g. ships deserters and stowaways) were, if possible,
deported to their point of departure, or any other port (Palfreeman 1970). Asylum was still not officially part of the lexicon of immigration entry: a refugee had to arrive under some other approved category of entry before they could be recognised as a refugee.

The Menzies government was clearly more inclined than its Labor predecessor to administer asylum policy flexibly and pragmatically, with an eye to foreign as well as domestic policy objectives. However, one aspiration remained constant. As put by Menzies in 1959,

> We desire to organise the future of our own country in our own way. We have witnessed many examples of nations in which a mixture of races has given rise to deep prejudices and almost insoluble social questions ... The whole essence of the matter is that we desire to build up our own population, partly by natural increase and partly by immigration in such a way as to produce as soon as possible an integrated population of a homogeneous kind ... It is the prerogative of every country to decide what shall be the composition of its population and what persons shall be admitted to permanent citizenship.

In hindsight, the antecedents of contemporary asylum positions can be found in Australia’s handling of the wartime refugees. Firstly, despite the operation of the White Australia policy, it was willing, as a measure of last resort, to grant asylum to Asian and other refugees for whom Australia was effectively the country of first asylum. Secondly, it did not see itself obliged to provide any more than temporary asylum until safe repatriation could occur. A grant of asylum was not automatically identified with a

---

43 Exceptions obviously occurred, eg in 1966 Bill Hayden claimed that the government had allowed twenty-nine Chinese ships deserters to stay only because ‘it was caught up in its own hysterical and emotional anti-communist policies and so was stuck with these people’; CPD (Reps), 27 Sep 1966, vol 53, p 1313.

44 As Palfreeman (1967: 64) notes, ‘the entry policy did not extend to political refugees: “they are not admissible as such and may only be admitted if they genuinely comply with the conditions laid down under the general policy”. That is, if they came in as assistants or merchants, or in some other approved category’.

45 Statement on Australian Immigration Policy, Honolulu, 9 May 1959, NAA A9738 PMS/024. Years later Menzies wrote, ‘it is one of the attributes of sovereignty that any nation may determine for itself how far and on what principles other people may enter or become citizens’ (Menzies 1967: 225).
grant of permanent residence, for either European or non-European refugees. Once the need for protection had ceased, as it did for most of the wartime refugees when the war ended, normal immigration policy and practices applied. Finally, while it might recognise an individual’s need for asylum, it did not automatically see Australia as the one who should meet that need, especially in the case of refugees who did not meet immigration criteria.

THE 1956 OLYMPICS

The government’s accession to the Refugees Convention in 1954 went unnoticed in Australia, although, like the wartime refugees a few years earlier, the grant of asylum in April of that year to Vladimir Petrov, Third Secretary in the Soviet Embassy, attracted considerable media interest and controversy. However, once this died down, asylum issues largely disappeared from the public eye for the next two decades. Indeed, in 1969 the then Immigration Secretary Peter Heydon was to claim no one had been granted asylum since Petrov.46

As Neumann (2004: 64) notes, Heydon was wrong, for ‘Dozens of people “did a Petrov” after Petrov’, and the number who effectively obtained protection in Australia was probably in the hundreds if not thousands.47 Neumann attributes Heydon’s comment to Immigration believing that only defectors with intelligence or propaganda value like Petrov were ‘true asylum seekers’. However, as will be seen, in the 1950s

46 Heydon to Minister for Immigration, 9 Sep 1969, NAA A6980 S250630. Heydon’s brief was associated with a question in Parliament about the number of people granted political asylum in the previous five years; Mulvihill & Rankin, CPD (Sen), 17 Sep 1969, vol 42, p 913. At the time, no records were kept by any department of the numbers applying for asylum, but it was agreed by External Affairs, Immigration and ASIO that there had been at least twenty formal applications during the period; internal DI note by Treloar, 25 Aug 1969, NAA A6980 S250630; internal DI note by Heydon, 10 Sep 1969, NAA 6980 S250630.

47 Reliable estimates are not possible because, as the DEA explained in 1962, ‘Many illegal entrants in Australia – mainly from Eastern Europe – who might have applied for asylum, are dealt with under the provisions of the Immigration Act and permitted to remain in Australia’; Landale to Minister for External Affairs, 11 Apr 1962, NAA A1838 1606/1 Part 1. That year, Heydon refused to estimate numbers on the grounds that ‘there are in fact a number of cases of political asylum having been granted which have not been made public’; handwritten note on Barnett to Forsyth, 30 Mar 1962, NAA A1838 1606/1 Part 1.
and 1960s Immigration was only a bit player in Australia’s ‘real life’ asylum situations, with policy directions and decisions on specific applications largely in the hands of External Affairs. And as Heydon’s successor pointed out, after Petrov External Affairs ‘invariably … [took] the view after examining each case that the request should be decided on the same basis as any application to settle in Australia’.\(^{48}\) In other words, rather than being refused protection, asylum seekers were channelled into normal migration and temporary entry streams, thereby avoiding or diffusing any political sensitivities that might have been aroused by an overt grant of asylum. Those of European background, mainly from Soviet-bloc countries, were generally allowed to settle permanently. As noted earlier, non-Europeans, mainly from communist China, were generally granted temporary residence permits, at least initially. Many potential asylum applicants were almost certainly also among the hundreds of unauthorised arrivals each year who simply avoided officials and disappeared into the community.\(^{49}\)

After Petrov, the first potentially major asylum situation came in the form of the Melbourne Olympics in 1956. With early indications that the Games might elicit some

\(^{48}\) Armstrong to Minister for Immigration, 16 Jul 1973, NAA A6980 S250089. In 1962 an Immigration official wrote, ‘although technically the question of political asylum is one for [the Minister of Immigration] to decide, in practice it was decided by DEA in consultation with ASIO’; Barnett to Forsyth, 30 Mar 1962, NAA A1838 1606/1 Part 1. Today, the option of using a visa other than a protection (refugee) visa to grant asylum in order to avoid diplomatic or other political complications still exists, but is very rarely used.

\(^{49}\) An estimated 5,635 seamen deserted in the five years from 1959-60 to 1963-64, while deportations in the same period totalled only 335, or about fourteen per cent of the number deserting; Opperman, CPD (Reps), 30 Oct 1964, vol 44, pp 2598-99. Before 1 June 1964, such unauthorised entrants could apply for and be granted permanent residence if able to satisfy normal migrant entry criteria, subject to having had a clear record since entry. After that date, seamen who entered unauthorised were generally deported (Opperman, CPD (Reps), 29 Oct 1964, vol 44, p 2555), but the number who continued to desert and were either granted entry or remained unlocated, remained high. For example, in 1971 the Government advised that 2,315 seamen had deserted in the three years from 1968 to 1970. Any requesting asylum were reported to have had their cases ‘resolved on the basis of normal immigration considerations’, but many of the deserters were also apparently still at large; Rankin, CPD (Sen), 16 Mar 1971, vol 47, p 555.
applications for asylum,50 External Affairs and the Australian Security Intelligence Organization (ASIO) initiated a review of the principles and methods to apply in handling asylum seekers of high profile. Immigration was content to take a back seat. In its view, the sorts of people being considered – Olympic Games visitors, members of visiting trade, cultural or other delegations, members of diplomatic and consular missions in Australia, people of influence or authority in Asian countries threatened by communist insurgencies, and defectors from communist countries who sought asylum at Australian or other diplomatic posts abroad – were primarily a matter of foreign policy and national security, and that the grant of asylum in these cases was probably inevitable, if only because public opinion was likely to be sympathetic.51 That said, in regard to Asian leaders Holt agreed with his department that

… Australia should not be used as a dumping ground, as in the last war, for all types of non-European refugees, and that the number at least in the initial stages should be limited to, say, fifty families.52

In October 1956, just before the Olympics began, Casey got Cabinet’s approval for ‘the principle that political asylum and refuge should be available in appropriate instances’ to people in the above categories.53 Cabinet also accepted three subsidiary principles: firstly, that if the family head was granted asylum, so too would wives and minors; secondly, that ‘in special circumstances where close relatives remain in the country of origin as points of communist pressure against the head of family’, they could be included in the grant of asylum; and thirdly, that the government would accept some financial responsibility for those granted refuge.54

50 Several inquiries about asylum were made of officials in the months preceding the Games; Heyes to Secretary, DEA, 17 May 1956, NAA A1838 TS 1606/2 Part 1; Spry to Menzies, 10 Oct 1956, attachment to Casey, Cabinet submission no 398, ‘Political asylum in Australia’, 4 Oct 1956, NAA A4926 398.
51 Heyes to Minister for Immigration, circa Jun 1956, NAA A6980 S250089.
52 Internal DI background paper, 23 Dec 1969, NAA A6980 S250089.
54 In regard to financial assistance, Holt and his department took the view that ‘there being no reason to encourage refugees to seek asylum, refugees generally should not be granted any special Commonwealth assistance except as may be necessary for the purposes of ASIO’, and preferred instead simply to help put a person in touch with ‘sympathetic compatriots’; Heyes to Minister for Immigration, 9 Aug 1956, NAA
Cabinet also agreed to procedures for handling asylum applications. The Director-General of ASIO, with the help of a screening committee of representatives from ASIO, External Affairs and Immigration, would handle applications from all of the above groups, except for applications from Asian leaders, which were to be handled by External Affairs, consulting with Immigration and ASIO where necessary.  

Recommendations of asylum would go to the Minister for Immigration for formal approval and the issue of appropriate permits. If asylum were granted, ASIO would take responsibility for the reception and welfare of anyone with intelligence value, External Affairs would take responsibility for Asian leaders, and Immigration the rest. Cabinet emphasised the need for flexibility and a low profile approach: ‘as a general rule any public references to specific cases which might arise should treat them as unexciting incidents which were bound to occur’. Perhaps mindful of the controversy generated by the wartime refugees and Petrov, major public statements about asylum cases were to be made only by the Prime Minister or Minister for External Affairs. If the Minister for Immigration made any statement, it was to be only after consultation with External Affairs and ASIO. Basically, asylum issues were considered too politically sensitive to be left to Immigration, whose main role was limited to issuing a permit to stay that would typically disguise the real reason for admission.

Some fifteen years later, Peter Heydon claimed that the above decisions had been pervaded by

\[\ldots\ \text{a clear concern by the Government to avoid accepting the concept of political asylum (partly because the granting of political asylum often involves embarrassment with governments of the}\]

---

55 In respect of asylum seekers during the Games, Menzies approved Spry’s recommendation that wherever possible they be persuaded to defer making a break until after the competition in order to avoid the risk of an entire team withdrawing in protest, but to provide protection immediately where a person’s position had been compromised and their safety was at risk; Spry to Menzies, 10 Oct 1956, attachment to Cabinet submission no 398, ‘Political asylum in Australia’, 4 Oct 1956, NAA A4926 398.

56 Cabinet decision no 487, 16 Oct 1956, NAA A4926 398.

countries from which the grantees come). Evidence of this caution is seen in the fact that the Government appears only to have seen one positive element in political asylum, viz. the intelligence value of some applicants for it. ASIO was given an important role in the procedure for this reason as well as because of its primary function in protecting Australia against the infiltration of possible agents.58

However, his analysis is a little simplistic, and the notion that Cabinet saw intelligence as being the only positive value in asylum an exaggeration. True, in its submission External Affairs drew a distinction between ‘refugees’, an umbrella term covering applicants for asylum in general, and ‘defectors’, which referred to refugees specifically of intelligence interest,59 and devoted most of its attention to the latter.60 But if Cabinet in 1956 had a particular interest in the intelligence and propaganda value of asylum seekers, it is hardly surprising in view of the pressing reality of the cold war and the growth of communist movements in Asia. Further, ministers are just as likely to have shared Casey’s own view, as expressed in the submission, that ‘Although the grant of asylum rests primarily on humanitarian grounds, political factors sometimes provide an ancillary argument in favour of it’.61 All, too, knew that the head of ASIO, Brigadier Spry, thought the Olympics would elicit few defectors, and that the majority of asylum seekers would, in his terms, ‘merely be “refugees” whose applications for asylum would be considered on purely humanitarian grounds’.62 Finally, the submission made it clear at the outset that it did ‘not purport to deal with the subject [of asylum] except in a limited compass’, nor attempt ‘to suggest a comprehensive definition of the instances or


60 Of the six categories of asylum seeker covered, four are described as being of potential intelligence or propaganda value (Soviet defectors, satellite country defectors, Asian defectors and Asian leaders). The other two are described as of little intelligence value, but warranting asylum on humanitarian grounds or for their propaganda value (Soviet or satellite refugees and Asian refugees). In the case of Asian leaders, an assurance of asylum in Australia was also seen as a way to encourage them to oppose communism, and, in the event asylum was necessary, a way for Australia to support governments in exile and continued ‘political warfare’; Casey, Cabinet submission no 398, ‘Political asylum in Australia’, 4 Oct 1956, p 3, NAA A4926 398; Tange to Spry, 20 Mar 1956, A7936 B/2/4 Part 1.


62 Spry to Menzies, 10 Oct 1956, attachment to Casey, Cabinet submission no 398, ‘Political asylum in Australia’, 4 Oct 1956, NAA A4926 398; also reference on p 7 of the submission.
ways in which [asylum] might be granted’. In this context, it is unreasonable to expect Cabinet to have been more expansive about its understanding of or commitment to the concept.

The submission does not mention the Refugees Convention, and emphasises the sovereign powers of governments over both the grant and conditions of asylum:

> Every State has absolute discretion concerning the admission of aliens to its territory and thus may not only exclude or expel aliens but admit them, with or without conditions, at will … It also follows that no individual has a right to asylum, and the preparedness of a State to grant it in a particular case depends on its relevant domestic laws.

That said, there are indications that a need for appropriate restraint in the exercise of these powers was recognised. For example, discussing an early draft of the submission at an interdepartmental meeting, the Immigration representative, Dighton Burbidge, queried why it referred to a ‘Soviet or satellite refugee’ as a person who might be considered on humanitarian grounds, but an ‘Asian refugee’ as a person ‘who should be given asylum because of his advantage to us (particularly intelligence) but not on humanitarian grounds’. He said that his minister might find it difficult to order an Asian’s departure if they claimed that their return would result in death, or if a request on humanitarian grounds were publicised. He also noted that Holt had instructed that people should not be deported if their only home was communist China. External Affairs explained it had made the distinction only because it assumed that Immigration ‘would not wish to establish the principle that Asians of this type would be permitted to enter Australia’. Its assumption was not entirely without warrant, since a few weeks earlier Immigration had rejected a proposal by External Affairs for entry of a limited number of Asians for permanent residence, ‘to remove the absolute bar which is offensive to Asian opinion’. However, it seems it was not oblivious to the difference

65 DEA, record of meeting, 26 Jul 1956, NAA A6980 S250089. See also the DI’s record of this meeting dated 31 Jul 1956 on the same file.
66 Holt, Cabinet submission no 247, ‘Conditions of entry to and stay in Australia of persons of non-European race’, 10 July 1956, p 2, NAA A5619 C211.
between a migrant and a refugee, and the meeting agreed that the distinction should be removed in future drafts.

If the 1956 Cabinet decision re-affirmed that asylum could be provided irrespective of race, it also re-affirmed some of the conditions on which asylum would be granted. Asylum granted to Asians ‘should not automatically confer the right of permanent residence in Australia’, and would be controlled by the use of certificates of exemption, renewable if and when necessary. Asylum granted to Europeans could be temporary or permanent depending essentially on migration criteria, for example the former being provided where there was uncertainty about a person’s bona fides.

As it turned out, China did not attend the Games and there were relatively few Asian participants, officials or visitors. Inquiries about asylum came mainly from Hungarians after the crushing of that country’s nationalist uprising by Soviet forces a few days after the Olympic team had left for Melbourne. About sixty people lodged asylum applications. Most opted to go to the United States, which was scouting for people of sporting as much as intelligence or propaganda value. Ultimately, Australia processed only about twenty applications, and granted temporary residence to all on a twelve-month certificate of exemption, pending completion of health, character and security checks. The summaries of the applicants’ interviews provide little evidence of a risk.

---

67 Cabinet decision no 487, 16 Oct 1956, NAA A4926 398. The submission notes that periods of asylum might be lengthy, for example if the country from which a person fled remained under communist control. Under migration regulations of the time, Asians had to have lived in Australia for at least fifteen years as a temporary resident before they could obtain release from the obligation to periodically renew their exemption certificate and become eligible for permanent residence and citizenship; see, for example, Cabinet decision no 300 of 10 Jul 1956 and related submission no 247, ‘Conditions of entry to and stay in Australia of persons of non-European race’, NAA A5619 C211; Cabinet decision no 812 of 11 Jun 1957 and related submission no 669, ‘Grant of permanent residence and citizenship to Asians who have had long residence in Australia but are still under Immigration restriction’, NAA A5619 C211.


69 Stuart to Secretary, DEA, 12 Dec 1956, NAA A1838 1606/4.

70 Committee of Review to Minister for Immigration, 21 Dec 1956 & 31 Jan 1957, NAA A1838 1606/4 (see also NAA A6980 S250089). The applicants included twelve Hungarians, three Rumanians, three Poles and two Yugoslavs. One Hungarian soon returned home, but the others were eventually granted permanent residence; Heyes to Secretary, DEA, 11 Apr 1958, NAA A1838 1606/4.
of persecution, none were assessed as having intelligence value, and the government did not use them for propaganda purposes.\(^{71}\) They therefore appear to have fallen into Spry’s category of refugees granted asylum ‘on purely humanitarian grounds’.

**ASYLUM SEEKERS FROM WEST NEW GUINEA**

If the 1956 Olympics gave cause for the government to reflect for a few brief months on its handling of high profile asylum seekers, the transfer of power in West New Guinea from the Netherlands to Indonesia forced it to engage with more gritty asylum issues for over a decade from the early 1960s. As the administrator of PNG until it became self-governing in 1973, Australia was effectively the country of first asylum for people coming from West New Guinea into PNG, even though immigration regulations ensured that they had no ready access to Australia.

**Asylum seekers from Dutch and UN administered territory**

West New Guinea had remained in Dutch control after it relinquished the rest of the East Indies in August 1949. The UN-brokered Netherlands-Indonesia Agreement of 15 August 1962 subsequently provided for it to be transferred first to UN and then Indonesian responsibility, and for an act of self-determination by 1969, again with UN involvement.

Australia had mixed feelings about these developments. On the one hand, it believed that Indonesia had no real claims to the territory, that the indigenous Papuans were not ready for self-government, that their absorption by Indonesia would end any chance of them determining their own future, and that the UN had no authority to transfer sovereignty of any territory from one country to another.\(^{72}\) Further, to Australian eyes, Dutch control seemed preferable to an expansionist and potentially communist

\(^{71}\) Committee of Review to Minister for Immigration, 31 Jan 1957, NAA A1838 1606/4.

\(^{72}\) Casey, draft ministerial statement, 6 Feb 1952, NAA A5104 14/2/1 Part 2; Casey to DEA, draft press release, 2 Dec 1954, NAA A1838 558/4 Part 14; summary report of the Australian Delegation to the 9th session of the UN General Assembly, New York, 21 Sep to 17 Dec 1954, Parliamentary Papers, Session 55, 1954-55, vol 2, pp 1802-07; Spender, press statement, 29 Aug 1950, NAA A5104 14/2/1 Part 2.
Indonesia. On the other hand, Australia wanted friendly relations with Indonesia, a
close neighbour and potential bulwark against the southward drive of communism in
Asia. As early as 1952, Casey spoke of the need to avoid ‘aggravating points of friction … such as West New Guinea might very well become’. Further, Australia had no
international support to stop Indonesia absorbing West New Guinea. When in January
1962 Sukarno threatened to assert Indonesia’s claims to the territory by force unless the
Dutch gave ground, Menzies bristled, saying that Australia would ‘discharge its prime
responsibility for the security of Australia, its territories and its people’, acting in close
consultation with its principal allies, the United States and the United Kingdom. However, within a month he issued a more conciliatory statement, noting that ‘it is the
inescapable fact that, though we have throughout recognised Dutch sovereignty in West
New Guinea, every nation in Asia supports the Indonesian claim’. Reading between
the lines, Australia had seemingly realised it should not take for granted the support of
its major allies in the event of an armed conflict with Indonesia over West New Guinea.
In this charged context, the issue of Papuans heading east to seek asylum in PNG as a
result of their changing fortunes was bound to be contentious and tightly managed.

With the weight of the 1956 Cabinet decision behind it, the role of External Affairs in
asylum issues was by now firmly entrenched. The decision provided the only formal
policy guidelines for officials, although in 1962, prompted by the desertion in Darwin of
three Portuguese naval ratings and their subsequent claim for asylum, the department

---

73 Ministerial statement (draft), 6 Feb 1952, NAA A5104 14/2/1 Part 2.
75 Press statement, 11 Feb 1962, NAA A9738 PMS/027.
76 The government thought their claims for asylum weak, refused their application and sought to deport
them. Following protracted legal proceedings, and in the face of media interest and public support, it
eventually let them stay subject to complying with normal immigration requirements and obtaining
employment, even though worried about the precedent the case might set in view of the hundreds of other
ships deserters each year (see fn 49 above). Announcing their decision to let the men stay, the Ministers
of External Affairs (Barwick) and Immigration (Downer) said: ‘No case exists for the grant of political
asylum, and persons arriving in Australia not as political refugees should not be encouraged to build up
by agitation unreal cases for political asylum … This is, of course, a special decision based on the facts of
the case and the merits of the individuals. The case is exceptional and is not to be taken as a precedent for
other cases’; press statement, 1 May 1962, NAA A1838 581/2 Part 5.
gave its then Minister, Garfield Barwick, an analysis of typical cases of asylum, and a list of suggested criteria for considering future applications. In its view,

The main criterion to be applied [in considering an application for asylum] is the political background of the applicant and whether or not he would be penalised by his own Government for his political beliefs, should he be returned to his country of origin. If there seems to be a danger that the applicant will be punished (for his political beliefs) if returned, this would be a strong argument in favour of granting asylum.

However, while the risk of punishment may have been the main criterion, and the only one External Affairs thought suitable for use in public statements, it suggested that other criteria should also in practice be taken into account. These included the circumstances of the application (eg whether the person had entered Australia legally or illegally), Australia’s relations with the person’s country of origin (including paying heed to any wishes that the country may have in the matter, especially ‘countries which we regard as friendly’), the state of the judiciary in the country of origin (eg independent and efficient, in case a government tries to ‘trump up’ some charge against the returnee), the person’s propaganda value (eg a defector from a communist country), immigration regulations (eg the ability to grant permanent residence without having to consider the issue of asylum, so as to allow the country of origin to save face or keep the case low profile), security (‘all applicants from Communist countries must be regarded as potential Agents Provocateur or Intelligence Agents’), and public opinion.

77 Tange to Minister, 20 Feb 1962, incl attachment, Landale to Secretary, 12 Feb 1962, NAA A1838 1606/1 Part 1.
78 Landale to Secretary, p 2, 12 Feb 1962, attachment to Tange to Minister, 20 Feb 1962, NAA A1838 1606/1 Part 1.
79 According to the submission (at pp 3-4 of attachment), ‘This device would not normally be applicable in the case of Afro-Asians; there is no legislative ban on this – merely policy. However the Department of Immigration has stated “Where the case was sufficiently significant politically we could, if necessary, grant permanent residence to Afro-Asians”’.
80 Shortly afterwards, a senior officer in London gathering information on the United Kingdom’s asylum policy suggested one more: ‘having regard to our immigration policies, it might be desired to apply to Asian applicants for asylum the test of whether they have an alternative country of refuge’; Kevin to Secretary, DEA, 21 Mar 1962, NAA A1838 1606/1 Part 1.
The final status of the submission is unknown, but the department’s views are clear: asylum decisions should reflect a broad range of considerations, and External Affairs should retain primary carriage in regard to them. It is unlikely that Barwick would have disagreed, for as he stated when the Portuguese naval ratings sought asylum,

The fact is that the Minister for Immigration has never ... had the decision as to whether or not political asylum should be granted ... Mr Calwell has failed to observe the distinction between granting political asylum and exercising a ministerial discretion under the Immigration Act not to enforce deportation of a prohibited immigrant ... In dealing with applications for political asylum, Governments take into account, among other things, the applicant’s political background, if any, and the possibility of his being penalised by his own Government for his political beliefs should he be returned to his country of origin. To grant ‘political asylum’ is to accept a person as a political refugee – that is to say either a person seeking escape from the consequences of some political activity in his own country or a person ‘defecting’ on political grounds from a system to which he had previously adhered. It is an Act of State raising as a rule general issues of international relations.81

Later that year, facing questions in Parliament about how the government would respond to asylum seekers from West New Guinea when it came under Indonesian rule, Barwick replied that, ‘any questions which arise, whether under the heading of political asylum or any other, will be entertained and decided from a very high humanitarian point of view’,82 adding that, ‘very often to ask for political asylum is to ask for more, really, than the facts will warrant’. Asked specifically about Papuan and Eurasian asylum seekers, he said, ‘If any requests are received under the heading of political asylum, they will be entertained and decided on their particular merits from a very high humanitarian point of view in accordance with traditional British principles’.83 On whether refugees would be permitted to set up a government in exile in PNG, he retorted, ‘Political asylum is not normally granted for the purpose of facilitating political activities’.84

---

81 Press release, 10 Jan 1962, PR 10, NAA A6980 S250089.
82 15 Aug 1962, CPD (Reps), vol 36, p 349.
83 23 Aug 1962, CPD (Reps), vol 36, p 752.
84 29 Aug 1962, CPD (Reps), vol 36, p 864.
In fact, only weeks earlier Cabinet had approved Barwick’s plans for helping the Dutch in the event of a need for emergency evacuations from West New Guinea.\(^8^5\) Potential evacuees included an estimated 11,000 Dutch citizens (about half Eurasian),\(^8^6\) 1,200 Dutch-sponsored Indonesians and Papuans (mainly people who had collaborated with the Dutch and feared Indonesian reprisal), and 400 Australian, British and American citizens.\(^8^7\) Taking the view that the departing colonial ruler should take responsibility for its former charges, it was agreed that Australia would assist with their evacuation to PNG, or if necessary Australia,\(^8^8\) but on the understanding that it was not obliged to offer any evacuee any long term residency arrangements.\(^8^9\) Costs were to be charged to respective home governments, who had to undertake to remove any of their evacuee nationals or sponsored refugees from PNG and Australia. In effect, all evacuees were to be viewed as ‘refugees in transit’\(^9^0\) to the Netherlands or other countries. The only ones Cabinet said might be allowed to stay in PNG were the Dutch-sponsored Papuan

\(^{85}\) Cabinet decision No 375, 6 Aug 1962, on related submission no 330 by Barwick of 19 Jul 1962, ‘West New Guinea – emergency evacuation planning’, NAA A452 1965/8891. The prospect of a mass evacuation had been lessened as a result of progress in the accord being negotiated between the Netherlands and Indonesia on the future of West New Guinea, but Cabinet thought that contingency plans were still desirable. Barwick outlined Australia’s general view of developments in West New Guinea in a statement to Parliament on 15 Mar 1962, CPD (Reps), vol 34, pp 896-909.

\(^{86}\) Wherever possible, the Dutch Eurasians were to be taken to PNG rather than Australia, ‘having in mind the need to minimise the risks and repercussions arising from the likelihood that many of the Eurasians once transferred to the mainland, will desire to remain within Australia’; Cabinet decision no 375, 6 Aug 1962, NAA A452 1965/8891.

\(^{87}\) For reasons not given, Cabinet added the proviso that Dutch citizens of Papuan and Indonesian ethnic origin not be helped.

\(^{88}\) The Administrator of PNG had advised that PNG could accommodate several thousand evacuees and refugees for a number of days, but if larger numbers or longer periods of stay were involved, many would need to be removed to Australia; Barwick, Cabinet submission no 330, ‘West New Guinea – emergency evacuation planning’, 19 Jul 1962, p 6, NAA A452 1965/8891.

\(^{89}\) Although open to the possibility that some Dutch and Dutch-sponsored refugees might wish to settle in Australia and might be accepted by the DI, Cabinet specified ‘that it is to be understood by the Dutch, that … [any offer by Australia to grant temporary or permanent residence to refugees with Dutch citizenship] does not commit Australia to, or hold out hope of, any modifications of Australian policies in the matter of temporary and permanent residence’; Cabinet decision no 375, 6 Aug 1962, NAA A452 1965/8891.

refugees, of whom it was estimated there might be about 150. Barwick warned of possible difficulties if Indonesia demanded their surrender, or if they stirred up anti-Indonesian sentiments in PNG. He also warned that many more Papuans than those sponsored by the Dutch might try to enter PNG on foot or by boat. However, he argued that there were ‘humanitarian reasons with which the Australian public would probably sympathise for not insisting on the expatriation overseas of natives of the island of New Guinea’. In his view they ‘should be readily assimilable’ into PNG, and their stay could be made conditional on not engaging in any political activity. Cabinet agreed that any request by a Papuan to stay in PNG should be decided on its merits by the Minister for Territories ‘in consultation in view of the political aspects with the Minister for External Affairs’.

As it happened, no emergency evacuations were required of Australia. However, shortly before the transition to UN control on 1 October 1962, the Dutch asked it to grant asylum in PNG to six Papuans. Suspicious of why the Dutch wanted the men to stay in PNG rather than take them to the Netherlands, Barwick told External Affairs to have its Liaison Officer in West New Guinea, RN Birch, afford the men an opportunity

91 According to the submission, ‘The case for allowing Dutch-sponsored Indonesians to remain in Australian Papua-New Guinea is not so strong. Some of them would seem likely to retain feelings of attachment to Indonesia, their choice of Dutch associations makes expatriation to Dutch territory more acceptable, they would not be so readily assimilable into the population of Papua-New Guinea, and [they] could in the course of time become a disturbing element’; Barwick, Cabinet submission no 330, ‘West New Guinea – emergency evacuation planning’, 19 Jul 1962, p 6, NAA A452 1965/8891.


93 The PNG Administration was not overly impressed by Canberra’s plans. Apart from concerns about the employment, accommodation, language, social acceptability and political issues that it thought could arise in hosting refugees long-term, it argued that the Eurasian refugees would assimilate better in Australia than PNG, where ‘In all probability [they] would be ignored by the expatriate communities and meet thinly veiled resentment from the indigenous groups’; Cleland to Secretary, DT, 10 Sep 1962, NAA A452 1965/8891. While Papuan refugees were seen as likely to evoke initial sympathy, the Administration felt that this too could change ‘when the sharing of limited resources and the encroachment on land and food production involves longer than a purely nominal period’; Gunther, Acting Administrator, to Secretary, DT, 8 Oct 1962, NAA A452 1965/8891.

94 Record of conversation, Secretary DEA & Netherlands Ambassador, 31 Aug 1962, NAA A452 1965/8891; Lambert to Cleland, 28 Sep 1962, NAA A452 1965/8891.
to apply on their own account, and to independently verify their protection needs. He added,

Mr Birch should be acutely conscious of the limitations upon the grant of political asylum generally, and upon these applications in particular. Allowance should be made for the fact that British practice is influenced by a general conception, dating from earlier European history, that England has [been] a refuge for the political ‘agitators’ (used sympathetically!) of Europe. I have no desire to allow Australian practice to be similarly influenced … We are not merely considering the admission of an unfortunate migrant … We must not allow an impression to be created that we are deliberately harbouring anti-Indonesian elements. We must remember that anti-Indonesian elements introduced into Papua-New Guinea may become a most embarrassing liability for us in the future.95

A truncated version of these instructions, which has Barwick advising Birch to ‘not be too infected with the British notion of being a home for the oppressed’,96 has been used to support a view that Australia’s approach to asylum seekers in PNG was from then on unprincipled or unappreciative of Indonesia’s poor human rights record (Neumann 2004, Brennan 2003). However, from the above account, Barwick’s intention was not to dismiss asylum principles per se, but to ensure that Birch appreciated the significance for Australian-Indonesian-PNG relations of granting asylum to individuals who may intend using PNG as a base for agitation against Indonesia. Even in the truncated version, Barwick prefaces his comment about not being a ‘home for the oppressed’ by saying that he hopes Birch ‘understands the basis of such cases, ie that it is not merely a question of obtaining entry permit but of being granted asylum in Australian Territory as political refugees’, and that ‘migration into Australian Territory is a separate question and a question for the Department of Territories’.97 His comment therefore seems like

95 McMillan to Secretary, DEA, 30 Oct 1962, NAA A1838 929/6/1 Part 2.
96 According to the truncated version, Barwick is reported as also saying that Birch should take care ‘not to give the impression of aiding and abetting anti-Indonesians’, and that, ‘It would be a mistake for us to let into Australian New Guinea people who might later become a focal point of disturbance or agitation’; Forsyth to Secretary, DEA, 8 Oct 1962, NAA A452 1965/8891.
97 Emphasis in original. Barwick’s comment also needs to be set in context. It was made before any cross-border flows had begun and in the course of giving instructions to investigate the circumstances of the people about whom the Dutch had made representations, to allow an informed and independent decision on the merits of any claims they made for asylum.
one by Whitlam a decade later, to a proposal that Australia should, if the occasion arose, accept political refugees from Asia and Africa, and particularly those from Indo-China who had ‘a special connection with Australia’, as well as ‘a modest proportion of the people whose lives might be in real danger’. He replied, ‘Yes, but any admitted are to eschew any “Captive Nations” activities or that ilk’. 98

Birch later suggested that requests by the six for asylum in PNG ‘could be amended to simple applications for permission to enter … if this would overcome the delicate aspects of their appearance as political refugees’. 99 However, a decision was still pending when in mid-October the Dutch Ambassador lodged a request for asylum for a further eight people. 100 Since the UN Temporary Executive Authority (UNTEA) had by then assumed control in West New Guinea, Barwick thought that requests for asylum should now be coming from it, rather than the Dutch. Nevertheless, he agreed to Birch extending his ‘process of fact-finding’ to the new applicants, and to a recommendation from his department that if any Papuans were admitted to PNG as refugees, they be ‘settled in areas well removed from the frontier’ and on the condition that they ‘not take part in any political activity inimical to Indonesia’. 101 He added,

The matter calls for judgment at every point. I agree with what is here notified but care must be taken not to excite interest or to excite expectation on the part of anyone. I anticipate the need for fairly firm objective decisions. 102

Meeting to discuss the Dutch requests, and the likelihood of more, External Affairs and Territories agreed that they could potentially be divided into two groups: one ‘without any suggestion that the people concerned were apprehensive of ill treatment because of

98 Handwritten comment on DFA (Department of Foreign Affairs) to Minister for Foreign Affairs, 18 Jan 1973, NAA A6980 932/3/2 Part 2.
99 Birch to Secretary, DEA, 23 Oct 1962, NAA A452 1965/8891.
100 According to Birch, ‘The position appears to be that the Dutch Government still considers itself to be morally responsible for the protection of Papuans whom it recruited to fight Indonesians with both words and weapons, and who performed faithful service’; Birch to Secretary, DEA, 23 Oct 1962, NAA A452 1965/8891.
101 McMillan to Secretary, DEA, 30 Oct 1962, NAA A1838 929/6/1 Part 2.
102 Emphasis in original.
political or other activities’, and to which there could be no objection if Territories refused, the other ‘where some reason for fear or ill-treatment was indicated’, in which case External Affairs would make further inquiries ‘to see whether there were real grounds for this apprehension’.\(^{103}\) It was agreed that Territories would advise External Affairs both of individuals who specifically requested asylum, and of those who didn’t but whose stories indicated that they had engaged in activities for which reprisals might be expected: ‘the nature of the case and not merely the use of the term “political asylum” should determine whether the case was referred to External Affairs for its view’. However, the departments agreed to delay a decision on the Dutch requests, preferring ‘to wait for some little time, perhaps a couple of months so as to avoid encouraging a large number of requests’.

Their complacency did not last. Worried that the UNTEA was unable to protect people because it relied on a mainly Indonesian police force, the Dutch ignored Barwick’s request that asylum requests be channelled through it, and in mid-November again approached Canberra, asking it to grant asylum to three of the Papuans they thought in particular danger.\(^{104}\) With Birch confirming the UNTEA’s limited capabilities, Barwick and Paul Hasluck, the Minister for Territories, this time agreed to provide ‘temporary residence’ in PNG for the three men and their families, but instructed the PNG Administration to not use the terms ‘political asylum’ and ‘refugee’ in any public comment on the matter so as to not ‘excite media interest’.\(^{105}\) Barwick summoned the Indonesian Ambassador in Canberra, told him that requests for asylum were being received, and made it clear that he would act on such requests ‘having in mind broad human considerations’.\(^{106}\) He said that he expected asylum would in some cases be

\(^{103}\) Forsyth, record of conversation, 2 Nov 1962, plus undated supplementary note, NAA A452 1965/8891.

\(^{104}\) Aide Memoir from Netherlands Embassy to Australian Government, 20 Nov 1962, NAA A452 1965/8891.

\(^{105}\) DT to Minister for Territories, 22 Nov 1962, NAA A452 1965/8891, and DT file note, 5 Dec 1962, NAA A452 1965/8891. In these three cases, and a number of others initiated by Dutch authorities, the Dutch offered to meet the financial costs of providing them asylum in PNG, but the writer found no indication in the archival record that this was a deciding factor in Australia’s decision to grant them such.

\(^{106}\) Record of conversation, 22 Nov 1962, NAA A452 1965/8891. Barwick reiterated these points in a second meeting with the Ambassador, Brigadier-General Suadi, on 21 Jan 1963, after Australia had
required. However, he also said that Australia did not wish to see any substantial influxes to PNG, would not facilitate it, and would not ‘be easily moved by baseless apprehension’. To this end, he suggested that Indonesia might consider taking steps to allay the fears of Papuans about how they would be treated, without precluding Australia’s right to grant asylum where needed:

I said that it may be that a clear statement, backed up by proper administration and clear instructions to the people on the ground would assist to allay apprehensions which quite understandably could be felt by Papuans and maybe others in West New Guinea. I said that I wished, however, to make it very clear that I would not regard the existence of such a public declaration of policy and administrative direction as precluding us from granting asylum, though it may well prove a factor to be considered in any particular case.

A few days later, Menzies, as Acting Minister, approved recommendations from External Affairs on sixteen asylum applications, on the grounds that the individuals concerned had ‘good reason’ for fearing reprisals by Indonesian authorities. He agreed to the refugees being settled away from the border area, and having to undertake to refrain from political activity affecting West New Guinea or Indonesia.

A month later, Birch reported being ‘inundated’ with requests for asylum after clashes between Indonesian troops and locals following pro-independence demonstrations on 1 January 1963. Asylum seekers also began to trickle across the border into PNG on their own accord, with seven arriving at Vanimo on 3 January 1963, followed a week later by another thirty-seven, and media reports that a further 600 were following. Clearly worried by the prospect of a major influx, and wanting to avoid any appearance of

---

107 Forsyth to Acting Minister, 30 Nov 1962, NAA A452 1965/8891. In making this decision, Menzies among other things rejected the view of Territories that asylum should not be granted to Indonesians, Indonesian wives of Papuans, and applicants with poor health or employability prospects.

108 Cable from Birch to DEA, 7 Jan 1963, NAA A1209 1962/981; DT to Minister for Territories, 9 Jan 1963, NAA A452 1965/8891; Secretary, DT, to Territory Administrator, 10 Jan 1963, NAA A452 1965/8891; DT to Minister for Territories, 16 Jan 1963, NAA A452 1965/8891.
support for a Papuan independence movement, Barwick and Hasluck, with the support of the UNTEA, added two riders to the ‘good reason’ for fear criterion for asylum determinations: firstly, that any request for asylum must be lodged and processed inside West New Guinea, and secondly, that the need for asylum must arise from actions taken on behalf of the Dutch before they left in October 1962, unless Birch was satisfied that there were ‘special circumstances which would warrant his submitting the case for consideration by Ministers on humanitarian grounds’. Any asylum seeker already in PNG who could not meet the latter criterion was to be returned to West New Guinea, and all new asylum seekers trying to cross the border were to be turned back unless they had been issued an entry permit in line with the former criterion. Hasluck asked his officials to exercise care in the execution of the measures, for the sake of both the asylum seekers and Australia’s reputation:

We might suggest to the Administrator that in giving effect to this decision he should pay careful regard to considerations of humanity and do what he can to avoid any unnecessary distress by the refugees. As an example of what we have in mind any persons who have recently arrived in Vanimo should not be immediately put on the road again if they are in any way exhausted after their journey from Hollandia or if they are need of food, rest or medical attention. We recognise the difficulties of the situation in a place as small as Vanimo but suggest that if it is possible to form some sort of a holding camp there it will serve the purpose both of giving the refugees a period of rest before they are sent back home and of helping to ensure that they do not travel independently beyond Vanimo but remain under our surveillance. According to the circumstances the Administrator might also consider the desirability of providing sea transport to return them to a convenient point of their choosing in West New Guinea. I should be glad if you would communicate these suggestions to the Administrator as early as possible, stressing the

109 On 7 January, Birch warned Canberra that ‘if word gets around that escape through Vanimo presents no difficulty there is a risk that border posts will be confronted by large numbers of Papuan refugees afraid of being assaulted by Indonesian “strong-arm” gangs’; cable from Birch to DEA, 7 Jan 1963, NAA A1209 1962/981. Two days later he sent another cable advising that ‘the Indonesians are no longer prepared to tolerate expressions of Papuan independence’, that ‘there is a definite air of panic in and around Hollandia’, and that many Papuans were applying for entry permits to the Australian Territory; cable from Birch to Secretary, DEA, 9 Jan 1963, NAA A452 1965/8891.

110 Cable from Birch to DEA, 14 Jan 1963, NAA A1209 1962/981; cable from Birch to DEA, 21 Jan 1963, NAA A452 1965/8891.

111 DT to Minister for Territories, 9 Jan 1963, NAA A452 1965/8891. See also Shaw to Secretary, DT, 9 Jan 1963, NAA A452 1965/8891; cable from DEA to Birch, 9 Jan 1963, NAA A452 1965/8891.
importance of avoiding any unnecessary hardship or ill-feeling on the part of refugees or providing the occasion for any exaggerated newspaper stories about the hardships of refugees rejected by the Australian Government.\footnote{Hasluck to Secretary, DT, 9 Jan 1963, NAA A452 1965/8891.}

For his part, Barwick asked for resolve:

\begin{quote}
We think however, great care will need to be exercised by the Administration not to cause misunderstanding by this clemency and to see that it is not imposed upon and that all those without permits both understand they must return [to West New Guinea] and are required to do so at the proper time.\footnote{Shaw to Secretary, DT, 9 Jan 1963, NAA A452 1965/8891.}
\end{quote}

After visiting Vanimo, Birch reported that none of the forty-four asylum seekers met the new criteria for asylum.\footnote{Cable from Birch to DEA, 14 Jan 1963, NAA A1209 1962/981. According to the Wewak District Commissioner, drawing inter alia on interviews conducted by a Patrol Officer with people who had sought refuge in Vanimo, ‘very few of the 44 could be described as political refugees; most were people who thought that prospects were better in Papua and New Guinea than in West New Guinea’; DT to Minister for Territories, 21 Jan 1963 (telephoned to Minister on 18 Jan), NAA A452 1965/8891. The DT was later to attribute their flight to a ‘fear of the future’; appendix to record of meeting, 6 Aug 1964, NAA A452 1963/8261.} With quick action being urged by the Wewak District Commissioner, who was concerned about the strain large numbers of refugees would impose on the local economy, and the support of the UNTEA, who offered to reassure the asylum seekers that it would not punish them and would protect them from Indonesian reprisals,\footnote{According to Birch, the Deputy Administrator of UNTEA believed that their repatriation was important for future relations with Indonesia, and that they had a duty to work for the progress of their own country; cable from Birch to DEA, 14 Jan 1963, NAA A1209 1962/981; cable from Birch to DEA, 21 Jan 1963, NAA A452 1965/8891; DT to Minister for Territories, 16 Jan 1963, NAA A452 1965/8891. The UN more broadly may have thought its reputation on the line, having brokered the future of West New Guinea in negotiations between the Netherlands and Indonesia, and having assumed responsibility for providing law and order in the territory pending the transfer of power to Indonesia. Perhaps, too, it was trying to help Indonesia save face, since the transfer of power had been endorsed by the General Assembly, and was supported by many ‘third world’ member states in particular.} arrangements were made to return the entire group to West New Guinea. After a night reconnaissance of a village just over the border by Vanimo locals and three of those being repatriated, the rest were taken there on 18 January by trawler,
escorted by the District Commissioner, two patrol officers and fourteen police. According to Birch, when the Deputy Police Chief in Hollandia (now Jayapura) was told of the return – it seems he was not told when or how it would take place – he said that the group was ‘too small and unimportant for the Indonesians to harbour resentment and there would be no retribution’, but added that he ‘would be happier if they did not return at all since many were troublemakers’. There is no evidence on how the group fared, save for a report by Birch that some received ‘superficial injuries from brawls’ in following days, and a claim by a Papuan nationalist leader in the Netherlands that some had been beaten.

The measures adopted by Australia and the UNTEA, and a respite in clashes between Indonesian authorities and independence supporters, led to no further cross-border movement until UNTEA relinquished control to Indonesia in May 1963.

**Asylum seekers from Indonesian administered territory**

In the year after Indonesia took over West New Guinea, some 382 Papuans sought asylum in PNG, with 229 arriving in the first month, and in numbers from two to forty-eight per month thereafter. According to Territories, where ‘fear of the future’ had been the main reason for flight during the UNTEA period, after May 1963 it was ‘general dislike of Indonesian administration’, and after April 1964 ‘avoidance of conscription’ for labour and military service purposes. Most if not all in the first group of 229 were allowed to remain with tribal kin on the PNG side of the border who agreed

---

116 Cole to Secretary, Department of the Administrator, 21 Jan 1963, NAA A452 1965/8891. A further three asylum-seekers who had arrived in Vanimo in the interim were repatriated on 19 January.

117 Birch to Secretary, DEA, 21 Jan 1963, NAA A452 1965/8891. Birch told the Indonesians that the return would occur, but not when or where.

118 Birch to DEA, 21 Jan 1963, NAA A452 1965/8891. The Wewak District Commissioner apparently also monitored the returnees, using community networks in the border area.


120 According to the DT, there were forty-eight asylum seekers during the UNTEA period, with four in December 1962 and forty-four in January 1963. After that, none are recorded until June 1963, the month after the transfer of control to Indonesia, when 229 are recorded, with another 153 over the following twelve months. See appendix to record of meeting, 6 Aug 1964, NAA A452 1963/8261.
to support them,\textsuperscript{121} despite efforts by authorities on both sides to persuade them to return. However, from then until late 1965, only a handful were allowed to stay,\textsuperscript{122} with the rest being repatriated, in the main, it would seem, through forceful persuasion rather than physical force.\textsuperscript{123}

Since Birch had left Papua on its transfer to Indonesian control, one of the criteria for asylum that had been set by Barwick and Hasluck – that applications must be lodged in Papua – was no longer practicable. However, another one – that the asylum need must arise from actions taken on behalf of the Dutch before they left in October 1962 – remained.\textsuperscript{124} In June 1965, External Affairs explained,

\begin{flushright}
\textsuperscript{121} Neumann (2004: 67) says that during the UNTEA’s administration of West New Guinea and the first year of Indonesian rule, Australia only accepted Papuan asylum seekers sponsored by the Dutch, and returned all others except for an ethnic Chinese family in April 1963. However, several Territories documents refer to a group of more than 200 asylum seekers in May/June 1963 being allowed to stay with their tribal relatives, and it is almost certain that this is the same group listed by the DT in an early report; see appendix to record of meeting, 6 Aug 1964, NAA A452 1963/8261; Hasluck to Abolins, 28 May 1965, NAA A452 1963/8261; cable from DT to all posts, 16 Jun 1965, NAA A452 1963/8261; DT file note, 17 May 1965, NAA A452 1963/8261. From 1964 the Territory Administration and the ASIO tried to count and monitor all Papuans living in PNG (Cleland to Secretary, DT, 21 May 1965, NAA A452 1963/8261), but accuracy would have been difficult in view of the remoteness of many areas, uncertainty over the precise location of the border, and the transient nature of some movements.

\textsuperscript{122} In May 1965 the Territory Administrator told Territories Secretary that ‘our policy of promptly returning West Irianese is slowly becoming known throughout the border area of West Irian and that the situation regarding crossings can be expected to become more stable’; Cleland to Secretary, DT, 11 May 1965, NAA A452 1963/8261. In 1966, the DEA told the UNHCR that between May 1963 and November 1965, only seven crossings were made by individuals or groups requesting entry to PNG on political grounds, with asylum being granted in four cases (including two pending a decision on request for asylum in the Netherlands) and the other three still being considered; cable from DEA to Australian Consul-General in Geneva, 12 Jan 1966, NAA A432 1962/3102. See also DEA to Minister for External Affairs, 23 Nov 1964, NAA A452 1963/8261. The writer was unable to establish how many Dutch-sponsored refugees were accepted, but they may have numbered only a dozen or so; see, for example, Warwick Smith to Secretary DEA, (draft), circa July 1965, NAA A452 1963/8261.

\textsuperscript{123} Early in 1965, the Wewak District Commissioner was reportedly instructed ‘to turn all parties back if possible without using force’; Legge, note for file, 26 Feb 1965, NAA A452 1963/8261.

\textsuperscript{124} This is despite some officials believing that the rule applied only to Dutch-sponsored refugees; see handwritten annotation on DT to Minister for Territories, 11 Mar 1964, NAA A452 1963/8261; also on cable from DT to all posts, 16 June 1965, NAA A452 1963/8261.
\end{flushright}
The existing position is that the Government decided in 1962 that as a general rule permission to reside in Papua/New Guinea should be granted to refugees from West Irian only where the cause for apprehension derived from their political actions before the Dutch withdrawal. To allow permanent entry following movement across the border to those motivated by a general discontent with the Indonesian Administration could, it was felt, lead to mass migration which the Papua/New Guinea Administration could not handle; could also create ill-will and suspicion between the Indonesians and ourselves; and could break down respect for the border.125

Neumann (2004: 72) describes Australia’s approach as ‘harsh’, but during these early years it clearly considered the UN-sanctioned arrangements for Papua as something that Papuans – and Australia – had to make the best of, the basis of many asylum claims weak, and the risks involved in repatriation low. In a 1964 review, Territories argued that general dissatisfaction with Indonesian rule and unauthorised departure did ‘not amount to political action and consequent personal danger of a kind qualifying [border crossers] as political refugees’, and that Papuans ‘have to learn to live with’ the new administrative arrangements for their country that had been imposed on them.126 In 1965 it claimed,

The reasons given by people for wanting to cross the border are varied – for example, rumours of epidemics, vague fears of change, low wages and poor work conditions, disinclination for compulsory community work, (in the case of lepers) escaping from a leper hospital, fear of compulsory military service, and a desire for political asylum … No authenticated reports have been received of punitive measures against people turned back from the border.127

125 Cable to all posts, 16 Jun 1965, NAA A452 1963/8261.
126 DT to Minister for Territories, p 2, 11 Mar 1964, NAA A452 1963/8261. See also Lambert to Territory Administrator, 8 Feb 1964, NAA A452 1963/8261. More flexibility was shown in the case of Papuans on temporary residence permits in PNG who subsequently requested asylum, eg in 1963 when a number of Papuans studying in Port Moresby were asked to return prematurely, and some applied for asylum, Australia negotiated an agreement with Indonesia for them to continue their studies with Colombo Plan assistance; Waller to Minister for External Affairs, 26 Apr 1963, NAA A4359 221/4/10; Prime Minister’s Department (PMD) to Prime Minister, 29 Apr 1963, NAA A1209 1962/981; Barwick, CPD (Reps), 30 Apr 1963, vol 38, pp 808, 814; DT to Minister for Territories, 11 Mar 1964, NAA A452 1963/8261. The DEA and the DT were unwilling to commit to send them back at the end of their course against their wishes; PMD to Acting Prime Minister, 24 Jun 1963, NAA A1209 1962/981.
In public, too, Ceb Barnes, who had replaced Hasluck as Minister for Territories, dismissed claims of returned asylum seekers being ill treated: ‘I say very definitely that there is no evidence of this whatsoever’.  

That said, in view of the tensions being generated by Sukarno’s confrontation with Malaysia, and Australia’s support for the latter, it is equally clear that Australia did not want to risk Papua escalating into a second front of military conflict with Indonesia. As External Affairs noted when refusing permission for several Netherlands-based Papuan activists to visit PNG in 1964,

> You should explain that Australian-Indonesian relations are delicately balanced in view of our commitments to Malaysia and the despatch of forces to Borneo. You should say it would be only embarrassing for the Government if they were to press their requests for visas under current circumstances. If they insist that their motives for wishing to go are entirely reasonable, you should say it is essential for us not only to prevent PNG territory being used as a base for illegitimate activities in West Irian, but also to avoid anything which might give the appearance that it is being so used.

Nevertheless, by late 1964 Australia was becoming less sanguine. Apart from persistent allegations that some returnees were being mistreated, it began to think it should probably grant asylum in cases involving a desire to avoid conscription for military service outside Papua, and resistance to Indonesian pressure over the promised act of self-determination. One reason was that any Indonesian action in this regard was in breach of its agreement with the Dutch. Another was that it had the potential to ‘present embarrassing problems’ for the government, one example being

> … if the Press wrote stories on the theme that Papuans pleading political asylum because they did not want to go to fight against Australian and British troops in Borneo were having such asylum refused.

---

128 CPD (Reps), 18 May 1965, vol 45, p 1553. How accurate these depictions were of the situation in regard to returnees is hard to say, since conditions at the border and in Papua made it difficult to verify allegations. A final view requires more substantial evidence than that available in policy files in the archival record.

129 Cable from DEA to Australian Embassy, The Hague, 21 May 1964, NAA A1209 1962/981.

130 DEA, record of meeting, 6 Aug 1964, NAA A452 1963/8261.
Further, after the Dutch left, economic and social conditions in Papua deteriorated, and
while efforts were made to revive the province after Sukarno’s overthrow, indigenous
dispossession continued and non-Papuans filled most administrative positions. In
1965, scattered instances of armed rebellion broke out, resulting in intensive Indonesian
counter-action. Signs also emerged that Indonesia might renege on its obligations to
conduct the act of self-determination by 1969, with Indonesia claiming that ‘if it was
ture that people had fled for political reasons, they were subversive elements “in the
employ of the imperialists”’. Finally, by 1965 issues relating to Papua and Papuan
asylum seekers were gaining a public profile. They were attracting questions in
parliament in Australia and PNG, local and international press coverage, and
correspondence from bodies such as the International Red Cross and the Returned
Services League.

As a result of these sorts of considerations, Australia dropped the criterion about an
asylum claim having to relate to pre-Dutch departure activities, and in September 1965
Barnes clarified asylum seeker processing arrangements as follows:

---

131 Osborn to Parliamentary Foreign Affairs Committee, 12 Nov 1968, NAA A452 1968/5721; see also
Hastings (1968).
According to Osborn (at p 5), by 1968 Indonesia estimated the number of Papuan rebels at 2,000, about
200 with modern weapons, and its own forces in Papua at 14,000, including 7,000 in combat units.
133 Furlonger to Hill, 13 Apr 1965, NAA A452 1963/8261.
134 West Irian Secretariat, quoted in cable from DT to all posts, 16 Jun 1965, NAA A452 1963/8261.
135 PNG’s House of Assembly had its first indigenous elected majority in 1964. After one particularly
spirited debate on Papuan asylum seekers in September 1965, the Administrator was told by Territories to
direct the attention of the House to ‘wider considerations’: the need to promote mutual respect for the
border; to avoid the administrative, financial and social problems of a large scale refugee movement; to
recognise the UN approved standing of Indonesian rule in Papua and not become or appear to become a
focal point for persons actively hostile to it; and to control the passage of persons who might affect the
security of the Territory, or who were seeking to avoid the consequences of criminal behaviour, or who
might introduce plant, animal or human diseases; DT to Minister for Territories, 1 Sep 1965, NAA A452
1970/1202; Warwick Smith to Territory Administrator, 2 Sep 1965, NAA A452 1970/1202. The advice
concluded, ‘There are considerations of humanity which should be given due regard in the spirit of the
Universal Declaration of Human Rights, but as the Declaration itself recognises the Government of each
country concerned must make its own judgment in the light of its responsibilities to its own people.’
Every person crossing the border into the Territory of Papua-New Guinea … is to be interviewed and if he can give no reasonable grounds on which he could claim special consideration for the granting of permissive residence in the Territory of Papua-New Guinea, he is to be fed, well looked after, and returned across the border as expeditiously as practicable. Any with an apparent case for consideration as political refugees are to be closely questioned and reported on, and held for the time being at a nearby border station pending decision.136

External Affairs insisted that it continue to have the main say in these decisions, with Hasluck, now Minister for External Affairs, rejecting a Territories proposal for Barnes to assume responsibility on the grounds that it reflected a ‘basic misunderstanding’ of the nature of asylum. Echoing Barwick, he argued that it ‘is an international question so long as it concerns the movement into Australian territory of persons under the jurisdiction of another government’, and that while Territories was responsible for the administration of PNG’s immigration laws and other domestic matters, ‘It has no function in respect of international relations’.137

Several months later, Hasluck granted asylum to six Papuans for ‘humanitarian’ and ‘practical’ reasons. These included that ‘they had good reason to fear the Indonesians’,

---

136 CPD (Sen), 28 Sep 1965, vol 29, p 654. According to operational guidelines issued to Australian military patrols in 1967, if they encountered Papuans seeking asylum they were to be reported to Territory District Commissioners; ‘Extract from Papua and New Guinea Command Operational Instruction 1/67, Patrols and Operational Exercises’, circa 1967, NAA A452 1968/2812. The guidelines continued, ‘In the absence of specific guidance, the general policy of the Administration is that all such people should be actively encouraged to return to their own Territory. Cases which are in obvious danger from the Irian Barat authorities should, however, be directed to the nearest Administration centre. If any numbers are involved, the Commander concerned should take especially urgent action to obtain guidance. Care should be taken to ensure that no hardship is imposed and that no opening is given for allegations of harsh treatment’. In 1968, Hasluck, then Minister for External Affairs, expanded on the process for determining asylum claims, reflecting the process and criteria agreed by Cabinet in 1962 and later Menzies, eg claims to be referred to ministers, merits-based assessment, and undertakings by refugees to refrain from political activity; CPD (Reps), 22 Aug 1968, vol 60, p 443.

137 Renouf to Secretary, DT, 27 Sep 1965, NAA A452 1970/1202. External Affairs may have also thought Territories would be more easily influenced by the sympathy for the Papuans being voiced in PNG’s House of Assembly. Sympathy for the asylum seekers does seem to have grown in the DT over time; see, for example, Warwick Smith to Secretary DEA, (draft), circa July 1965, NAA A452 1963/8261.
‘they would probably be punished on return if caught [and] at best, faced a continued nomadic existence’, 138 ‘they would be likely to try repeatedly to cross the border in future’, and ‘the Administration of Papua New Guinea was prepared to accept them’. 139 However, in line with the decisions taken by Barwick, Menzies and himself in 1962, the terms ‘asylum’ and ‘refugee’ were avoided, and the Papuans were given ‘permissive residence visas’ on ‘humanitarian’ grounds for an initial period of five years. Further, the visas were issued subject to each Papuan signing a declaration that,

I will abide by the laws of the Territory of Papua and New Guinea, make every conscientious endeavour to sustain myself and my family by my own efforts, will not in any way directly or indirectly engage in any political activity whatsoever in connection with the country I left to seek refuge in the Territory of Papua and New Guinea, and will accept resettlement in whatever centre of the Territory of Papua and New Guinea to which I and my family might be sent.140

In a further illustration of Australia’s desire to contain the situation, the UNHCR was held at a polite but firm distance. In March 1965, concerned by media reports of Indonesian repression in Papua and the risk of Papuan asylum seekers getting caught in the cross-fire between Australia and Indonesia over the latter’s confrontation with Malaysia, the UNHCR’s local representative asked to discuss the Papuan situation and possible UNHCR involvement. 141 In reply, External Affairs wrote,

There is at present no refugee problem in New Guinea. Indeed, the word ‘refugee’ is largely inapplicable to the kind of cross border movement that has taken place between West Irian and the Territory of Papua and New Guinea. Those persons who have come across the border have

---

138 The men had spent several months in hiding before crossing into PNG.
139 Secretary, DEA, to Secretary, DT, 5 Jan 1966, NAA A452 1969/4413. See also Loveday to Secretary, DT, 29 Nov 1965, NAA A452 1969/4413.
140 Copy of declaration on file (undated), NAA A452 1969/4413. The decision to grant permissive residence visas formally lay with the Minister for Territories, having regard to advice from the Territory Administrator and the Minister for External Affairs.
141 McIver to Furlonger, 19 Mar 1965, NAA A452 1963/8261. The UNHCR’s principal legal adviser in Geneva, Paul Weis, had advised McIver that the Refugees Convention did not apply to Papuan refugees in light of Australia opting to restrict its scope to Europe, but that this didn’t exclude the possibility of them being regarded, where so merited, as refugees within the UNHCR’s mandate, or the High Commissioner extending his good offices to them. He had also advised that the principle of non-refoulement would still apply.
in most cases been resident in the border area, with many of them having tribal connections and tribal lands extending across the border into Papua/New Guinea.\textsuperscript{142}

Behind the scenes, the Australian Consul-General in Geneva was told to speak to Felix Schnyder, the UN High Commissioner for Refugees, to explain Australia’s delicate situation, and urge him – and through him his junior officers – to not create embarrassing situations:

What we want to get across is that there is no significant problem at present; that premature publicity to this matter could jeopardise the already difficult task of building up a neighbourly relationship with Indonesia on border questions; and that we expect no action would be contemplated by the High Commissioner’s Office – even in the form of references in UNHCR documents – without the closest consultation with us. I think that Schnyder and Jamieson [UNHCR’s director of operations] would appreciate the force of this view; what needs also to be avoided is that people like Weis [UNHCR’s principal legal adviser], who may not realise the political sensitivity of the matter, may take seemingly routine action at a lower level which could be just as embarrassing as action taken with the full knowledge of senior UNHCR people.\textsuperscript{143}

From then on, until Australia relinquished control in PNG, it kept the UNHCR informed of developments in regard to the Papuan asylum seekers, but otherwise kept it out of the equation.\textsuperscript{144} As External Affairs put it in 1967, a request by the UNHCR to visit PNG ‘has not been accepted although it has not been refused’.\textsuperscript{145} Territories did not object,

\textsuperscript{142} Furlonger to McIver, 13 Apr 1965, NAA 452 1963/8261.
\textsuperscript{143} Furlonger to Hill, 13 Apr 1965, NAA A452 1963/8261. The UNHCR agreed to Australia’s request to not refer to Papuan asylum seekers or refugees in its documents, and said that ‘officers down the line knew the position’; Hill to Furlonger, 29 Apr 1965, NAA A10034 225/6/18 Part 1.
\textsuperscript{144} As late as March 1973, the DFA briefed the then Acting Special Minister of State, Don Willesee, when meeting a UNHCR representative, to respond to any question about the treatment of Papuan refugees in PNG post-independence as a matter for the PNG Government, but to emphasise that there was no cause for complaint in their current treatment by Australia and thus no need for any UNHCR investigation. Further, that any publicising of their situation by the UNHCR would not be appreciated by PNG or Indonesia; 28 Mar 1973, NAA A1838 932/3/1/5 Part 3.
\textsuperscript{145} Brief for Australian delegation to the 22\textsuperscript{nd} Session, UN General Assembly, circa Oct 1967, p 2, NAA A1838 929/6/1 Part 4. See also cable from Australian Consulate-General, Geneva, to DEA, 18 Oct 1967, NAA A1838 929/6/1 Part 4. While the Refugees Convention does not specify that a state must allow a representative of the UNHCR to enter its territory, or to directly supervise its treatment of refugees, under Article 35 a state must cooperate with the UNHCR in the exercise of its functions and facilitate the High
being concerned that the UNHCR might otherwise pressure PNG to accept more refugees than Territories thought it could support. Nor did Indonesia, which was more loath than Australia to have the UNHCR involved, to the point that Australia was able to use the threat of its involvement as a ‘stick’ to get Indonesia to back off whenever it began to protest too strongly about asylum grants.\(^\text{146}\)

Commissioner’s duty to supervise the Convention’s application. According to the DEA’s legal adviser in 1968, were Australia to assume the Article 35 obligation in regard to PNG by acceding to the Protocol, ‘it might be very difficult in practice to maintain that the High Commissioner should not send a representative to [PNG] if his own opinion was that this was necessary’; Brazil to Osborn, 28 Nov 1968, p 8, NAA A1838 929/6/1 Part 4. That said, the DEA was probably fairly hard-nosed in thinking about the UNHCR. As it noted in 1973, in relation to the proposed repatriation of several Papuan asylum seekers who AG’s and it thought excluded from Convention protection because of their criminal activities in Papua: ‘Should the UN High Commissioner for Refugees, contrary to our expectations, take the view that our interpretation of the Convention was mistaken in this case, we would expect him to seek to persuade Australia and PNG to apply different criteria in future cases. The UN High Commissioner for Refugees is bound by his charter and by the practicalities of international relations to seek to exert influence by persuasion and cooperation with governments. We exclude the possibility of his entering into an acrimonious or public confrontation with Australia or PNG over this issue. We also exclude the possibility that this case could in any way prejudice Australian or PNG accession to the [1967 Protocol]. Indeed, even in the eventuality (which we do not expect) of it being generally considered that the terms of the Convention had been misinterpreted in this case, we would expect the relevant parties, including the UNHCR, to be more, rather than less keen on Australian and PNG accession to the Protocol’; Woolcott, DFA, to Secretary, DET (draft), circa Jul 1973, NAA A1838 932/3/1/5 Part 3.

\(^{146}\) DEA policy planning paper, ‘Border policy in West Irian / Territory of Papua New Guinea’, 17 Nov 1969, NAA A452 1970/2113. Indonesia’s view of the issue is illustrated by comments made by its DFA in April 1970, when told that the High Commissioner had suggested a senior UNHCR official visit PNG to observe the condition of Papuan refugees. The DFA replied that, ‘From an Indonesian viewpoint … such a visit would not be timely and would cause some concern’, claiming that it might unsettle or re-arouse tensions among border people, that the refugees were different to those customarily handled by the UNHCR (they were still Indonesian citizens and, at the time, free to return to Papua under an amnesty), and that current arrangements between Indonesia and Australia were working satisfactorily; cable from Australian Embassy, Djakarta, to DEA, 21 Apr 1970, NAA A452 1970/2113; Farran to Secretary, DEA, 22 Apr 1970, NAA A452 1970/2113. The DFA continued, ‘There was no requirement for a third party or UN agency to interpose itself or interfere in any way, in contrast to other situations where refugees often find themselves caught between two border authorities not on speaking terms’. The Embassy summed up the situation by saying that it is ‘very clear to us that the Indonesians do not … consider that the time has come to vary the approach we have both followed over the last year or so in relation to UNHCR interest or involvement in these matters’. The Australian Ambassador to Indonesia was later to allege that
And indeed, the UNHCR itself did not press too hard. From 1967 it had a standing request to visit PNG, and in 1968 a senior UNHCR officer visiting Australia expressed concern about Australia’s patrol officers being able to expel Papuan border crossers if they judged they had no prima facie case for refugee status, without any right of appeal.\(^{147}\) He asked whether a UNHCR legal officer could assist in the refugee status determination procedure, but External Affairs declined the offer on the grounds that patrol officers were not police but civil service officials, and told him that issues involving the Papuans should be discussed at higher levels in the UNHCR. The new High Commissioner, Prince Sadruddin Aga Khan, was subsequently reported as being ‘fully satisfied’ with how the asylum seekers were being handled.\(^{148}\) Perhaps he was, since had he wanted to, he could clearly have exerted a much greater degree of moral and persuasive pressure on both Australia and Indonesia.\(^{149}\) However, it is equally possible that he decided to tread carefully, concerned that he might otherwise prejudice his efforts to have Australia drop its reservations to the Refugees Convention and support the 1967 Protocol and the 1967 Declaration on Territorial Asylum. Similarly, he may have decided that it was not in the broader UN interest to get Indonesia offside, in view of the UN’s pending involvement in the Papuan act of self-determination. Only

---

147 Record of meeting between Brazil and Rorholt, 17 Dec 1968, NAA A1838 932/3/1/5 Part 2. Rorholt reportedly saw this as potentially a breach of Article 32 of the Convention, and wanted tribunals to be instituted with a right of appeal, an arrangement Australia saw as unrealistic in the Territory context; Baird to Department of Foreign Relations & Trade, PNG, circa Jul 1973 (draft), NAA A1838 932/3/1/5 Part 3; record of meeting, 9 Mar 1973, p 3, NAA A1838 932/3/1/5 Part 3.

148 Cable from Consulate-General, Geneva, to DEA, 22 Jan 1969, NAA A452 1968/5721.

149 As the DEA’s legal adviser noted in 1968, while the responsibility of the state to determine eligibility for Convention protection is clearly established, the UNHCR is entitled to intercede on behalf of individuals who it believes are entitled to be treated as refugees: ‘It has this role by virtue of being the international agency established to deal with refugee matters, and it would be wrong to conclude that because its rulings are not legally binding, their moral and persuasive force can be ignored’; Brazil, internal note, 4 Dec 1968, NAA A1838 929/6/1 Part 4. See also Brazil, record of meeting of 12 Sep 1967, NAA A1838 929/6/1 Part 4.
in 1970, after the tensions surrounding this event subsided, did the UNHCR renew its request to visit PNG.\textsuperscript{150}

From late 1965, Australia’s policy was therefore basically to provide refuge to Papuan border crossers when there was a clear and genuine need for it, but otherwise to return as many as practicable, and keep the problem low key.\textsuperscript{151} The numbers entering PNG fluctuated, climbing at times to over a hundred a month. Less than ten per cent were found to be refugees, with most others being viewed as motivated by economic reasons, and persuaded to return.\textsuperscript{152} Other than an incident in 1967 when the PNG Administration was chastised for deporting two refugees on permissive resident visas without consulting Territories or External Affairs,\textsuperscript{153} the two departments had little difficulty managing the issue, especially with Indonesia sharing their desire to avoid publicity.\textsuperscript{154} In one respect a trickle of asylum grants was useful, for it helped Australia

\begin{footnotes}
\item Farran to Secretary, DEA, 22 Apr 1970, NAA A452 1970/2113. Neumann (2006) provides a somewhat different account of the UNHCR’s motives for keeping quiet about Papuan asylum seekers during these years. In his view, it was due to a desire to avoid the risk of Australia cutting its financial support to the UNHCR, a view that intervention would have constituted interference in the domestic affairs of Indonesia, and a belief that an ‘over-liberal’ asylum policy would not be in the interests of the Papuans themselves.
\item Anderson to Minister for External Affairs, circa Oct 1967, NAA A1838 929/6/1 Part 4.
\item The figure of less than ten per cent is a Territories estimate of September 1967 (Brazil, record of meeting of 12 Sep 1967, NAA A1838 929/6/1 Part 4), repeated in the brief to the Australian delegation to the 22\textsuperscript{nd} session of the UN General Assembly, circa Oct 1967, p 2, NAA A1838 929/6/1 Part 4. The writer was unable to locate comprehensive figures, but figures for the three months of February to April 1967 (in Anderson to Minister for External Affairs, circa Oct 1967, NAA A1838 929/6/1 Part 4) are perhaps typical. During this period, 325 Papuans including dependents entered PNG, with asylum being granted to twenty-four (twelve adults, all active members of the Organisasi Papua Merdeka (OPM) and their twelve dependents).
\item Hay to Secretary, DT, 20 Apr 1967, NAA A452 1969/4413; Warwick Smith to Hay, 21 Sep 1967, NAA A452 1969/4413. One had been engaged in repeated incidents of fighting and drunkenness, and the other difficult to employ. Warwick Smith, the Secretary of DT, instructed that his department in future be informed of all such proposed deportations, ‘having regard to the international implications surrounding refugees accepted into Papua New Guinea’.
\item Brazil, record of meeting of 12 Sep 1967, NAA A1838 929/6/1 Part 4.
\end{footnotes}
assuage criticism by Papuan nationalist organizations in the Netherlands. However, with its greatest fear being that PNG would become a base for clandestine anti-Indonesian operations, External Affairs repeatedly told the PNG Administration to keep a watchful eye on those granted asylum, and ensure they abided by their undertakings to refrain from political activity.

The next main flashpoint was the 1969 act of self-determination, especially when Indonesia sought to prevent demonstrations during visits to Papua by UN delegations, and their receiving letters or petitions from dissidents. Contingency plans were prepared by the PNG Administration to accommodate several thousand refugees, to apprehend and disarm Papuan militants using PNG to escape and regroup, and to contain incursions by the Indonesian forces trying to catch them. Under the plans, armed bands that voluntarily surrendered their arms would be treated as refugees, but any who refused would be ordered back to Papua.

The PNG Administration thought it could cope with most scenarios relating to the act of self-determination, but it did float the idea that either resettlement in Australia or forcible repatriation might be necessary if the numbers seeking asylum became too great. Immigration was not at all keen on the former idea, citing potential integration problems and inconsistency with its policy towards PNG citizens, who themselves had no right of permanent entry. But the option of forced repatriations was also

155 Anderson to Minister for External Affairs, circa Oct 1967, NAA A1838 929/6/1 Part 4. As Arthur Tange said of a proposal of his, when High Commissioner to India, to permit entry of ‘impressive examples of a few hundred cultivated Indians’ to counter resentment of Australian immigration policy, ‘What I have in mind would not really involve any significant change in policy but would vastly improve the raw material with which diplomacy has to work’; cable from Tange to DEA, 4 Mar 1966, NAA A1838 581/2 Part 6.
159 Brazil, record of meeting of 12 Sep 1967, NAA A1838 929/6/1 Part 4.
dismissed by Canberra, partly because it would almost certainly attract the attention of Indonesian authorities – up to then, returns could generally be made unnoticed, but Indonesian border patrols were becoming more frequent – and partly because it was thought likely to be ‘seized upon by countries already critical of certain aspects of Australian policy’, and turned into an international issue.\textsuperscript{160}

Since 1963, efforts to disperse Papuan refugees throughout PNG had often been stymied by difficulties in placing and employing them. However, with evidence that some at Wutung and other places near the border were engaging in para-military activity,\textsuperscript{161} and

\textsuperscript{160} Territory Intelligence Committee Paper No 2/68, 8 Mar 1968, NAA A452 1968/2812. According to the Committee, opposition would come mainly from some indigenous politicians, some Europeans (academics, missionaries, etc), and Papuan nationalist organizations in Europe, Japan and the United States. In its view, most Territorians were only vaguely aware of the Papuan situation, and would be less opposed to forcible repatriations if they occurred in the context of a mass influx, particularly in the event of the influx causing economic problems. According to one commentator, sympathy for the Papuans among PNG indigenous politicians was growing at this time, with a common view being that Australia should ‘take over’ Papua and spend as much money on it as on PNG; Hastings, ‘The trickle that threatens to bring a torrent of problems’, \textit{The Australian}, 28 Mar 1968, NAA A452 1969/18. Sympathy for border crossers amongst PNG people living close to the border also probably helped deter forced removals. In 1973, the DFA claimed that the expulsion of genuine political refugees from Papua against their will ‘has never been a practical possibility’; Cumes to Minister for Foreign Affairs (draft), 16 Jan 1973, p 7, NAA A1838 932/3/1/5 Part 3.

\textsuperscript{161} The evidence appears well grounded, coming from both PNG intelligence and independent sources. For example, after visiting some of the camps at the border in late 1968 with the help of Papuan refugees, a journalist, TD McCarthy, wrote of a well-organised and militant Papuan nationalist movement operating in both Papua and internationally, with many supporters living in the border camps, and some engaged in para-military operations against Indonesian authorities. According to the DT, McCarthy’s findings were generally consistent with PNG intelligence reports, if ‘slightly exaggerated’ in its depiction of the strength and activities of the movement and the aggressive potential of the bush dwellers. The DEA claimed that a build-up of numbers at Wutung and other bush camps was a result of coordinated action by dissident groups to prepare for an uprising in November 1968. See Galvin to Minister for External Territories, 6 Nov 1968, NAA A452 1968/5508; Besley to Minister for External Territories, 23 Oct 1968, NAA A452 1968/2812; brief for DEA appearance before Parliamentary Foreign Affairs Committee, 11 Nov 1968, Attachments 4 & 6, NAA A452 1968/5721 & Attachment 5, NAA A452 1968/5508; Osborn to Parliamentary Foreign Affairs Committee, 12 Nov 1968, NAA A452 1968/5721.
that Indonesian intelligence agents could also be active in the area, in October 1968 Australia decided to act more decisively to create a buffer zone. Over forty people, being either refugees with permissive residence visas or asylum applicants, were taken to Manus Island. Another 300 or so, being either failed asylum seekers or border crossers who had never sought a permit of any kind, were, according to the instruction from Barnes, to be returned to Papua ‘as quickly as possible, without the use of force’. Within six weeks, all were reported to have gone, although extra police were needed at one camp to stop a group who tried to return when they heard that Indonesian troops might be in the area.

Manus Island was chosen as a holding centre because its remote location curtailed opportunities to breach refugee undertakings in regard to political activity, and because it had more accommodation and employment opportunities than other possible centres, for example Wewak and Aitape. The number of Papuans held at Manus rose to fifty-eight by April 1969. At one stage most appeared ready to accept an offer from Indonesian authorities for them to return to Papua to participate in the act of self-determination, with Australia paying their airfare. However, all are reported to have ultimately stayed in PNG.

The above crackdown was criticised by some indigenous leaders, especially those from electorates close to the border. For example Michael Somare, the parliamentary

162 Intelligence operations at the border appear to have been conducted by both Indonesia and Australia, with Papuans in PNG being a source of information on Papua for Australia; Besley to Secretary, DT, 2 Nov 1968, NAA A452 1968/5508.
164 Besley to Minister for External Territories, 4 Dec 1968, NAA A452 1968/5508; Wakeford to Secretary, Department of the Administrator, 9 Nov 1968, NAA A452 1968/5508.
165 Besley to Secretary, DET, 2 Nov 1968, NAA A452 1968/5508; Attachment 6, DEA brief for appearance before the Parliamentary Foreign Affairs Committee, 11 Nov 1968, NAA A452 1968/5721.
representative for East Sepik, stated that it was no way to treat ‘people of common blood, especially those seeking freedom or relatives,’ and Paul Langro, the representative for West Sepik, claimed that Australia

… was being unnecessarily restrictive towards refugees on two counts: the first was that too many genuine and legitimate refugees were being turned back; the second was that those allowed remain were excessively restricted in movement.

Privately, John Guise, the Speaker in PNG’s House of Assembly, urged Barnes to provide a ‘real sanctuary’ for Papuans fleeing Indonesian troops, and to approach the UN about the issue. Even the PNG Administrator urged simpler processing procedures, and if necessary the acceptance of larger numbers of refugees.

However, in Canberra’s eyes firm action was needed. For it, the critical needs were to constrain dissident activity in PNG, reassure Indonesia of Australia’s neutrality on Papua, discourage an influx of asylum seekers and other border crossers, and promote respect for the border among locals on both sides. In effect, in 1968 Australia drew a line in the sand. It would grant refuge to Papuans who could demonstrate a genuine

---

167 Quoted in Attachment 6, DEA brief for appearance before the Parliamentary Foreign Affairs Committee, 11 Nov 1968, NAA A452 1968/5721.
169 Guise to Barnes, 6 Dec 1968, NAA A452 1969/18. While the views of leaders like Somare and Guise made Papuan asylum seekers a sensitive political issue in PNG, debates in the House of Assembly appear to have generally favoured the Administration’s approach; background notes for Besley, DET, for meeting on border planning, 30 Apr 1969, NAA A452 1968/2812.
170 Besley to Secretary, DET, 23 Apr 1969, NAA A452 1968/2812. According to Besley, he told the Administrator (DO Hay) that ‘in recent times [the] trend had been to harden rather than soften [the] line but that since this very much related to external relations with Indonesia [it] would have to be settled in collaboration with External Affairs’.
need for it. It would even tolerate their demonstrations, petitions and other expressions of anti-Indonesian sentiment, for as External Affairs noted,

[These] may be unfortunate for Australia’s relations with Indonesia, [but] they are not the sort of activity which would cause the [PNG] Administration or the [Australian] Government to enter the lists against them … [and some of these activities] indeed are legitimate and proper rights which are accepted.172

However, it would not tolerate the formation of covert groups in PNG, the passing of subversive material through PNG into Papua, or dissidents training in PNG for a Papuan uprising. In the view of External Affairs, ‘The return of the bush campers and the movement of West Irians to Manus represent an attempt to disrupt this activity within the Territory’,173 or as one official put it, to have them ‘taken out of the game’.174

Clamping down on anti-Indonesian activities becomes then a game of warn and bluff. Recent actions have demonstrated that the better way to deal with these activities is to disrupt legally the game rather than remove the players entirely.175

---

172 Attachment 5, DEA brief for appearance before Parliamentary Foreign Affairs Committee, 11 Nov 1968, NAA A452 1968/5508. One reason for being unwilling to deport activist refugees was also the desire to avoid the risk of having Australia’s claim tested that the conditions imposed on them were consonant with the Refugees Convention; see Attachment 5, DEA brief for appearance before Parliamentary Foreign Affairs Committee, 11 Nov 1968, NAA A452 1968/5508. For claims that Australia was observing Convention standards in PNG, although not obliged to, see, for example, statement to PNG House of Assembly by the Secretary for Law, 20 Nov 1968, House 3/15, NAA A452 1968/5508; Osborn to Parliamentary Foreign Affairs Committee, 12 Nov 1968, NAA A452 1968/5721; Hasluck to Fitzgerald, 29 Nov 1968, NAA A452 1969/18.

173 Attachment 5, DEA brief for appearance before Parliamentary Foreign Affairs Committee, 11 Nov 1968, NAA A452 1968/5508. There was also concern that the Soviet Union and China might see advantage in becoming involved in dissident activity, a point made by United States officials; Dingle to Secretary, DEA, 2 Dec 1968, NAA A452 1969/18. In 1969, three Papuan refugees in Port Moresby wrote to Hasluck appealing for arms to help fight the Indonesians, with a veiled threat to get them from communist countries if Australia did not oblige; Jockel to Secretary, DT, 6 Jan 1969, NAA A452 1969/18.

174 Background notes for Besley, DT, for meeting on border planning, 30 Apr 1969, NAA A452 1968/2812.

Significantly, Australia appears to have had the tacit support of the UNHCR, at least in regard to removing refugees from the border area, designating places of principal residence for them, and preventing them engaging in subversive activity towards Indonesia.\textsuperscript{176} It also appears to have had the support of a majority in the PNG House of Assembly, despite occasional criticism like that mentioned earlier. For example, a proposed vote of sympathy and consideration for Papuan asylum seekers by Somare in November 1968 was lost by a vote of 56 to 24.\textsuperscript{177} Australia quietly confided to Indonesia that ‘MHA’s, particularly those sympathetic to the West Irianese cause, tend to be outspoken and there is nothing we can do to curb this’.\textsuperscript{178}

The start of 1969 saw a sharp rise in Indonesian military and police activity along the border, and a heightened concern in Australia about the prospect of an influx of asylum

\textsuperscript{176} Record of meeting between Brazil and Rorholt, 17 Dec 1968, NAA A1838 932/3/1/5 Part 2. According to Rorholt (UNHCR’s legal adviser), moving refugees from border areas and designating a place of principal residence for them in the public interest did not conflict with Article 26 of the Refugees Convention (relating to freedom of movement), and he gave the example of the UNHCR contributing financially to moving refugees away from border areas in Africa. On refugee political activity, he said Article 2 (on a refugee’s general obligations) and Article 15 (right of association) could permit some restrictions, but distinguished between legitimate political activity (eg public comment and criticism of the regime) and impermissible activity (eg organising acts of sabotage or other forcible activities): ‘A complete embargo on political activity would not be proper … People become refugees because of their interest and activities in political matters and it was not reasonable to require them to abstain completely from politics’.

\textsuperscript{177} Extract from ‘This Week in the Papua-New Guinea House of Assembly’, No 7, Index for Week November 25-29 1968, NAA A452 1968/5508. Territories advised the Administrator to resist any attempt to broaden the debate to issues relating to Indonesia or Papua as beyond the House’s competence; cable from DET to PNG Administrator, 25 Nov 1968, NAA A452 1968/5508. Under the \textit{Papua-New Guinea Act}, the House was technically limited to making ordinances only for ‘the peace, order and good government of the Territory’.

\textsuperscript{178} Besley to Minister for External Territories, 7 May 1969, NAA A452 1968/2812. According to Besley, Malik, the Indonesian Foreign Minister, had previously been advised that Australia’s ability to impose further restraints on the political activities of Papuan refugees was severely limited by PNG law, the Refugees Convention and the attitude of some leading indigenous politicians. See also background notes for Besley, DT, for meeting on border planning, 30 Apr 1969, NAA A452 1968/2812, where it says that the Australian Ambassador had told Indonesian officials that ‘one must expect public statements on [the] Act of Free Choice [from PNG politicians] and live with them’.
seekers and border infringements by the Indonesian forces.\footnote{179} External Affairs told Adam Malik, the Indonesian Minister for Foreign Affairs, that any influx would attract unfavourable publicity for Indonesia, and that while Australia ‘could turn back people who crossed for economic reasons, it would be a very different situation if the crossers could claim they were fugitives from armed pursuit’.\footnote{180} Malik said he had been told that no military operations were being conducted near the border, but added candidly, ‘you could not always believe what the military told you and … many of them were prone to think that the best way to solve things was with a gun’.

Relations were particularly strained by the occasions when Indonesian forces crossed into PNG. The most notable incident occurred on 26 April 1969, when seventy-nine Papuans fled across the border at Wutung, pursued by police who, under orders to arrest refugees, searched houses, tried to arrest one person, and in the confusion fired over the heads of the unarmed Australian in charge of the Wutung post and two PNG policemen.\footnote{181} Territories were furious, and wanted a ‘stiff formal protest’ delivered to Indonesia.\footnote{182} However, External Affairs held that Australia ‘had to play it cool with the Indonesians’ and that ‘a protest might not now be in order’.\footnote{183} The incident was

\footnote{179} The concern was less with the troops than the police mobile brigades, which consisted of Indonesians and Papuans and lacked the disciplined training of the army; Legge to First Assistant Secretary, DET, 21 Mar 1969, NAA A452 1968/2812.

\footnote{180} Cable from Ambassador, Djakarta, to DEA, 6 Feb 1969, NAA A452 1968/2812.

\footnote{181} Statement by the Minister for External Territories, in cable from DEA to Australian Embassy, Djakarta, 27 Apr 1969, NAA A452 1968/2812; cable from PNG Administrator to DET, 29 Apr 1969, NAA A452 1968/2812; cable from Military Command, Port Moresby, to Army, Canberra, 30 Apr 1969, NAA A452 1968/2812; extract of Joint Intelligence Organisation Committee Current Intelligence Report No 18, 1969, NAA A452 1968/2812. The Australian official, Anthony Try, considered the incursion (which was in the order of 200 to 400 metres into PNG) a result of confusion as to where the border was. The police released their captive when Try and the PNG constables intervened, saying that he was from Wutung and not a refugee. The seventy-nine Papuans were taken to Vanimo and given the opportunity to claim refugee status.

\footnote{182} Besley to Secretary, DET, 28 Apr 1969, NAA A452 A1968/2812; Warwick Smith to Secretary, DEA, (draft), circa 30 Apr 1969, NAA A452 1968/2812; DET file note on telephone conversation with Osborn, DEA, 2 May 1969, NAA A452 1969/18.

\footnote{183} Besley to Secretary, DET, 1 May 1969, NAA A452 1968/2812. Barnes discussed the issue with Freeth, but was unable to convince him of the merits of a formal protest.
smoothed over in a flurry of diplomatic activity, with Malik assuring Gordon Freeth, the new Minister for External Affairs, that he would take appropriate action ‘to restrain over-excitable local officials’ and avoid a recurrence of the incident.\textsuperscript{184}

If nothing else, Freeth probably thought his hands tied by embarrassing timing, since at a press conference in Jakarta on the same day as the Wutung incident he had expressed support for Indonesia’s preferred voting arrangements for the act of self-determination over the UN’s,\textsuperscript{185} described reports of demonstrations and arrests in Papua as ‘purely a matter of internal administration’, and dismissed border crossings as ‘matters of administrative detail’ on which Indonesia and Australia had reached a satisfactory arrangement:

Some of those who have come over the borders have crossed them because they are relatively primitive people who don’t understand what national borders are. Some of them have come across because they really want to settle in the other territory, and where they are not likely to be political troublemakers, we have accepted some of them. But these details have been worked out very satisfactorily with the Indonesian Government. There is no great problem between our Government and the Government of Indonesia. In some cases we have sent people back, and they have gone back without any difficulty.\textsuperscript{186}

In following months, a regular program of border liaison was agreed, including monthly meetings, daily radio contact, and so forth, to help both sides discuss issues more quickly and effectively, with a particular focus on preventing anti-Indonesian activities.

\textsuperscript{184} File note by Besley, 29 Apr 1969, NAA A452 1968/2812.
\textsuperscript{185} The UN representative, Fernando Ortiz Sanz, recommended a one-person one-vote type process in coastal areas where most people lived, and a ‘musjawarah’ (‘reasoning together towards a consensus’, involving discussions among local council members) type process elsewhere. Indonesia opted for the latter process in all areas; cable from Australian embassy, Djakarta, to DEA, 26 Apr 1969, NAA A452 1969/18. According to the DEA, Sanz was to say privately that the idea of an expression of ‘free choice’ in accordance with international practices, as specified in the Dutch-Indonesian Agreement of 1962, was ‘an absurdity’ because of the absence of appropriate local traditions of voting; Osborn to Parliamentary Foreign Affairs Committee, 12 Nov 1968, NAA A452 1968/5721.
\textsuperscript{186} Transcript of press conference in cable from Australian Embassy, Djakarta, to DEA, 26 Apr 1969, NAA A452 1969/18. A similar line was taken by Freeth in a press conference on his return to Australia on 30 Apr 1969, NAA M2567 2.
in border areas and incursions into PNG by Indonesian forces. However, Australia refused to exchange intelligence on refugees and anti-Indonesian rebels, or conduct joint border patrols:

Humanitarian considerations aside, our main objection is that these might be represented by Papuan and New Guinean politicians as an alliance directed against the indigenous people of New Guinea. This would make trouble for us and would also promote a dangerous tendency which could later damage independent Papua-New Guinea’s relationship with Indonesia … We are [also] concerned at the potential for embarrassment inherent in a police role for Indonesians in Australian territory and vice versa.

187 DET to Minister for External Territories, 19 Jun 1969, NAA A452 1970/1202; DFA policy planning paper LP/No 1, ‘Border policy in West Irian / Territory of Papua New Guinea’, 17 Nov 1969, NAA A452 1970/2113; internal DFA brief, March 1971, NAA A452 1970/1202. Under the arrangements, it was agreed that both sides could discuss all matters concerning the border, including border crossers, and that if Indonesian authorities had evidence of anti-Indonesian activity in PNG they could inform PNG authorities who would take appropriate action. Indonesian and Australian patrols were under orders to not cross the border. When Indonesia declared an amnesty period for Papuans in PNG after the 1969 act of self-determination, the Minister for External Territories agreed to visits by Indonesian officials to holding camps for asylum seekers at Yako and elsewhere to help explain the amnesty and reassure people that they would not be harmed if they returned; Ellis to District Commissioners, 18 Nov 1969, NAA A452 1970/1202. These visits continued after the amnesty had expired; ‘More refugees cross border’, *Post-Courier*, 21 Oct 1970, in NAA A452 1970/1202; cable from DET to Territory Administration, 4 Oct 1971, NAA A452 1970/1202. While well intentioned, the visits may have created a sur place situation for some asylum seekers, eg in August 1970 Indonesian police reportedly questioned people being held at the Yako holding camp during a monthly border liaison meeting, and took photographs of the campsite: Jack McCarthy, ‘Alarm at Indon police visits to Vanimo’, *Post-Courier*, 5 Aug 1970, in NAA A452 1970/1202.

188 DFA brief for meeting with General Sumitro, 1 Feb 1971, NAA A452 1970/1202. See also Osborn to Secretary, DET, 1 Apr 1969, NAA A452 1968/2812, where Australia’s Ambassador is reported as being told ‘to make the point to the Indonesians that there is no question of our assisting them in locating or rounding up dissidents on the border’. Whenever Malik and others alleged that subversive activities were being undertaken by Papuan refugees in PNG, the standard response from Australia became that it knew of no such cases but would investigate all allegations; see for example, Freeth, CPD (Reps), 28 May 1969, vol 63, p 2315. Australia also rejected Indonesian proposals for an agreement to govern border crossings more generally; see, for example, cable from Australian Embassy, Djakarta, to DEA, 21 Apr 1970, NAA A452 1970/2113; Farran to Secretary, DEA, 22 Apr 1970, NAA A452 1970/2113; record of meeting between Marentek, Indonesian DFA, and DEA, 13 Oct 1970, NAA A452 1970/2113.
Moreover, while Indonesia held to its view that the asylum seekers were ‘criminals or troublemakers’, Australia continued to insist on its right to grant protection to any it thought had sufficient grounds for refugee status.\textsuperscript{189} Holding camps for asylum seekers were established at Yako, Boset, Oboe and Rouku in addition to the one at Manus Island,\textsuperscript{190} and the number granted permissive residence since 1963 rose from sixty-seven in March 1969\textsuperscript{191} to over 500 by mid-1971.\textsuperscript{192} The few Papuans who sailed south to seek asylum in Australia were promptly sent to PNG to have their applications processed there.\textsuperscript{193}

In late 1969, a Foreign Affairs (formerly External Affairs) policy paper noted that,

> Although the Indonesians … put pressure on Australia to divulge information about refugees, we have consistently declined to do so. This has constituted one of the major points at issue between the two sides, but the Australian view (lent strength by Indonesia’s desire to avoid involvement by the UNHCR) has prevailed and is understood by the Indonesian authorities. Australia has also protected her right to grant permissive residence to certain categories of West Irianese refugees and to interpret whether persons in this category are to be regarded as political refugees or criminal fugitives … [Indonesian authorities] are no doubt restrained from being more assertive on this point principally by the opportunities we have taken to wave the UNHCR stick at them from time to time.\textsuperscript{194}

The act of self-determination, with the choice being absorption into Indonesia, took place in mid-1969, and several months later the UN General Assembly confirmed Papua as sovereign Indonesian territory. Indonesia announced an amnesty for Papuans who

\textsuperscript{189} DFA brief for meeting with General Sumitro, 1 Feb 1971, NAA A452 1970/1202.
\textsuperscript{190} Internal DFA brief, March 1971, NAA A452 1970/1202.
\textsuperscript{191} DEA, notes for possible questions to Minister for External Affairs, 7 Mar 1969, NAA A452 1969/18; see also cable from DEA to Australian High Commission, London, 5 Nov 1968, NAA A452 1968/5508.
\textsuperscript{192} Barnes, CPD (Reps), 20 Aug 1971, vol 73, p 474.
\textsuperscript{193} Eight Papuans landed in the Torres Strait in February 1969. For an official account of their treatment, see Freeth in CPD (Reps), 6 Mar 1969, vol 62, pp 461-2, and CPD (Reps), 15 Mar 1969, vol 62, p 1127. A critical account can be found in Neumann (2004: 76-78).

had fled to PNG, which lasted until June 1970. Many asylum seekers accepted the offer and returned home, resulting in the Boset, Oboe and Rouku holding camps being closed.

The asylum issue seemed destined to gradually fade away, for if any international support had ever existed for the cause of Papuan independence, it now seemed weaker than ever. When a Netherlands-based Papuan activist visited the UN in mid-1971, African and West Indian representatives reportedly told him that Papua’s incorporation into Indonesia was ‘universally accepted’ – although they did suggest he could pursue the idea of a united Melanesia, comprising New Guinea, Solomon Islands and New Hebrides/Vanuatu. In their view, this seemed potentially the only face-saving way that Indonesia might now ever countenance releasing Papua.

**Passing responsibility to an independent PNG**

In the remaining few years of Australia’s administration of PNG, the number of asylum seekers dwindled, although a trickle continued, as did occasional incursions by

---

195 Ellis to District Commissioners, 18 Nov 1969, NAA A452 1970/1202. Australia allowed individuals to choose whether they returned to Papua or stayed in PNG. However, it offered assistance with transport to return, and its slow decision making on asylum applications (sometimes taking six to twelve months) led some to speculate that ‘a new psychological war is being waged in the hope that [asylum seekers] will give up in despair and go back to West Irian to face the music’; ‘Frank statement needed on Irianese’, *Post-Courier* editorial, 2 Apr 1970, in NAA A452 1970/1202. Further, it made it clear that any refugee who stayed would remain bound by the undertaking they had made in regard to employment, movement and political activity, and that an extension to their permissive residence visa would be subject to normal application processes. When the amnesty ended, subsequent voluntary returns were considered on their merits and at the discretion of the Indonesia military commander in Papua, with approaches being made through the local border liaison channels that had been established in 1969; cable from Australian Embassy, Djakarta, to DFA, 2 Jul 1970, NAA A452 1970/1202; Australian Embassy, Djakarta, to Secretary, DFA, 27 Jul 1970, NAA A452 1970/1202.

196 McDonald to Secretary, DFA, 26 Jul 1971, NAA A452 1970/1202.

197 For example, in April 1970 up to 150 Papuans who had not sought permission to reside in PNG were reported as hiding in the West Sepik district, near Vanimo (Jack McCarthy, ‘Irian refugees hiding in border district’, *Post-Courier*, 23 Apr 1970, in NAA A452 1970/1202), and another 100 or so were reported as crossing the border near Yako in the five months after that (‘More refugees cross border’,
Indonesian forces. In July 1973 there were still an estimated 500 refugees on permissive residence visas in PNG, comprising some 190 adult males, their wives and children.

However, after 1969 both sides were clearly intent on avoiding any further flare-ups over asylum issues. Indonesia appeared to treat voluntary returnees well, but it continued to chafe at the use of PNG by dissidents and in 1971 suggested the creation of ‘zones of hot pursuit’, an idea that Australia immediately rejected. For its part,

Post-Courier, 21 Oct 1970, in NAA A452 1970/1202). In July 1971, eight Papuans, including two wounded, were reported to have crossed into PNG at Imonda, returning to Papua after leaving one of the wounded, who applied for asylum; cable from PNG Administrator to DET, 15 Jul 1971, NAA A452 1970/1202.

198 Bunting to Secretary, Department of the Administrator, 12 Aug 1971, NAA A452 1970/1202.

199 Cable from DFA to all posts, 24 Jul 1973, NAA A1838 932/3/1/5 Part 3.

200 Record of conversation between DET & DFA, 18 Oct 1972, NAA A452 1971/4189; Woolcott to Minister for Foreign Affairs, 18 Jul 1973, NAA A1838 932/3/1/5 Part 3. When refugees on permissive residence visas wanted to return to Papua, it was usually arranged after assurances by local Indonesian authorities that they would not be harmed; see, for example, PNG Administrator to Secretary, DFA, 9 Jun 1971, NAA A452 1970/1202; Bunting to Secretary, Department of the Administrator, 7 Dec 1971, NAA A452 1970/1202. In 1973, Indonesia offered to permit periodic inspections by PNG officials of returnees to satisfy themselves that they had come to no harm; record of meeting between Conroy (Secretary, PNG Department of Foreign Relations & Trade) and DFA, 6 Aug 1973, NAA A1838 932/3/1/5 Part 3. It is not known whether such an arrangement eventuated.

201 The PNG Administrator and PNG officials claimed that PNG was used only intermittently by Papuan rebels, that all Indonesian allegations were checked, including by foot and helicopter patrols, and that while there were occasions when medical treatment was given on humanitarian grounds, no supplies were being provided; see, for example, DET file note, 6 Feb 1973, NAA A452 1971/4189; DET file note, circa Feb 1973, NAA A452 1971/4189. However, the District Commissioner in Vanimo and many in the DET and DFA thought Indonesia’s concerns justified, believing that rebels used PNG to escape Indonesian forces, obtain supplies and medical assistance, and for courier purposes, and that they received active support from some Papuan refugees in PNG; see, for example, PNG Intelligence Committee, 29 Oct 1971, NAA A452 1970/1202; Steven, report on border liaison meeting, 27 Jun 1972, NAA A452 1971/4189 & internal note, 13 Sep 1972, NAA A452 1971/4189; record of conversation, DET & DFA, 18 Oct 1972, NAA A452 1971/4189; Arriens to Secretary, DFA, 21 Aug 1973, NAA A452 1971/4189; Greenwell to Secretary, DFA, 11 Sep 1973, NAA A452 1971/4189; DET file note, Sep 1973, NAA A452 1971/4189.

202 Cable from DFA to Australian Embassy, Djakarta, 28 Sep 1971, NAA A452 1970/2113.
Australia sought to give Indonesia as little to complain about as possible. The buffer zone approach was maintained, and refugees and asylum applicants were held at Manus or Yako if accommodation and employment was not immediately available elsewhere.²⁰³ Refugees were monitored for compliance with their asylum conditions, which was also encouraged by dispersing them throughout PNG, assigning a few of the more likely offenders to remote villages, and refusing entry to PNG of Netherlands-based Papuan activists.²⁰⁴ Any allegations by Indonesia of subversive activity were followed-up, with Foreign Affairs advising its Jakarta Embassy in 1973 that,

We do not want you to assert that the border is now water-tight, but to make it clear that serious efforts are being made to follow up Indonesian reports of rebel use of PNG and to follow procedures that reduce their opportunity to do so. We particularly wish to dispel Indonesian suspicions of indifference – or worse – on the part of the Australian and PNG Governments.²⁰⁵

Canberra also ordered a stop to the interrogation of asylum seekers on military deployments and conditions in Papua, on the grounds that it was no longer necessary in view of improvements in Australian-Indonesian relations, and because it would harm

²⁰³ Barnes, CPD (Reps), 14 Oct 1971, vol 74, p 2453. In March 1971, there were about forty-six Papuan refugees at Manus awaiting employment, and about thirty-five refugees at Yako plus eighteen asylum applicants; internal DFA brief, March 1971, NAA A452 1970/1202. Media claims of ‘concentration type camps’ during the mass crossings in 1969 led to the people at Yako being granted almost unrestrained freedom of movement; DET file note, Sep 1973, NAA A452 1971/4189.

²⁰⁴ On considering moving one activist refugee to a remote village, the DET commented, ‘As permissive residents are very dependent on the Administration (and they know this) up to date there had been no problem in shifting them”; record of meeting, 23 Mar 1971, NAA A1970/1202. Foreign Affairs was never quite satisfied, believing that while most refugees resettled quietly, the Administration in practice had limited powers of control and exercised little supervision over them, and that some kept contact with Papuan organizations overseas and in Papua; Woolcott to Minister for Foreign Affairs, 18 Jul 1973, NAA A1838 932/3/1/5 Part 3. In 1971 it refused an application to enter PNG by the Netherlands-based Papuan activist, Nicolaas Jouwe, on the grounds that it ‘would create problems for the Australian Government and the future independent state in Papua-New Guinea”; record of meeting, 23 Mar 1971, NAA A1970/1202.

²⁰⁵ Cable from DFA to Australian Embassy, Djakarta, 12 Feb 1973, NAA A452 1971/4189.
As noted earlier, permission for the UNHCR to visit PNG was also still withheld, not least because of Indonesian (and growing PNG) opposition. And finally, the language of asylum continued to be avoided. As Foreign Affairs observed,

> We have to date avoided the more offensive language of the Convention (‘political refugees’, ‘well-founded fear of persecution’, etc) in favour of more neutral terms (‘permissive residents’ and ‘humanitarian grounds’).

As a result of these sorts of measures, by mid-1971 Foreign Affairs and Territories agreed that ‘the refugee problem was no longer a pressing one’, with Territories reporting that,

> The number of refugees in the border regions had dwindled away. About 500 had been allowed to stay in the Territory but there were very few of these that caused any problems at all. Most were now working either with the Administration or in private enterprise. There was a mere handful that were not prepared to work and that posed a minor problem ... The refugees in the Territory had been given permits to reside there subject to certain conditions and up to a certain date. However, no one was expecting them to be told to go and it was unlikely that any pressures to that end would develop.

The only element of unpredictability that seemed left was what policies PNG might adopt after independence. While Indonesian-Australian relations over asylum issues may at times have been prickly, years of engagement had led to familiarity and mutual understanding. By contrast, Indonesia had little knowledge of or experience in dealing with indigenous leaders like Somare. It knew that there was some sympathy in PNG for their Papuan ‘brothers’, and was concerned that this might translate into tolerance of

---

206 Secretary, DET, to PNG Administrator, 27 Oct 1971, NAA A452 1970/1202. In addition to being questioned about their claim, asylum applicants were, however, still quizzed on dissident activities in the border area, especially on instances of trespass and contact with PNG residents.


subversive activity against Indonesia, if not complicity. Further, according to Foreign Affairs,

The Indonesian nightmare … is that the example of independence for PNG and the greater rate of economic development there may stimulate otherwise moribund separatist urges in West Irian. In their first shock, they even asked whether the rate of constitutional development in PNG could be slowed down. That is of course untenable. Indonesia will have to live with an independent PNG. President Soeharto himself asked Mr McMahon whether the rate of economic development in PNG could be slowed down to something nearer the pace of development in West Irian. That too is impracticable.210

Australia sought to allay Indonesia’s concerns, with one Territories official saying,

I remain in doubt as to whether the sensitivity of the Papua New Guineans to aiding the elimination of the rebels has been correctly explained. It is rather implied that this [is] hostility towards Indonesia. I doubt if this is so. There is some fear of Indonesia but my understanding is that Papua New Guinea has a natural reluctance to take action against their own kind rather than ‘hostility’ to Indonesia. Presented as ‘hostility’ suggests the likelihood of Papua New Guinea actively encouraging the rebels of which there has been no evidence.211

However, there was not much more that Australia could really do, for it could no longer totally control PNG’s policy directions, including on border control and asylum issues. Decisions on asylum applications continued to be made by External Affairs until December 1973, but from January 1970 rejected applicants were discussed with the PNG Administrator’s Executive Council, which could decide whether to permit the person to stay on normal immigration criteria.212 In the year before self-government, consultation also took place on asylum grants.213 And despite Somare’s previous complaints about Australia’s handling of asylum issues, as leader of PNG’s fledgling government he too was now having to juggle competing objectives, in this case

213 Cable from DFA to all posts, 24 Jul 1973, NAA A1838 932/3/1/5 Part 3.
avoiding antagonising Indonesia\textsuperscript{214} while respecting domestic sympathies.\textsuperscript{215} For example, in November 1973 he declined an invitation from Australia’s new Prime Minister, Gough Whitlam, to include PNG in its proposed accession to the 1967 Protocol,\textsuperscript{216} on the grounds that his Cabinet needed more time than Australia was prepared to give it to consider the matter,\textsuperscript{217} and pending a review of the need for reservations and finalisation of a border agreement with Indonesia.\textsuperscript{218} Whitlam’s note to the Governor-General to sign off on the accession subsequently stated that,

> Having regard to the advance of Papua New Guinea to independent statehood, the Government of Australia is of the view that it would be appropriate to allow Papua New Guinea to reach its own decision in due course on the question of becoming a party to the Protocol.

\textsuperscript{214} Record of meeting with Secretary of PNG’s Department of Foreign Relations & Trade, 6 Aug 1973, NAA A1838 932/3/1/5 Part 3.

\textsuperscript{215} Internal DET note by Greenwell, 17 Oct 1972, NAA A452 1971/4189. This did not stop Australia from making suggestions, eg that PNG and Indonesia preserve the distinction Australia had made between proposals that entailed discouraging use of PNG by Papuan dissidents and proposals that entailed active cooperation in eliminating them, and that PNG judicialize infringements and sanctions in regard to refugees breaching their asylum conditions; see, for example, record of meeting, 18 Oct 1972, NAA A452 1971/4189; Greenwell to Secretary, DFA, 27 Oct 1972, NAA A452 1971/4189.

\textsuperscript{216} While there is no specific comparable provision in the Protocol, Article 40 of the Convention provides for a state, at the time of signature, ratification or accession, to declare that the Convention shall extend to all or any of the territories for the international relations of which it is responsible. It seems Australia provided advice on both the pros and cons of accession to PNG, with Territories putting a good case for accession (eg Baird to PNG Department of Foreign Relations & Trade, (draft) circa Jul 1973, NAA A1838 932/3/1/5 Part 3). However, it did not want to force PNG’s hand in case it hindered PNG in finalising a border agreement with Indonesia and prejudiced future relations between the two states, since Indonesia had indicated that it would prefer PNG to not accede; see, for example, record of meeting, 9 Mar 1973, p 3, NAA A1838 932/3/1/5 Part 3; Baird to Secretary, DFA, circa March 1973, NAA A1838 932/3/1/5 Part 3; Baird to Secretary, DFA, 10 Jul 1973, NAA A1838 932/3/1/5 Part 3.

\textsuperscript{217} As noted in the previous chapter, Whitlam was keen for Australia to become a party to as many conventions as practicable in the field of human rights to celebrate the 25\textsuperscript{th} anniversary of the UDHR on 10 December 1973.

Government of Australia accordingly declares that Australia will not extend the provisions of the Protocol to Papua New Guinea.219

This incidentally corrects the popular belief that it was Australia’s decision not to extend the Protocol to PNG, to ensure that ‘ratification did not apply to persons coming from Papua New Guinea’ (Price 1990b: 11), and so ‘we would not have the international community pressuring us in the [event of] boat people coming uninvited from [PNG] seeking asylum’ (Brennan 2003: 17).220

Somare also rejected Australia’s proposal to extend to PNG the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness,221 probably due to concern that increasing numbers of Papuan asylum seekers were likely to fall into this category on account of Indonesian laws on citizenship, under which it could be forfeited if a person was domiciled in another country for more than five years with no application being lodged to retain it before the five years elapsed, and then every subsequent two years.222 He did, however, agree to Australia extending to PNG the Hague Agreement relating to Refugee Seamen, on the back of an assurance that Australia would take any seamen granted asylum by PNG who were unable to find employment, provided Australia had been consulted before PNG made the grant.223

219 Explanatory memorandum, attachment to DFA minute paper for the Executive Council, 4 Dec 1973, NAA A1838 932/3/1/5 Part 3. Australia deposited the instrument of accession with the UN on 13 December, with the rider that it did not cover PNG.

220 These views are puzzling anyway, since under Article VII of the Protocol no reservation can be made to the non-discrimination provisions in Article 3 of the Convention.

221 Baird to Secretary, DFA, 10 Jul 1973, NAA A1838 932/3/1/1 Part 3.

222 Secretary, DET, to Secretary, DEA, 22 Apr 1970, NAA A452 1970/1202.

223 Secretary, DI, to Secretary, DFA, 5 Jan 1973, NAA A1838 932/3/1/3. See also Petherbridge to Wright, 26 Oct 1971, NAA A1838 932/3/1/3; Petherbridge to Secretary, DET, 24 Feb 1972, NAA A1838 932/3/1/3; Costello to Morris, 17 Feb 1972, NAA A1838 932/3/1/3; Waller to Minister for Foreign Affairs, 25 Oct 1972, NAA A1838 932/3/1/3; Secretary, DI, to Secretary, DFA, 5 Jan 1973, NAA A1838 932/3/1/3; Secretary, DFA, to Secretary, AG’s, 18 Jan 1973, NAA A1838, 932/3/1/3. The instrument of accession to the Agreement was deposited with the UN on 18 April 1973 and entered into force for Australia, PNG and Norfolk Island on 17 July 1973.
In effect, as PNG set about its duties as a new sovereign state, it decided to do what probably every country has done before acceding to these conventions: explore the implications for asylum, migration and citizenship policy, the desirability of entering reservations, and the consequences of having the UNHCR looking over its shoulder. As one Australian official recorded,

Fears have been expressed [by PNG] 1) that the application of the protocol to PNG could lead to the High Commissioner’s interfering unreasonably in the treatment of Irian Jaya border-crossers by the PNG Government, and 2) that in any case his involvement, particularly in following up complaints, would lead to publicity being given to the Irian Jayan situation that would be resented by Indonesia.224

Another thirteen years were to elapse before PNG acceded to the Refugees Convention and 1967 Protocol, but with significant reservations that it is only now thinking of lifting.225 Its problems with Papuan asylum seekers have proved chronic, and refugee numbers in PNG have grown considerably over the last 30 years.226 A detailed account of PNG’s dealings with Indonesia on the issue is yet to be written, but the two countries continue to keep it as low key and tightly managed as when Australia was involved.

When PNG became self-governing on 1 December 1973, Australia’s formal responsibility for Papuan asylum seekers in that country ended. Foreign Affairs must

224 Baird to PNG Department of Foreign Relations & Trade, circa Jul 1973 (draft), NAA A1838 932/3/1/5 Part 3. See also record of meeting, 9 Mar 1973, NAA A1838 932/3/1/5 Part 3; Conroy (for PNG Administrator) to DET, 10 Jul 1973, & attached information paper by Somare on role and functions of UNHCR, 5 Jul 1973, NAA A1838 932/3/1/5 Part 3. In August 1973, commenting on a possible visit to PNG of a UNHCR official, Conroy, the Secretary of PNG’s Department of Foreign Relations & Trade, said, ‘the PNG Government showed a tendency to resist outside “dabbling” in these matters and wished to give priority to developing closer links with Indonesia’; record of meeting, 6 Aug 1973, NAA A1838 932/3/1/5 Part 3.

225 When PNG acceded to the Convention and Protocol on 17 July 1986, it stipulated that it did not accept the obligations contained in Articles 17(1) (employment), 21 (housing), 22(1) (elementary education), 26 (freedom of movement), 31 (penalties and restrictions on refugees unlawfully in the country), 32 (protection from expulsion) and 34 (naturalization).

226 Estimates of the number of Papuan refugees currently in PNG vary between 10,000 and 13,500, although the overall number to have sought asylum in PNG since 1973 may number approximately 20,000 (Palmer 2006).
have felt satisfied with its work. It had managed the issue for a decade without
undermining what it saw as its primary objectives, namely:

… the protection of the interests of the people of [PNG]; the maintenance of good relations with
Indonesia; [and] the desire to hand over to an independent PNG a harmoniously working
relationship with her Western neighbour.\textsuperscript{227}

Whether it had managed it in a way that would win plaudits from Papuan nationalist
sympathisers, human rights activists or historians is a different matter. For example,
Neumann (2004: 72) describes Australia’s approach as ‘harsh’ from 1962 to 1964, and
‘very selective’ from 1965.

In reflecting on Australia’s performance, we should acknowledge that it granted asylum
to some ten per cent of the Papuans who crossed into PNG on its watch. Further, while
providing Indonesia with face-saving devices, such as not using the language of asylum
and keeping the UNHCR at a distance, in private it was often quite blunt about
Australia’s right to grant asylum to whomever it saw fit. Moreover, while it returned
the other ninety per cent of Papuan arrivals, the archival record contains few if any
substantiated instances of returnees being persecuted, or of forcible repatriations of
individuals with strong claims to asylum.

That said, there were few means to verify allegations of harm, or to check the quality of
decisions made by patrol officers at border posts. Further, while the Convention was
never meant to serve refugees wanting to engage in subversive activity in their country
of origin, there is little question that in PNG Australia exploited its loopholes to serve
bilateral state relationships. For example, in Somare’s view,

The Australian Government and the [Territory] Administration have … always maintained that
the ‘norms’ (ie the principles, subject to the reservations in Australia’s ratification) have been
applied to people from Irian Jaya seeking refuge in Papua New Guinea. Observation of the

\textsuperscript{227} DFA briefing notes for meeting with General Sumitro, 1 Feb 1971, p 3, NAA A452 1970/1202. As
the DFA noted elsewhere, it had no desire to have a situation emerge in which serious trouble between
Indonesia and PNG resulted in Australia having to make ‘invidious choices’ between the two; DFA
‘norms’ has allowed a degree of discretion in treating ‘permissive residents’ outside of what would be possible under adherence to the Convention and the Protocol without reservations.²²⁸

In sum, Barwick’s criterion of approaching the issue of asylum for Papuans from ‘a very high humanitarian point of view’²²⁹ was by no means absent during Australia’s administration of PNG. However, it shared the stage with other, much more pragmatic criteria drawn from Australia’s foreign and territory policy, including having the Dutch take initial responsibility for their own former charges, avoiding complicity in Papuan separatist activities,²³⁰ and not prejudicing a future independent PNG’s policy options or

²²⁸ Somare, information paper on role and functions of UNHCR, 5 Jul 1973, NAA A1838 932/3/1/5 Part 3. See also Baird to Secretary, DFA, circa Mar 1973, NAA A1838 932/3/1/5 Part 3.

²²⁹ CPD (Reps), 23 Aug 1962, vol 36, p 752.

²³⁰ Significantly, when dealing with Papuan asylum seekers between 1963 and 1973, Australia took the view that mere membership of OPM or some other Papuan nationalist organization was an insufficient reason to refuse asylum. Rather, there had to be clear evidence that the person had been responsible for or involved in murder or other serious criminal activity during guerrilla operations. Even then, on at least three occasions when these circumstances applied prior to July 1973, asylum was still granted because of opposition to forcible returns in the PNG Administrator’s Executive Council; Woolcott to Minister for Foreign Affairs, 18 Jul 1973, NAA A1838 932/3/1/5 Part 3. The DFA notes this in a submission about five new asylum applicants, all alleged to be guilty of armed robbery in Papua, and possibly accomplices in murder. Whitlam agreed to the DFA recommending to the Administrator’s Executive Council that PNG grant asylum to one man who had cooperated with the authorities in locating the group’s weapons and documents, and to deporting the others. The DFA and AG’s took the view that the men were excluded from Convention protection under Article 1F, which provides that the Convention does not apply ‘to any person with respect to whom there are serious reasons for considering that … he has committed a serious non-political crime outside the country of refuge’. Further, the DFA argued (at pp 4-5), ‘to grant permissive residence would be seen as evidence that the Australian and PNG Governments were uncensorious of acts of violence committed in the cause of “West Papuan liberation”. This would reinforce suspicions we know to be current in the Indonesian armed forces as to Australia’s and PNG’s attitude to Irian Jaya. It would give respectability to the incipient hostility towards Indonesia which exists in some quarters in PNG. It would invite the rebels and their sympathisers to make greater use of PNG territory for anti-Indonesian purposes and it would reduce the prospects of Indonesian cooperation if rebel movements developed in the PNG itself’. As it happened, on the basis of press reports that refugees were about to be deported, and before the Australian Ambassador in Geneva was able to brief the UNHCR on the details of the case, the UNHCR’s head office in Geneva instructed its local office to lodge a ‘strong formal protest’ with the DFA. On learning the details, the local office and the DFA agreed respectively to defer lodging the protest and deporting the men until a discussion took place between the Ambassador
relations with Indonesia. In 1973, Richard Woolcott, a future Secretary of Foreign Affairs, summarised the values Australia saw itself forced to juggle in the following way:

On the one hand, humanitarian considerations would appear to point in the direction of leniency towards applications for asylum. On the other hand, however, practical political factors deriving from Australia’s and most of all PNG’s relations with Indonesia need to be taken fully into account, especially in the treatment of persons who have been active as rebels against the Indonesian Government. Failure to give due weight to these factors could ultimately result in a great deal of human misery. The question at issue is how to balance each of these elements in any particular case.²³¹

**CONCLUDING COMMENTS**

In 1972, the Minister for Immigration, AJ Forbes, claimed that, ‘Every policy is part of a wider mosaic of the goals and objectives which a nation sets itself’. He went on to say that immigration policy, for example,

… must be seen within the broader context of our external relations and national security, our economic progress, and the living standards – material and non-material – of the Australian people. It is the Government’s responsibility to ensure a proper balance between these objectives and to determine the role and influence of immigration in achieving them.²³²

Forbes could equally have been speaking about how Australian governments since World War Two had viewed asylum policy. For as this chapter has shown, the values underlying asylum policy developments in a succession of real life situations between the 1940s and early 1970s invariably involved whole-of-government type considerations, with issues relating to foreign and territory policy often dominating.

---

²³¹ Woolcott to Minister for Foreign Affairs, 18 Jul 1973, p 5, NAA A1838 932/3/1/5 Part 3. The writer was unable to find documents indicating the final outcome.

²³² ‘Immigration policies for Australia’, address to the Australian and New Zealand Association for the Advancement of Science, Sydney, 14 Aug 1972, pp 1-2, NAA A5882 CO1076.
Indeed, during the period examined, the desire to not let asylum issues create embarrassing diplomatic situations, or interfere with Australia’s relations with other countries, led to External Affairs being accorded prime carriage over asylum decisions, the language of asylum being avoided wherever possible, and asylum grants being made under the guise of innocuous-sounding temporary or permanent migration permits.233

Even in the first year of the Whitlam government in 1973, the new Minister for Immigration, Al Grassby, stated that, ‘If political asylum is sought this is a matter for Foreign Affairs and we will refer it to them’.234 His departmental secretary, RE Armstrong, drew his attention to the fact that he actually did have a formal role to play,235 and gave him a copy of a paper by his predecessor, Peter Heydon, complaining that Australia had never taken a positive attitude to the idea of asylum.236 However, like Heydon, Armstrong thought it was not Immigration’s place to initiate reform:

> Obviously a friendly Government could be affronted if one of its citizens were specifically deemed by Australia to need asylum here in case he suffered persecution by the Government on political grounds. Such potentially grave matters of international relations clearly need assessment by the Minister and Department of Foreign Affairs.237

---

233 Even today, while rare, grant of entry to an asylum applicant using a form of visa other than a protection visa is not unknown, according to a former senior immigration official in private communication with the writer.


235 Several months later Grassby again disclaimed responsibility for asylum decisions, stating that, ‘matters concerning political asylum are not under my control … I refer matters of political asylum to the Minister for Foreign Affairs (Mr Whitlam). The determination is made by the Minister for Foreign Affairs in all matters of political asylum. It is not part of my responsibility’; CPD (Reps), 27 Sep 1973, vol 85, p 1678. A handwritten DI file note, dated 2 Oct 1973, notes that a ministerial staffer would correct him; NAA A6980 S250089.

236 Heydon to Minister for Immigration, 23 Apr 1970, p 7, NAA A6980 S250089. The then Minister, Philip Lynch, described Heydon’s paper as ‘excellent’, but nothing changed, presumably because he agreed with Heydon’s view that, ‘Initiation of a policy on political asylum would probably be for the Minister for External Affairs, especially as our reserve on the matter has been based on avoidance of situations of tension with governments from which political refugees flee’. See also Heydon to McGinness, 31 Mar 1970, NAA A6980 S250089.

Grassby agreed with Armstrong, as Philip Lynch had with Heydon, and requests for asylum continued to be handled according to the procedures agreed by Cabinet in 1956, under which Immigration, other than keeping a watchful eye that the broad parameters of entry policy were being observed, generally took a back seat to Foreign Affairs.

Things began to change in 1977 with the establishment of a Determination of Refugee Status Committee, which was chaired by Immigration and included representatives of Foreign Affairs, Attorney-General’s and Prime Minister and Cabinet (NPC 1991). A number of reasons might lie behind the gradual shift in carriage of asylum decisions from then on to Immigration, but it is reasonable to think that they included less sensitivity to Indonesian views about asylum seekers in PNG after it became self-governing, the dismantling of the White Australia policy – which meant Immigration had fewer conflicts of interest when dealing with non-European asylum applicants, and Foreign Affairs fewer embarrassing decisions to defend – and the fact that Immigration always had to be involved anyway, being responsible for issuing an appropriate visa to successful claimants, and removing the rest. Also of help would have been the gradual instantiation of the Refugees Convention and 1967 Protocol into domestic law between 1980 and 1994, which meant governments could explain asylum grants as a function of domestic and international law rather than executive fiat. Migration regulations still provide for a territorial asylum visa to be issued purely at the discretion of the Minister for Foreign Affairs, but the discretion is very rarely used, being suggestive of a much more overt political statement by the government of the day than if it channels a person into the refugee status determination process associated with its obligations under the Convention.

Nevertheless, as late as 1988, despite having granted entry to many Indo-Chinese and East Timorese refugees, Immigration was still reportedly claiming that asylum applied only to high profile political criminals and dissidents, and there had been only three cases of it in Australian history (in Nicholls 1998). One can only conclude that it remained influenced by a desire on the part of Foreign Affairs to downplay grants of asylum – especially in the case of the East Timorese – in case they antagonised a

---

238 A representative of the UNHCR was also included in an observer capacity.

239 For details of this provision, see fn 31 in chapter one.
‘friendly government’, and the belief that refugee resettlement needed always to be sited within the immigration program anyway, in order to maintain public support for it.

That said, an assessment of Australia’s response to asylum situations during these early post-war decades requires more nuance than is often allowed. For example, according to Mares (2001: 201), while Australia acceded to the Refugees Convention in 1954, ‘successive governments have been irritated by its obligations and reluctant to provide sanctuary to those who knock on our door uninvited’. However, this chapter supports a more prosaic view: that successive governments have been prepared to grant asylum when genuinely needed, but have linked it to a grant of permanent residence only when consistent with immigration policy, and have typically sought to manage such matters in as quiet and discrete a manner as possible. Examples include Asian refugees during World War Two, Chinese nationals after the communist party took power in 1949, and Papuan nationalists fleeing Indonesian rule in West New Guinea.

It is a minimalist approach, but potentially defensible as consistent with the principle that international protection in the form of a grant of permanent asylum is ‘an option of last resort’ (Hathaway 2001: 16). Whether it sufficiently mirrors that ‘wider mosaic’ of goals and objectives to which a nation aspires, as referred to by AJ Forbes, is another matter, and the subject of ongoing debate. It is a question we will return to in chapter six, when we consider the potential relevance of an ethics of care for asylum policy.

Finally, foreign and territory policy considerations aside, the framing value in domestic asylum policy during the period surveyed in this chapter remained the desire to preserve the ability to grant asylum consistent with immigration policy. A classic example of this came during debates over the Asian wartime refugees, who the government wanted to leave as soon as their protection need ceased, and over the European refugees being resettled under the IRO scheme, who it wanted to stay permanently. Portraying himself as the ‘custodian of the rights of the Australian people’,240 and as charged with

240 To quote Calwell, ‘In my administration I have tried to express the sentiments of the great majority of the Australian people. I regard myself merely as the custodian of the rights of the Australian people in the matter of immigration’; CPD (Reps), 6 Oct 1948, vol 198, p 1282. See also Calwell, CPD (Reps), 9 Feb 1949, vol 201, pp 65-6.
administering the rule of law as passed by Parliament,\textsuperscript{241} Immigration Minister Calwell presented refugees as basically being of two broad types: those who form part of a long term vision of Australia’s future, and those who do not. Similarly, he presented governments as also composed of two broad types: those who preserve the ability, indeed the right of citizens to create the community of their choice, and those who surrender this ability and right in the face of recalcitrant non-citizens, legal loopholes, international interference, and wayward emotion. In drawing these crude distinctions, he established a paradigm for viewing and presenting asylum issues that has permeated political debate ever since.

\begin{flushright}
\textsuperscript{241} For example, defending his decision to refuse entry to a Filipino soldier who was an American citizen married to an Australian (the Gamboa case), Calwell argued: ‘I don’t make the immigration laws of this country. I am only carrying them out … If I let Gamboa back in the country I have to let back 6000 Asiatics who left this country voluntarily. If I used my heart in these matters I would not interfere with these Asiatics but, after all as a responsible Minister, I have to use my head’; ‘Calwell says: “no Negroes”’, \textit{The Courier Mail}, 23 Nov 1949, NAA A433 1950/2/25.
\end{flushright}
CHAPTER FOUR: VALUES IN ASYLUM POLICY – THE PERSONAL RECORD

If Australians have a distinguishable [political] ideology it is an updated version of the utilitarianism propagated by Jeremy Bentham (1748-1832) – a set of values oriented strongly towards pragmatism and empiricism … The criteria for successful policies are not related to deeply held values but rather to the 'twin utilitarian standards of efficacy (will it work?) and plurality (have you got the numbers?)'. (AC Palfreeman)

The more there is paradoxically a sense of control, the more compassion can be exercised. (M3)

In the two preceding chapters, we have seen how Australian governments have been grappling with asylum issues since World War Two, contrary to the popular image of them arising only in the 1970s with boat people from Vietnam. More importantly, we have also seen how the broad framework of asylum policy and important policy dispositions were established during this early period, with immigration, foreign and territory policy considerations being juggled with, and usually outweighing, generic humanitarian values and ideals relating to international law and global governance. Successive governments have made the most of the minimum standards approach of the Refugees Convention and the limited supervisory and policing powers of the UNHCR to ensure a relatively seamless fit between asylum policy and immigration and foreign policy.

In this chapter we continue to explore the values that have guided Australia’s political leaders on asylum, but turn to developments since 1973, and more particularly to the narratives of people who have been integrally involved with these developments. As a matter of methodology, the trail provided by archival documents is left here to pursue another, being that of the reflections of policy makers who are still alive, as obtained from interviews.

The chapter begins with a review of asylum policy developments since 1973. Since detailed accounts are available elsewhere, the focus is on highlighting areas of continuity and change in the basic policy framework and dispositions inherited from earlier times. It then turns to explore the whys and wherefores of ministers and public servants responsible for these developments, focusing on the values that they say drove or inspired them. The discussion is structured according to the two main themes contained in their reflections: firstly, that asylum policy is part of a broad project of nation building, and secondly, that it reflects – or should reflect – the concepts and criteria of good governance.

DEVELOPMENTS SINCE 1973

Since 1973, the Convention has continued to gird asylum policy, with successive governments claiming to have adhered to its requirements. Indeed, in 2001 the Howard government endorsed a declaration by Convention signatories, the first since the Convention was established, that reaffirmed its importance as the primary global instrument for the protection of refugees. However, no simple dichotomy exists between a Convention refugee and others in Australian asylum policy, political landscape or public imagination. And where some see a ‘dwindling quality of asylum’ (Edwards 2003: 192) since the early 1990s, others see merely an increased segmentation, with governments introducing measures designed to treat different groups in the asylum seeker population differently, deter unauthorised arrivals, and counter people smuggling. As DIMIA (2002: 149-150, fn 127) notes,

Migration legislation covering protection visas, humanitarian visas and safe haven visas now provides flexibility in dealing with a diverse range of groups, including: refugees who stay in their first country of asylum and are resettled from there to Australia; refugees who move from a

---


country of first asylum to a third country and are resettled from there to Australia (this group includes those intercepted en route to Australia unlawfully and removed to a ‘declared country’ where any asylum claims may be processed); refugees who reach Australia and enter unauthorised at an ‘excised offshore place’; refugees who enter Australia unauthorised and have spent at least seven days in a country en route where they could have sought and obtained effective protection; refugees who have entered Australia and been immigration cleared … on fraudulent documents; refugees who have entered Australia lawfully; and refugees who have fled directly to Australia as the country of first asylum.

With this segmentation has come a burgeoning of popular dichotomies, often crudely cast. Current ones include, for example,

- refugees for whom Australia is the country of first asylum, versus forum shoppers or secondary movers;\(^4\)
- refugees who Australia selects from the most vulnerable ones languishing unseen and unheard in refugee camps around the world, versus self-selecting queue jumpers who can afford the illicit services of people-smugglers;
- refugees who play by the rules and wait their turn to participate in Australia’s generous program of refugee resettlement, versus illegal arrivals\(^5\) who exploit this generosity and given half a chance will swamp the country; and

\(^4\) That is, refugees for whom Australia is not the country of first asylum but rather the asylum country of choice, in the sense that they have enjoyed asylum in another country before arriving in Australia, and have moved unnecessarily from that country from a protection point of view, or that en route to Australia from the country of persecution they have spent a period in a country where they could have sought and obtained protection.

\(^5\) Debate often occurs over whether the term ‘illegals’ is appropriate for asylum seekers who enter Australia without a visa. It is a question that can be discussed at two levels: one in terms of its technical accuracy, the other its value content. Technically, since the UDHR contains a right to seek asylum, it may be argued that a person who exercises this right is not acting unlawfully. Further, it is fair to say that a person fleeing persecution should not be expected to follow standard procedures to gain entry to a country of refuge. On the other hand, from the perspective of domestic law, entry to Australia of any person without authority, refugee or not, is unlawful unless and until they are granted authority to stay. Further, the Refugees Convention itself uses the terms ‘lawful’, ‘unlawful’ and ‘illegal’ to refer to the legal status of refugees in a state’s territory, and provides for differences in their treatment. However, turning to value content, the issue is more clear-cut. The term ‘illegal’ generally has pejorative connotations, whether intended by the user or not. For this reason the term ‘unauthorised arrival’ is
• refugees of whom Australians can be sure of their identity, bona fides and security risk, versus asylum seekers of dubious identity, refugee status and motive.

These types of dichotomy arguably perpetuate the paradigm of two basic types of refugee that we saw develop under the Chifley government in the previous chapter: namely, those who form part of a popular vision of Australia’s future, and those who don’t. However, a more accurate image is probably of four concentric circles, with refugees of best fit comprising the innermost circle, and those of least fit the outermost circle. The circles correspond to what has evolved into a refugee and humanitarian program of four main strands: a resettlement program for refugees selected from third countries, a family or community sponsorship program, an in-country protection program for refugees who have entered on non-refugee visas or as unauthorised arrivals, and an offshore interception and processing program for asylum seekers intercepted en route to Australia. As we move outwards from the inner circle, the mood shifts from one of planned giving to gated community. The level of reception and settlement services provided to refugees in the inner circle, which is high by world standards, drops away to the minimum standards set in the Convention for others. Further, some reception measures, notably the mandatory detention of unauthorised arrivals and offshore interception and processing, are severe by most European standards.

Preferable, and is used by this writer in this thesis. It accurately reflects the nature of their entry, but has less ‘top spin’ than the term ‘illegal’.

Potentially there is a fifth strand (and circle), the temporary safe haven visa arrangement introduced in 1999, which provides for ad hoc asylum situations and is largely independent of the others. To date, it has been activated only to provide short-term protection to people displaced by crises in Kosovo, East Timor and the Maluku islands.

That is, a country other than the country of origin (often the country of first asylum).

The extensive services granted the inner circle include immediate access to social security, health and other government assistance services available to Australian citizens, special settlement services, language training, initial accommodation support and so forth. The measures attached to the outer circles include the mandatory detention of unauthorised arrivals, the grant of different levels of residence status and benefits (eg those who arrive unauthorised, or are immigration cleared on fraudulent documents, or have engaged in secondary movement, are granted only temporary protection visas, limited public services and no access to family reunion), and the removal of intercepted boat people to centres outside Australia’s migration zone (and thereby the reach of domestic law), from where any protection claims are
1996 the target number of visas granted under the entire program has been set at between 12,000 and 13,000 a year, varying between ten and fifteen per cent of total annual settler immigration. Whether this intake is generous or average by world standards is a matter of perspective: it is generous in the inclusion of a dedicated third country resettlement program of any size, with only a handful of other countries offering this kind of contribution to international protection arrangements (DIMIA 2002), but it is only average in terms of the overall number of refugees Australia hosts, ranking thirty-second in the world in 2000 (Do 2002).

While the Chifley government’s paradigm of two types of refugees has therefore become more diffuse, the same cannot be said of its paradigm of two types of governments: those who protect their community from unwanted intruders and those who don’t. Over the years, both coalition and Labor governments have worked hard to avoid being tagged as a ‘soft touch’, and to retain public confidence in their ability to regulate the entry and stay of people in Australia. At a bureaucratic level, the regimentation of the refugee and humanitarian program mirrors the ‘strong managerial control’ (Burstein et al: 1994: 221) that Australia exercises over all aspects of immigration. As Cox and Glen (1994: 283) point out,

---

assessed and met either through resettlement in a third country or, if all else fails, in Australia on a temporary basis (at least initially).

9 Other than their support for bodies such as the UNHCR, most countries, by choice or necessity, contribute to international protection arrangements by responding on an ad hoc basis to asylum seekers who arrive unauthorised in their territories, rather than having a pro-active refugee resettlement program.

10 Further, the number of resettlement places offered to people offshore is coupled to the number granted protection under the in-country program, rising or falling so as to not exceed the overall target of 12,000 to 13,000 per year. The government justifies this offset arrangement – mooted originally in 1990, by the then Labor minister for immigration, Gerry Hand, and implemented in 1996 by Phillip Ruddock, the minister for immigration in the new coalition government (Nicholls 1998) – on the grounds that Australia’s ‘social and financial capacity to resettle these [refugee and humanitarian entrants] successfully’ is limited, and that its protection obligations under the Convention require it to give priority to the in-country program (DIMIA 2002: 149, fn 126). However, it contributes to public resentment of unauthorised arrivals by encouraging the view that they displace traditional sources of refugees and reduce opportunities to sponsor family members and others with links to Australia.
In very general terms, the Administrative model [of immigration] adopted by Australia consists of a universal, complex, and differentiated visa system; a supplementary control system of entry permits; the use of administrative authority to control access to national territory; [and] the submission of refugee claims to administrative regulation and decision making …

At a political level, a similar mix of basic bipartisanship, public sentiment and wedge politics to that which secured passage of the 1949 *War-Time Refugees Removals Act*, also helped secure passage of the Hawke government’s mandatory detention legislation in 1992 and the Howard government’s border protection legislation in 2001 (Marr & Wilkinson 2003, MacCallum 2002). Border control remains a sensitive public issue, able to influence election results (McAllister 2003, Shanahan 2002, Betts 2001), and the desire to grant and set asylum conditions in ways consistent with orderly, selective immigration has remained the primary aim of governments of all persuasions. The Liberal Party’s 2001 election slogan – ‘We decide who comes to this country and the circumstances in which they come’ – may have sounded new to many at the time, but it mirrored the language and sentiments of a succession of earlier political leaders. For example, like Calwell in 1948, Howard in 2001 coupled the public debate on asylum seekers to sovereign and democratic rights rather than human rights, arguing in the case of legislation to sanction the interception and removal of boats carrying asylum seekers from Australian waters that,

The protection of our sovereignty, including Australia’s sovereign right to determine who shall enter Australia, is a matter for the Australian government and this parliament … It is in the national interest that the courts of Australia do not have the right to overturn something that rightly belongs to the determination of the Australian people, as expressed through their representatives in this parliament’.\(^\text{11}\)

Similarly, as Bob Hawke put it, speaking in 1990 of Cambodian boat people,

Do not let any people, or any group of people in the world think that because Australia has that proud record, that all they’ve got to do is to break the rules, jump the queue, lob here and Bob’s your uncle. Bob is not your uncle on this issue, other than in accordance with the appropriate

\(^{11}\) CPD (Reps), 29 Aug 2001, pp 30569-30570.
Regional relationships too remain a strong influence on asylum policy, particularly that with Indonesia. When five Papuan asylum seekers arrived at Thursday Island in July 1985, it elicited a frank response from the Minister for Immigration, Chris Hurford. He stated that ‘the men, even if they were genuine refugees, would not be allowed to take up permanent residence because Australia did not want to anger Indonesia or become a frontline state for its political dissidents’ (in Mares 2001: 127). Further, perhaps referring to PNG or the Netherlands, he claimed that ‘there were plenty of other places in this world’ where the men could go. Papuans were again an issue in March 2006, when forty-three arrived by boat, with rumours of another 500 or so being set to follow suit (Forbes 2006, Hart & Powell 2006). All were granted asylum, at least for an initial period of three years, but Australia wasted no time in announcing measures to reduce the likelihood of further arrivals and mend relations with its northern neighbour. These included increased maritime surveillance, potentially in a joint arrangement with the Indonesian navy, legislation – later aborted when it became clear it would not pass the Senate – to have all future boat arrivals processed in offshore camps,13 and a review of refugee determination procedures, including the possibility of taking into account representations made by the country of origin of asylum seekers.

Similar sensitivities were generated by the arrival of approximately 1,650 asylum seekers from East Timor between 1989 and 1995, and in 2000 by a boat carrying fifty-four people from the Maluku islands. The Timorese were granted temporary entry, but neither Labor nor Liberal governments were keen to grant them permanent asylum, arguing – not entirely without substance14 – that they were Portuguese citizens and

13 Legislation introduced in response to the upsurge of boat arrivals from north-west Asia in 1999 to 2001 provides for offshore processing (eg in facilities in Nauru) for persons who land in areas (eg offshore islands) excised from Australian territory for migration purposes, or who are intercepted at sea. The proposed legislation would have extended this to cover all unauthorised boat arrivals, regardless of where they landed.
14 As Mares (2001: 128) notes, in 1993 Xanana Gusmao himself claimed to be a Portuguese citizen under international law, and an East Timorese citizen by conscience. Further, it wasn’t until 1999 that Portugal
could avail themselves of long-term protection there if it were necessary. As Mares (2001: 126-127) notes,

The very public issue of the Timorese boat people proved to be an uncomfortable pebble in the shoe of an Australian government striving to waltz harmoniously with the Suharto regime. Recognition of Timorese claims for refugee status, even if it came via an independent tribunal, would amount to an open and official acknowledgment of Indonesia’s military brutality in East Timor. But the Portuguese nationality argument offered Canberra a convenient side-step in its diplomatic dance with Jakarta. Paul Keating, the Australian prime minister, executed the move with alacrity, even though the evident hypocrisy made it less than stylish. ‘Timorese people have Portuguese citizenship,’ he declared ..., ‘so, they have no refugee status, though the government has taken the view that Timor is part of Indonesia, ... those people still have Portuguese citizenship status’.

It took until 2005 before the future of the Timorese was finally resolved, and only after lengthy court and administrative processes. Nearly all were granted permanent residency in Australia, but under the discretionary ‘public interest’ powers of the Minister for Immigration rather than as refugees. The Maluku Islanders were handled much more quickly and quietly: some agreed to voluntary repatriation and others were granted a ‘safe haven’ visa, which provides temporary entry (at least initially) for persons affected by humanitarian or other crises, and is not dependent on a refugee status determination.

clarified that under its constitution people born in East Timor were not automatically Portuguese citizens, but could elect for such. Mathew (1999) provides a more critical view.

15 By the time the final decisions were made about the Timorese, political developments in East Timor had removed the ability of many of them to substantiate a claim for a continued need of asylum anyway. But all this was still to Australia’s benefit, for it saved it from the embarrassment of having to effectively admit that Indonesia had been either unable or unwilling to protect some of its own citizens from persecution.

16 More details about this group are provided in Mares (2006). Why a similar visa was not granted to the Papuans who arrived in March 2006 is unclear, since, as noted, it sidesteps the issue of whether a person is a Convention refugee. This may seem like dodging the issue, but, as in the case of the 1960s, when Australia chose not to use the language of asylum in regard to Papuans in PNG, it would have been a way to help Indonesia save face, whilst still providing refuge to people in need of it. Possible reasons for the difference in treatment may include the extensive media publicity given the arrival of the Papuans, a desire on the part of Immigration to not fudge the issue (perhaps to improve its public image after a long
Foreign policy objectives have also influenced the handling of asylum seeker situations further afield. For example, discussing the handling of Cambodian boat people in the early 1990s, Brennan (2003: 39) argues that,

At this time the Evans peace plan [for Cambodia] was being formulated and was attempting to repatriate 300,000 Cambodians from Thailand. It was in all the politicians’ interests that the handful of boat people turning up in Australia be found to be economic migrants. In short, if those turning up in Australia were refugees, there was no way the peace plan could work.

The treatment of Asian asylum seekers by the Fraser government, which granted refuge to some 177,000 Indo-Chinese refugees in the 1970s and 1980s, may seem an exception to these frosty dispositions. Annual arrivals of Indo-Chinese peaked at nearly 22,000 in 1980-81 and 1981-82, and they made up about sixteen per cent of total settler arrivals from 1976 to 1983 (York 2003: 135). However, the differences are more apparent than real. Firstly, there were factors unique to the Indo-Chinese that made the case for taking large numbers compelling, and eased its acceptance by the general community. These included the extent of Australia’s involvement in Vietnam, the war’s loss, the influence of cold war considerations, and the readiness of North American and European countries to share in the resettlement of Indo-Chinese as part of a comprehensive international response to their exodus. Secondly, only about 2,000 Indo-Chinese ever entered Australia unauthorised. The need for long and perilous boat voyages to Australia, and Australian alarm about the prospect of unauthorised arrivals, were both allayed by the rapid development of offshore holding centres and processing and resettlement arrangements involving not only Australia, but the UNHCR, countries in the region, other countries of resettlement, and the countries of outflow.\textsuperscript{17} The arrangement basically involved promising asylum seekers (and the countries in which they were being held) that they would be resettled if they waited in the holding camps, and cooperation among many players to ensure this promise was met. However, importantly, it did not involve diluting any of the policy principles on refugee

\textsuperscript{17} By 1989, these arrangements evolved into the Comprehensive Plan of Action for Indo-Chinese Refugees, at which time voluntary and forced repatriations were added to the possible outcomes; see Robinson (2004, 1998).
resettlement outlined in 1977 by the Minister for Immigration, Michael MacKellar, including that ‘The decision to accept refugees must always remain with the Government of Australia’.  

Another exception might seem to be the Hawke government’s decision to grant asylum to some 19,000 mainland Chinese following the suppression of student demonstrations in Beijing in June 1989. However, these were not unauthorised arrivals, but persons already lawfully in Australia, mainly students, who had already been through the immigration checks and screening requirements necessary for temporary entry visas. Further, they were again not granted permanent residence immediately, but a four-year, potentially renewable temporary resident permit, with a promise that they would not be returned to China against their will afterwards unless they had seriously breached Australian law (NPC 1991). Like Fraser’s, Hawke’s initiative featured a unique combination of domestic and international circumstances and political personalities. Both resulted in a lumpy refugee and humanitarian program, but both contained sufficient order, selectivity and conditions to ensure an image of a government in control of asylum seekers, rather than at their mercy.

Another broad area of continuity between the early post-war decades and more recent ones has been the testy nature of relations between governments and courts over asylum decisions and immigration matters in general. From 1985, when the High Court decided that the courts could review ministerial decisions rejecting the grant or extension of an entry permit on the grounds that the applicant was not a refugee, lawyers and judges have played an increasing and often contentious role as minders and

---

18 CPD (Reps), 24 May 1977, vol 105, p 1714. The other three were: ‘1. Australia fully recognises its humanitarian commitment and responsibility to admit refugees for resettlement … 3. Special assistance will often need to be provided for the movement of refugees in designated situations or for their resettlement in Australia. 4. It may not be in the interest of some refugees to settle in Australia. Their interests may be better served by resettlement elsewhere. The Australian government makes an annual contribution to the UNHCR, which is the main body associated with such resettlement.’

19 Minister for Immigration and Ethnic Affairs v Mayer [1985] 157 CLR 290. This was followed by the Court ruling in Kioa v West [1985] 169 CLR 290 that failed asylum seekers were, in the interests of procedural fairness, entitled to hearings before being deported.
arbitrators of what is correct and fair in asylum procedures and decisions, and in interpretations of relevant domestic and international law. As Lopez (2003: 17) notes,

Once the [High] Court began explicitly questioning the Minister’s decisions vis-à-vis granting visas on the basis of his discretionary application, the floodgates had opened to the Court’s review of any decision relating to ‘strong humanitarian or compassionate grounds’ [until 1989 a potential ground for stay in Australia, subsuming Convention refugee status] … The apex occurred in Chan\(^{20}\) [in 1989] a ‘watershed’ case representing the ‘height of judicial activism’ in which the definition of what constituted a refugee was reviewed in detail and the ‘real chance’ of persecution test clearly iterated. The Government’s response was nothing less than outrage, as parliamentary representatives felt the Court had overstepped its bounds in nullifying the discretion of the Executive to execute policy as it and the legislature saw fit. Publications by the Parliament expressing extreme disquiet and the need to assess how the government could adequately effectuate its policies echoed these concerns.

Access to judicial review has benefited asylum seekers when courts have decided in their favour, and also government officials when decisions have clarified areas of uncertainty. Nor is it a principle that political leaders are usually likely to oppose. However, just as Parliament in 1949 responded to the High Court’s ruling on the O’Keefe case by passing the \textit{War-Time Refugees Removals Act}, so too have perceptions of judicial activism, obstruction of parliamentary mandates, and unreasonable delays and costs in court appeals led to parliament on several occasions since 1985 attempting to reassert its authority over asylum, and reclaim areas of ‘lost ground’. For example, in 1989 it confined the power to grant stay on compassionate or humanitarian grounds – as distinct from Convention grounds – to immigration ministers alone, whose decision would be purely discretionary and non-court reviewable.\(^{21}\) In 1992 it entrenched

---


\(^{21}\) Migration Regulations (1989). Under previous arrangements, compassionate or humanitarian grounds were criteria for a particular visa category, and Immigration officials were themselves able to issue such visas. However, this visa category was abolished, and under the new arrangements any asylum seeker not found to be a Convention refugee, and not eligible for any other visa that could be applied for on-shore, could only turn to the minister to decide whether there might be any other reason to permit them to stay in Australia. The only criterion that was specified for the minister to consider was whether or not permission for them to stay would be in the ‘public interest’. The minister would not be compelled to intervene, and any decision taken (including a decision to not take a decision) would not be reviewable by
mandatory detention for unauthorised arrivals and people who overstay their visas. In 1990 and 1999 it resurrected temporary asylum arrangements. And in 2001 it provided guidance on how officials and courts should interpret the Convention definition of a refugee, reduced the grounds for judicial review in migration and asylum matters, and installed a legislative platform for intercepting and processing asylum seekers offshore.

the courts. Further, a person could only exercise this avenue of appeal after they had been rejected as a Convention refugee.

For example, s189 of the Migration Act 1958 requires Immigration officers to detain any person that they know or suspect is an ‘unlawful non-citizen’; ss196 and 198 require that they be detained until either removed from Australia or granted a visa; and s183 stipulates that courts are unable to order releases from immigration detention.

A system of four-year temporary entry permits was re-established by the Hawke government in early 1990, but discontinued in favour of permanent protection visas in November 1993. According to Nicholls (1998: 74), they were abandoned as ‘untenable as applicants remained uncertain of their status, and unattractive to employers, for an unreasonably long period of time’. He adds, ‘More generally, the scheme was thought to be anomalous within arrangements which otherwise emphasized quick access to permanent residence’. While continuing to grant permanent residence to most other refugee and humanitarian entrants, a three-year temporary protection visa targeting unauthorised arrivals was re-introduced in 1999 by the Howard government. In 2001 it was extended to cover persons granted visas to Australia under the interception and offshore processing arrangements that were introduced in that year. Access to permanent residence by the holders of these temporary visas varies, depending on, for example, ministerial permission, the circumstances in which they arrived in Australia, and de novo decisions on whether protection is still required.

Among other things, the Migration Legislation Amendment Act (No 6) 2001 introduced a definition of the terms ‘persecution’ (in Article 1A(2) of the Convention), ‘serious non-political crime’ (in Article 1F) and ‘particularly serious crime’ (in Article 33(2)). It also qualified the scope of the term ‘particular social group’ (in Article 1A(2)). That said, some of the changes merely reflected existing case law (eg the meaning of ‘serious non-political crime’).


See, for example, the Border Protection (Validation and Enforcement Powers) Act 2001, the Migration Amendment (Excision from Migration Zone) Act 2001, the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001, and the Migration Legislation Amendment Act (No 5) 2001.
The authority of international bodies charged with providing guidance on international law has also on occasion been challenged. The most notable example occurred in 1997, when the Howard government refused to accept the judgment of the UN Human Rights Committee (UNHRC) that Australia’s treatment of a particular asylum seeker, and the apparent absence of court powers to order a person to be released from detention, was in breach of its obligations under the International Convention on Civil and Political Rights (ICCPR). In 2005 it also rejected concerns expressed by the Committee about aspects of its asylum system in relation to meeting its obligations under the Convention Against Torture, including the lack of independent review of ministerial decisions on cases involving these obligations.

These efforts to reassert executive control over asylum have had mixed success. For example, in 2003 the High Court neutered much of the 2001 legislation designed to restrict judicial review, drawing on principles of natural justice and a constitutional provision limiting the power of parliament to curb the jurisdiction of the Court.

27 See Attorney-General & Minister for Immigration & Multicultural Affairs, ‘Response of the Australian Government to the views of the [UN Human Rights] Committee in Communication No 560/1993 A v Australia’, joint media release, 13 Dec 1997, responding to the Committee’s findings in A v Australia, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993, 30 Apr 1997. According to its ruling in A v Australia, the UNHRC considered that it was not per se arbitrary to detain an asylum seeker, there was no rule of international customary law to this effect, and detention could occur and continue where a state could provide appropriate justification. However, in the case of Mr A, it believed that Australia was in breach of Article 9(1) of the ICCPR because it could not meet this requirement. More generally, it said Australia was also in breach of Article 9(4), on the grounds that the Migration Act 1958 contained no provisions for a court to order a person to be released from detention where this detention was incompatible with the ICCPR (eg where it was ‘arbitrary’). The Committee’s opinion merely added to the low regard in which it was held by the Howard government, which subsequently announced that it would adopt a ‘selective and economical approach’ to reporting to such UN bodies, and agree to monitoring visits only when there was a ‘compelling reason’ to do so.

28 See Attorney-General, ‘Australia reaffirms commitment to proscribing and preventing torture’, media release no 055/2005, 7 Apr 2005. The minister (Phillip Ruddock) was tabling Australia’s report on its performance in relation to meeting its obligations under the Convention.

29 Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2. Australia’s constitution (s75(v)) precludes the passing of laws restricting the jurisdiction of the High Court in any case in which judicial review is sought against an officer of the Commonwealth. Brennan (2003: ch 6) provides a useful account of these developments, as does Beaton-Wells (2005).
that year the Full Federal Court confirmed that there were limits on the ability of the
government to keep in detention failed asylum seekers unable to return home or to a
third country, drawing inter alia on Australia’s obligations under the ICCPR.³⁰ And in
2005, the High Court moved to restrict the circumstances in which Australia is released
from its protection obligations to a refugee merely because they appear to have access to
effective protection in another country – ironically a concept initially developed in the
courts, although buttressed later by legislation.³¹

However, jostling for position continues. For example, in 2005 parliament enacted
reforms to deter unmeritorious litigation, to impose uniform and generally stricter time
limits in which to appeal, and to otherwise facilitate quicker handling of both asylum
and migration cases.³² For some, the nature of the proposed reforms suggests the
government has at last accepted that there are limits to its ability to place substantive
restrictions on judicial review. For example, according to Beaton-Wells (2005: 174),

This must be seen as a major victory for supporters of judicial review rights. It spells the retreat
of the Executive and Parliament from any attempt to prescribe or circumscribe the grounds of
review, leaving that task to the judiciary, to be led by the High Court in its ongoing development
of s75(v) as the ultimate safeguard of the rule of law in this country. To many, this is as things
should be (and should always have been).

However, this is cold comfort for asylum seekers who are not in Australia, but trying to
enter it unauthorised by boat. For if intercepted and removed to an offshore processing
centre like Nauru, they remain largely beyond the reach of domestic law.

Further, the courts are candid about who ultimately holds responsibility for the broad
parameters of asylum policy. As Justice French of the Federal Court said in 2001, at the
time of efforts to force the government to grant entry to asylum seekers intercepted at

³⁰Minister for Immigration & Multicultural and Indigenous Affairs v Al Masri [2003] FCAFC 70.
³¹NAGV & NAGW of 2002 v Minister for Immigration & Multicultural Affairs [2005], 213 ALR 668.
Hadaway (2005) provides a useful account of this development.
³²See Migration Litigation Reform Act 2005.
sea on the *Tampa*, and hence bring them into the jurisdiction of Australian domestic law,

The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australian community, from entering.

---

33 The *Tampa* was a Norwegian container vessel that rescued 438 mainly Iraqi and Afghan asylum seekers from a stricken Indonesian fishing boat en route to Australia in August 2001. The captain thought initially of landing them in Indonesia or Singapore, the ship’s destination, but after protests from the asylum seekers, sought instead to land them at Christmas Island (Australia). The government refused permission, and when court challenges failed most were ferried by naval ship to Nauru (some were accepted by New Zealand), where their claims for asylum were considered outside the reach of Australian domestic law. For differing perspectives and accounts of the events, see, for example, Marr & Wilkinson (2003), Piotrowicz & Blay (2001) and DIMIA (2001).

34 *Ruddock v Vadarlis* [2001] FCA 1329 at 193. In the same case (at 125-6), Beaumont J said, ‘There is nothing in any of the authorities to contradict the principle that an alien has no common law right to enter Australia. This aspect is beyond argument … whilst customary international law imposes an obligation upon a coastal state to provide humanitarian assistance to vessels in distress, international law imposes no obligation upon the coastal state to resettle those rescued in the coastal state’s territory. This accords with the principles of the Refugee Convention. By Art 33, a person who has established refugee status may not be expelled to a territory where his life or freedom would be threatened for a Convention reason. Again, there is no obligation on the coastal state to resettle in its own territory.’ On the sovereign powers of the state in regard to immigration matters, Beaumont is here merely echoing the view of the High Court in *Lim v MILGEA*; see fn 8 of chapter one.

That said, in the view of the UNHCR (2000), this understanding of sovereign rights should be qualified so that the obligation of non-refoulement extends in certain circumstances to refugees outside a state’s territory. Significantly, while not necessarily conceding this principle, the Howard government was careful to ensure that asylum seekers on the *Tampa* and other intercepted boats have had an opportunity to have any protection claims assessed, through a UNHCR-type process in the offshore camps to which they have been removed. It also eventually accepted into Australia those found to be Convention refugees when unable to find any other country willing to take them. According to DIMIA (2002: 151), ‘Australia is committed to ensuring that any identified protection needs [of the asylum seekers it intercepts offshore] are addressed. However, these needs will preferably be met in a manner that is disruptive to people smugglers and secondary movement’. Whether Australia’s conduct in these matters has been appropriate in regard to international law and standards is a complex issue, and remains highly contentious; see, for example, Magner (2004), Bostock (2002), Fonteyne (2002), DIMIA (2002), Piotrowicz & Blay (2001).
Similarly, in a 2004 case in which the High Court affirmed the authority of Immigration to detain a person potentially indefinitely, provided it retained the intention of deporting them, Justice McHugh described the finding as ‘tragic’ for the people concerned, but added,

As long as the detention is for the purpose of deportation or preventing aliens from entering Australia or the Australian community, the justice or wisdom of the course taken by the Parliament is not examinable in this or any other domestic court. It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights.  

**OF MINISTERIAL WHYS AND WHEREFORES**

The above developments appear to confirm Rene Cassin’s 1957 view that when it comes to matters of asylum ‘states are jealous of their sovereignty’. They also appear to confirm the view that Australian policy makers have a ‘control above all else’ (Lopez 2003: 23) mentality when it comes to asylum. However, this is neither unexpected nor particularly controversial, for the regulation of people moving to and fro across national borders is the aim of immigration departments and governments the world over. Further, even the harshest critics of Australia’s asylum policy rarely extend their arguments to removing border controls altogether. More contentious and contested are the questions why, and to what purpose, this quest for control?  

To help answer these questions, in the rest of the chapter we explore what values some of the most senior policy makers of the last thirty years themselves say that they brought to asylum issues. As noted earlier, the discussion is structured according to the two main themes that pervaded the interviews with the former ministers (henceforth M1 to

---

35 *Al-Kateb v Godwin* [2004], HCA 37 at 75. See also *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38.

36 Also contentious are questions like what is the cost of such control (eg for the asylum seekers and the receiving community), and whether similar outcomes might be achieved by other means, or by the same means applied more caringly. As will be seen in chapter six, these latter sorts of questions are important when approaching asylum issues from the perspective of an ethics of care.
M5) and public servants (henceforth PS1 to PS3), namely nation building and good governance.

**Engineering a nation**

According to Jupp (2002a: 52), for over a century from the 1850s to the 1960s, Australia, through a combination of assisted passages, preference for British migrants and racial exclusion, underwent a degree of social engineering almost unique in the world. In his view,

> Australia was consciously created by governments as a particular form of society. This tradition is still with us and dominates official thinking on immigration even today. Except at the margins, there has never been a free market in migration, nor is there one today.

The idea that political leaders will try to mould and guide their country in a particular direction is hardly surprising: it is the mandate that governments are given when elected to office. It is perhaps also unsurprising then, that interviewees saw even asylum policy as ultimately a matter of nation building, and interlocked with three aspects of such in particular: economic development, cultural formation, and global citizenship. Each of these is considered below.

**Asylum and economic development: the immigration paradigm**

For interviewees, national development, immigration policy and asylum policy tended to comprise a descending order of priorities, and they sought to emphasise how changes in one could affect the others, and that balances and tradeoffs were often required. And while the state of the economy and labour market is often cited as an important parameter of immigration policy – as M4 noted, ‘tolerance has been at a premium when the gold has run out, or work difficult to find’37 – interviewees saw these factors as also influencing asylum policy. For example, in M1’s view, the decision to resettle large numbers of European refugees after World War Two, and their public acceptance, was

37 In a speech referred to in M4’s interview.
due mainly to the belief that the refugees were necessary for national growth and security:

The basis of the policy was that the country was empty, which it pretty well was, six million people in a great continent … In a great national context there was great unanimity that Australia needed to build itself.

According to M5, the nexus between asylum, immigration and national development continues today:

If you’re an Australian politician you have to consider what is in Australia’s national interest, and … [have] uppermost in your mind that you’re looking at policy issues. Now what is the issue that I look at? Uppermost it is the implementation of an immigration program which has important national interest outcomes. First is to put in place an immigration program that will give you a good economic outcome for your existing population. In other words, promoting economic growth, promoting opportunity. The way in which you are able to do that through immigration is through having selection criteria which says something about people’s skills, the extent to which they are going to be able to use those skills in Australia, … because you see it as important in terms of maintaining public confidence in an immigration program, in terms of giving the broader Australian community reason to believe that its in their interest to support it. I put it down to assuming an important role in terms of nation building … You’re putting in place the building blocks that will enable the government to provide for Australia’s needs.

For this minister, critics of a ‘culture of control’ in respect of asylum fail to appreciate why it exists:

I can understand people say there is a culture of control, but … you can only conduct good immigration policy and good refugee policy if you are able to manage your borders. If managing means control, then, you know, they are synonymous. But I think to put it in that way, dominated by a culture of control, really misconceives the underlying motives.

From this perspective, a failure to contain the numbers being granted asylum can undermine the task of nation building in several ways. Firstly, the profile of asylum seekers does not always match labour market requirements. Secondly, if asylum numbers grow, public support for immigration of any kind is likely to fall, with M5 noting how ‘polling shows that support for immigration increases with more efficacious
administration of the migration program’. And thirdly, government expenditure on asylum seekers and refugee resettlement may reduce the funds available for expenditure on public services and infrastructure in other areas. As M2 put it, ‘You’re being tough because of the requirements that you face as a nation and the resources which you’ve got’.

That said, most interviewees considered Australia had the financial and economic capacity to absorb larger numbers of refugees than the 12,000 to 13,000 currently accepted each year, and that refugees usually provided good ‘migrant material’. For example, according to M3,

Refugees are the best possible people that we could have because they’ve got nowhere else to go … They throw their heart and soul into anyone who will take them, and they’ll do their best to integrate [because] they are people who don’t have a choice.

Similarly, M1 suggested that even when unauthorised arrivals were found not to be Convention refugee, provided they were willing to work, they should be given an opportunity to show what they could do for Australia:

Give them a chance of working or not working. Give them a choice of working and paying their taxes and showing what they can do for the country and for themselves [or going elsewhere] … Because some of the refugees who came in the post-war years, some of the 660,000 … made the greatest contribution to Australia of anybody in the history of Australia.

Further, most thought that the initial welfare cost to the nation of supporting people granted asylum would eventually be outweighed by the economic contribution made by their children or grandchildren.
Asylum and cultural formation: a people of ‘tough love’

If ministers and public servants were sensitive to the links between asylum policy and economic development, so too were they sensitive to the links between asylum policy and the evolution of Australian culture.38

Non-discrimination, generosity, empathy, tolerance, humanity: all were seen as desirable social and institutional qualities for political leaders to reflect and nurture at a national level. As put by M2, urging what he termed ‘tough love’ towards asylum seekers,

You’ve got to marry proper compassion for [asylum seekers], dealing with them humanely, with the situation at home, because it’s no use bringing migrants … of one sort or another into Australia at such a rate that the local population becomes enraged … [But] I think we all should be governed by … the fact that we should treat others as we would like to be treated ourselves. And if we don’t do that as a nation, then we put ourselves at risk of developing a sort of an attitude, a national attitude, which personally I don’t think is the sort of national attitude that we should have.

In M5’s view, asylum policy ‘says something about you as a nation’, with an organised refugee resettlement program being a sign of ‘generosity’:

The dimension [of an immigration program] that says most about you [as a nation] is the extent to which you have a resettlement program focused on the most vulnerable refugees … And in the end you don’t apply skilled criteria. You don’t apply family criteria. You essentially identify a need that has to be addressed, recognising you can’t accommodate all but as a generous society nevertheless want to fulfil that role.

While most interviewees agreed that public concern about asylum seekers, especially unauthorised boat arrivals, could easily be aroused and exploited for political gain, Australians were not seen as unusually racist or xenophobic. For example, according to M1, ‘every country has ten per cent of bigots and discriminators and racists and whatever’. He added,

38 Used here to refer to ‘the total of the inherited ideas, beliefs, values and knowledge which constitute the shared bases of social action’ (Wilkes & Krebs 1988: 273).
I do think that there is greater tolerance among all Australians than there has ever been … It’s inevitable, because in the population … you’ve got 200 ethnicities, you’ve got 120 religions, you’ve got more than 100 hundred languages spoken at home … The old bigotries have withered away.

Similarly, M2 considered racism in Australia to be less than in neighbouring countries like Malaysia and Indonesia, especially institutionalised racism, and M3 that Australians are relatively open and outward-looking, especially compared to people in countries like America and China:

I think the sheer size of this country, its remoteness from our principal ethnic roots, … the sheer quality of the ABC and SBS, the coverage we get, [and the extent of overseas travel people now do], is such that we have been outward looking. And that’s the thing that strikes so many people … I’ve met through working in politics and … [now] my international clients.

Nevertheless, elements of racism and xenophobia were believed to contribute to public concern about asylum seekers. Further, in the case of the 1999-2001 boat arrivals, these elements were seen as mingling with concern about the potential scale of the inflow, the Islamic faith or Arabic culture of many of them, a feeling that Australia’s generosity was being abused, growing community ‘selfishness’,39 and the absence of experiences or links that might encourage empathy.40 All interviewees saw public concern as a major constraint on asylum policy, with M5 suggesting it was actually an intuitive form of ‘collective wisdom’, worthy of respect:

I do have some very strong views about people who are racist and about people who discriminate against others because of their race. But I nevertheless have a respect for what I would call the collective wisdom, which is often intuitively formed, which says, ‘Hey look, they haven’t got it quite right. We don’t know what it is, but we just suspect that what they’re doing is not appropriate’.

39 When mentioned, this was normally attributed to the weakening of institutions such as churches and unions, and the competitiveness generated by micro-economic and international trading reforms.

40 Compared, for example, to the mutual experience of wartime conditions during the resettlement of European refugees post World War Two, and of being wartime allies during the resettlement of Indo-Chinese refugees after 1975.
However, most saw negative public attitudes as something to be managed and manipulated, rather than an outright obstruction to a humane and generous asylum policy. Leadership issues are discussed below, but several interviewees spoke confidently about the potential for major shifts in public attitudes. In their view, prejudice towards recent asylum seekers pales in comparison with the racial and sectarian divides of earlier decades in Australia, and the way in which these earlier divides have now largely disappeared gives hope that the new ones will also eventually ease. As M3 noted,

> It was just dreadful when I was growing up. It really was ghastly. And it’s something my son, who is 25, would not be able to comprehend … It just doesn’t cross their minds … Nor might I say does it cross his mind or the minds of their contemporaries very much because they’re dealing with Vietnamese and other people, kids born in Australia. And we all knew that would be the end result [of refugee resettlement after World War Two and Vietnam]. That was a very, very important thing.

Issues of perception will also be discussed later. Suffice here to say that most interviewees were of the view that political leaders could cultivate the ‘better angels’ of our nature only if they could reassure people that asylum numbers were under control, and that asylum procedures were fair and rigorous. They disagreed about how best to provide this reassurance, and the number of entrants that would or should trigger concern. However, M3 captured the general view well when he said that ‘the more there is paradoxically a sense of control, the more compassion can be exercised’.

*Asylum and world affairs: the benchmarks of global citizenship*

The third way in which asylum was seen to have a link to nation building was through it being viewed as a means by which Australia can contribute to a better world, as a nation state among an international community of nation states. Or as M4 put it, while asylum policy is ‘multi-faceted’, part of it involves ‘what it means to be a good international citizen, trying to establish a more peaceful and a more stable world’.

---

41 PS1, quoting Abraham Lincoln.
Needless to say, views differed on what being a ‘good international citizen’ might in practice entail in regard to asylum, although a few common benchmarks did emerge. The first was the observance of legal obligations under the Refugees Convention and other international instruments to which Australia is party. However, while some thought current policy met this benchmark, others thought it didn’t, notably in regard to the ability to detain unauthorised arrivals – and particularly children – for seemingly indefinite periods, and the limited scope for courts to order release. Views also differed on the desirability of expanding the content and enforceability of international instruments relating to asylum. PS1, for example, thought the obligations of international law important ‘to minimise the opportunities in democracies for short-term political opportunism’, but PS3 was concerned that they could only be expanded at the expense of clarity over minimum requirements and hence a less ‘solid basis of accountability’. In his view, ‘the more you make the edges [of an obligation] fuzzy … the more easy it is for governments to fudge whether or not they’re meeting it’. As M5 was also quick to note, changes in international law don’t necessarily flow through to domestic jurisdictions:

The framework of law under which we operate as a sovereign nation is that if we are going to include international law as part of our domestic legal regime, we have to incorporate it directly … In terms of the legal situation, we are a country that treats our obligations seriously. We’ve looked very carefully at what those obligations are and we’ve always acted lawfully. But there are many people who assert that there are international obligations, oblivious to the fact that those matters only become obligations in terms of legal effect if they’re incorporated into domestic law.

Another commonly cited benchmark of global citizenship was willingness to share in international efforts to address humanitarian problems, for example by providing resettlement opportunities in Australia, working with international institutions to help refugees return home in safety, and potentially intervening with others in refugee-producing countries. ‘Caring’, ‘generous’, ‘civilised’, ‘humane’, ‘decent’ and ‘compassionate’ were all thought nice international plaudits to win. However, whether or not they could be claimed of Australia’s current levels of resettlement, or the funding it provides the UNHCR and overseas aid, or its treatment of unauthorised arrivals, was again a matter of contention.
A third perceived benchmark of global citizenship was willingness to meet obligations of historical association, for example those associated with involvement in refugee-producing situations. Many saw the Indo-Chinese asylum seekers of the late 1970s as falling into this category. As M4 explained,

Well, I thought in relation to Indochina we’d participated in the war, and that gave us a very special obligation [to] the people we supported, whether we were right to or not … Because of our history I think we had a very special obligation.

Nevertheless, this benchmark was probably the weakest of the three, being viewed as susceptible to other considerations. According to M2, for example, the Whitlam government never really accepted ‘a responsibility for looking after the people who we’d worked with’ in Vietnam, and M3 thought the same applied of the Howard government in relation to asylum seekers from Afghanistan and Iraq:

If we're bombing the Afghans or the Iraqis then we have an obligation … I just can’t imagine why we wouldn’t be taking people who were fleeing the regime we’re bombing.

Further, no mention was made of other asylum seeker groups with whom Australia has also arguably had a unique historical association, such as the East Timorese and Papuans.

Importantly, while being a good international citizen in regard to asylum was seen as part of Australia’s international legal and humanitarian responsibilities, it was also seen as a potential means of achieving purely domestic objectives. Indeed, according to M5, there is no conflict between the two: ‘I think being a good international citizen supports your position in the world and is in the national interest’. Some explained the link in terms of ensuring Australia could call on others for support when handling an asylum crisis, citing the potential influx of Indo-Chinese post-Vietnam as an example. According to M2, the Fraser government deliberately ‘internationalised’ that particular problem to achieve control of it:

We moved people through the [Australian refugee status determination] system as quickly as we could. But at the same time we took action [internationally]. We promoted, in fact called, two
UN conferences on refugees, Indo-Chinese refugees. And I spent a lot of time in the countries of south-east Asia talking to the leaders there to see if we could control the movement of these people and expand the number of countries that accepted responsibility for taking some in … We couldn’t take them all. The countries of south-east Asia couldn’t take them all. So this was an international problem. So we internationalised it. We controlled [the problem]… by working with the countries of south-east Asia. How we did that? We said okay if they bounce on your place we will assist you to process them. We will assist you by taking some of the more difficult cases from you. And we will assist you by internationalising it, with your assistance, and making sure that you won’t be left with thousands of people in refugee camps.

For others, engagements of this kind were thought to have a desirable spill-over effect on general regional relations, and on Australia’s security and influence in global forums. For example, according to M3, the response to the Indo-Chinese was part of a broader policy ‘of getting closer to the region, and going back to the map and understanding the realities [of Australia’s geographical location]’. Similarly, to quote PS1,

In addition to physical power, countries that have influence are those who are able to persuade. And the countries that are able to do that, who in fact fight above their weight, are the Scandinavian countries [and] Canada. They have influence and standing far beyond their economic or military capabilities. And … the values that they hold to, not always successfully, but they hold to, [are] the values which are attractive to the world.

**Governing well**

In addition to the theme of nation building, the interviews were permeated by ideas about what it means to govern well, or how ‘to direct and control the actions, affairs, policies, functions etc’ of the nation according to standards of excellence (Wilkens & Krebs 1988: 484). The two topics are related but distinguishable: good governance can be seen as a means of nation building, but also a goal or end in its own right. Further, in assessing how they and others performed in regard to this goal in the area of asylum, the interviewees appeared to share similar basic criteria, guidelines or markers of performance. These may be summarised as preserving the freedom to govern, making ‘proper’ public policy decisions, providing leadership, shaping perceptions, and caring for asylum seekers and refugees.
Each criterion is discussed in detail below. However, a couple of general comments are worth making beforehand. Firstly, two other potential rules of thumb in assessing performance could have been ‘did the policy help us get elected’ and ‘did it work’ – or as Collins (1985: 156) puts it in the quote at the start of this chapter, the ‘twin utilitarian standards of efficacy (will it work?) and plurality (have you got the numbers?)’. For example, when asked what criteria of success political leaders used in asylum policy, all three public servants referred to political outcomes, with PS3 saying,

They’re all political animals. They all want to get re-elected. And some of them are keener than others to actually get promoted.

For their part, ministers spoke often of policy efficacy, with M3 at one stage saying, ‘Did it work! That’s the only real, it seems to me, judgment’.

However, while re-election, promotion and policy efficacy were important instrumental values, they were usually followed by reference to more normative values. In PS3’s case, for example, a focus on re-election was

… not necessarily a bad thing because at the end of the day … it is a democracy after all, and that is supposed to be the accountability method.

In other words, PS3’ views about ministers being ‘political animals’ were linked to his views about what constitutes a ‘proper’ public policy decision and good leadership. Similarly, in M3’s case, a policy that ‘worked’ was one that achieved outcomes ranging from controlling the numbers and sorts of people granted entry in order to help secure broad social and economic objectives, to winning an international reputation ‘for compassion and workable solutions’. That is, his views about what works were linked to his views about preserving the freedom to govern and shaping perceptions. And what at first appeared a crude instrumentalism was not necessarily so on closer examination.

Secondly, the views and values of ministerial advisers are not represented in this study, although they often have a critical role in moderating interactions between ministers and public servants, and between ministers’ offices. According to PS3, were these advisers surveyed by the writer, he would have found ‘much more political pragmatism and much less attachment to sustainably good policy’. In his view,
Your questions are all about [policy] development and selling and balance and priorities and so on. But that’s just the end game. It’s not really the game.

This is an important point to bear in mind when reflecting on the asylum policy process and the factors that can influence the trading and balancing of values. However, it does not detract from the validity of the values of ministers and senior public servants on display here, or absolve them from their share of responsibility for policy decisions and outcomes.

We return now to the five criteria used for assessing good governance in the area of asylum.

**Criterion 1: Preserving the freedom to govern**

The desire of governments to control asylum was attributed, among other things, to a bureaucratic penchant for order. To quote PS2,

> As an old public servant, you know, you always like order in things, and common sense and rationality and clear cut criteria for entry and so forth … [And] you can’t have people just turning up willy-nilly, otherwise you might as well have an open immigration policy altogether, and I don’t think too many people really want that.

The central concern, however, was to preserve government discretion in significant areas of policy, notably the tailoring of immigration to national needs and capacities and the steadying of community change in a fast moving global environment. As put by M2, ‘You’ve got to keep control of numbers, the sorts of people, and make sure that the best interests of Australia are being followed’. Similarly, according to M5,

> You can’t have an immigration policy if you can’t manage your borders. If you simply abandon managing your borders you’ll have no capacity to deliver what you think is in the national interest. That’s the bottom line.

PS1, too, emphasised the interconnectedness of asylum and immigration policy:
[The Howard government] has been able to increase the migration numbers in the past few years, and I think that is because the government has been able to reassure the public it is looking after our borders … If the community is reassured that its borders are safe, it will be prepared to accept more refugees and migrants … The public must be persuaded that the government is in charge, that it is not beholden to anyone otherwise the whole [migration and refugee] program will collapse.

For PS3, the ‘unifying bottom line’ of all governments has been the view that ‘tolerance is going to go’ ‘if asylum policy and irregular migration policy doesn’t work and we get a lot of irregular entrants’. To M3, controlling the flow of people into Australia was simply a matter of rationality:

It’s crucial for any nation as much as it can to control the flow of people to it, whether they’re deemed to be refugees or migrants … There was no argument that it was in the national interest to determine rationally who came to Australia.

The main risk to policy freedom was thought to be boat people, that is, asylum seekers arriving unauthorised by boat. Less concern was expressed about people seeking asylum after being granted entry on other types of visas, although these traditionally number more than unauthorised arrivals. In an indication of their strength of concern about the latter, most accepted the principle of intercepting and processing boat arrivals offshore, particularly in times of threatened mass influx. According to M3, speaking of the interception and offshore processing arrangements initiated by the Fraser government for Indo-Chinese asylum seekers in the 1970s,

In the case of an island nation it’s easier to control [the flow of asylum seekers] than those who have land borders … [We saw] a two-pronged aspect of what was in the national interest: … a proper process whereby we processed [the Indo-Chinese boat people] offshore, and … coastguards and … the navy [to intercept them].

And similarly M2,

We had to control as far as we could the number of boats coming … because not only is it people on board, but quarantine requirements and health requirements … We had to control that as best we could … That was my approach. Stop them coming. Cut them off at the pass if you like … I don’t know of any government really that I can recall that didn’t say as a base point that
Australia had the right to decide who did and who didn’t come in, who stayed and who didn’t. You must have that. And all governments would say that.

However, most interviewees sought to distinguish the offshore arrangements of the Fraser government’s for Indo-Chinese from the Howard government’s for north-west Asians on three main counts: that they were not put in place unilaterally but organised on a cooperative basis with countries in the region, the UNHCR, and other resettlement countries;\(^{42}\) that they were allied to a commitment to resettling many more refugees than currently accepted by the Howard government; and that they were accompanied by government efforts to increase public acceptance of the refugees rather than to exploit public concern for political gain.

A second risk to policy freedom was said to be people smugglers, persons who in M3’s words are ‘ruthlessly capitalising on human dilemmas’, and who virtually all agreed should be suppressed in the interests of both their clients and countries of destination.

A third risk was people ‘abusing’ the asylum system. No one claimed that unauthorised arrivals per se fell into this category, but rather people who didn’t ‘play by the rules’, whatever their mode of entry. One such group were said to be people who made false claims about their circumstances and identity. For example, according to M2,

> There are shysters and crooks out there who will tell you anything, spin the most extraordinary stories, and sound extraordinarily convincing. And if you’re a compassionate person you’ve really got to keep in mind that all is not necessarily as it looks, and that there are people who will seek to try and take advantage of situations. There are lots of them. In many cases totally understandable. But you’ve got to keep that in mind as well.

Another such group, according to some, were people seeking entry to Australia as a country of second or third rather than first asylum, for reasons other than protection. There was sympathy for their circumstances, but PS3 noted that whether or not refugees have a right to choose their country of asylum is a different issue to having a right of

---

\(^{42}\) Some acknowledged that the international circumstances and political climate of the 1970s were more conducive than the early 2000s to nations providing large numbers of permanent resettlement places under an internationally coordinated program.
asylum. In his view, while there was a ‘clear acceptance’ by the Howard government that Australia was likely to be a country of first asylum for people from neighbouring countries, the same could not be said of people ‘coming from halfway around the world’:

Since the Vietnamese exodus the Asian region has not been a major producer of refugees. And for that reason our thinking about refugees shifted from being a country of first asylum [to a country of resettlement] … And I think that’s what has become entrenched, not something that says that people don’t have the right to asylum. We’re saying that they’ve got the right to seek asylum where they can get it next door. They shouldn’t be using people smugglers.

For PS2, if a view developed in the community that any kind of welfare system was being abused, efforts to improve it were impeded, and public support for helping those even genuinely in need would decline:

When I was in Social Security it struck me very early on that you had to ensure that there wasn’t large-scale abuse of the social security system if you were hoping to adopt or have adopted improvements in the social security policies and programs. People just simply wouldn’t stand for it. If there was evidence which had been publicised that people were simply ripping off the system, then there was no way that you were going to get that increase in the real benefits or allowances, or improvements in the system generally. It’s a bit analogous to that in the immigration area. That if in fact there is abuse of the system, at least in the minds of some people, because they are not going through due process and so forth, and taking the law into their own hands in turning up, then you’re not going to get a lot of support for the orderly process, or for the people who come in through more traditional refugee type situations.

A fourth risk to policy freedom was said to be the legalisation of asylum processes, with particular frustration expressed at the role of legal ‘advocates’ of failed asylum seekers and ‘creative’ judges. According to PS3,

---

43 The right of refugees to ‘choose’ their country of asylum is a contentious issue, since it raises questions about not only the effectiveness of the protection from persecution afforded them in the country where they first flee, but also the social and economic conditions they experience there compared to what they are entitled to receive under the Convention, or that they seek in order to pursue a future for them and their families.
The thing that immediately comes to mind when I think of the three [ministers with whom I worked] is how upset they all got about how the legal system was biased, as they saw it, towards people who were trying to abuse the system … [If] I look at an interesting unifying reaction it was that frustration of having to very carefully try to develop a legal and fair public policy, having it legislated by the Australian Parliament, and then watching the courts pick it to pieces.

M2 explained the frustration in terms of the difficulty of securing the quick practical outcomes desired by governments ‘where you have an almost unending capacity for legal challenge’, with people ‘keeping the legal appeals going until they’d reached a point where the judges said they’ve been here so long that they should be allowed to stay’. M5 explained it in terms of believing that ‘no court ever makes an informed decision’ in terms of policy implications:

When people exercise that entitlement – which they have, the judiciaries – to develop some jurisprudence, they don’t sit there and say, ‘This decision may add to the number of successful asylum claims five hundred people this year, a thousand people next year, and the impact of that is going to be that the government of the day will say that a thousand less people will come in from abroad’.

To support his view, M5 cited a humanitarian visa category introduced by the Fraser government, under which onshore applicants had merely to demonstrate strong and compelling compassionate grounds for stay. According to M5, with the courts providing guidance on what these words meant, the number of visas granted by Immigration officers under this category rose to approximately 14,000 by the time it was abolished in 1989. In his view, it had ‘a very significant distorting effect’ on an immigration program that at the time totalled only about 80,000. Another example he gave related to a former visa category for overseas relatives of Australians with special needs. Here he claimed that the courts interpreted the term ‘special need’ so widely that it was eventually able to be used to secure the entry of relatives to assist persons suffering from minor as well as major conditions, for example being homesick.

44 Provision for this visa category was originally in s6a of the then Migration Act.
One exception to this concern about judicial subversion of executive and parliamentary authority was M4, who favoured stronger international law on asylum, and adherence to the principle of equal rights before the law. In his view,

Menzies in his day … would often put in writing about the Liberal Party, maintenance of the rule of law, a policy of equal rights before the law, right up to the top if he was describing the Party and why it was formed. I mean, I took these things for granted, but he was older and probably realised that you could not always take these things for granted. Australians have taken them for granted for a long while.

Another more qualified exception was PS1, who talking about the need to process asylum applications quickly said,

I think the Australian public gets very tired of long processes, appeals. I know there is the whole question of the legalities and the appeal system. I always used to believe that, frankly, I would rather trust the minister and officials than the courts. I’m not sure now.

Criterion 2: Making proper public policy decisions

In theory, developing public policy involves charting a course through a multitude of interested parties, views and values, often competing and sometimes irreconcilable. On face value, asylum policy would seem a prime example of this in view of the controversy it generates, in Australia and elsewhere. Yet several ministers claimed to have experienced no value conflicts at all over asylum policy. Further, while others were able to identify dilemmas or tensions they juggled when in office, all seemed reasonably comfortable with the balances they and their governments had struck.

There are several possible explanations for this apparent paradox, including either that these are not people prone to angst in the first place, for reasons of personality or strength of personal conviction, or that they had learned at an early stage to take a very pragmatic view of what they could and could not do to resolve the dilemmas they encountered in the area of asylum. As PS3 observed of the ministers he worked with,

I don’t think any of them lost any sleep over it. I don’t think they saw a tension … They moved very quickly from thinking that it was all relatively straight forward and that there was an easy
‘either / or’ sort of answer. It only took a few weeks before the horrifying realisation that if you get hung up on the tension you’d be paralysed [and] you’d never do anything.

However, the interviews also point to another explanation, one that doesn’t negate the possibility of the above factors being present, but helps round them out. It is that all the interviewees were confident that they had worked their way through the dilemmas of asylum policy in accordance with sound public policy making principles.

Turning first to the nature of the reported dilemmas, even those who claimed personally to have felt no value conflict when approaching asylum issues seemed, from other comments they made, aware of at least three core dilemmas, and of balances struck in these areas having a significant effect on policy directions. The first involved asylum policy versus whole-of-government considerations. In the words of PS3,

You can’t talk about asylum policy in isolation because it’s just one component of a broader migration policy, a broader population policy, a broader crime prevention and fighting policy, a broader foreign relations policy. And it’s got very strong connections if not roots in all of those things. And to think that you somehow, sitting aside, have something called asylum policy, that you can bring to bear particular values or particular moral judgments or particular balancing things between priorities or whatever, you can’t do it. It’s a whole-of-government issue. It’s relationships even between the domestic portfolios, between compliance and detention and so forth. It isn’t till you try to run them altogether that you realise that you can’t deal with one without recognising that it’s going to have serious implications for a whole range of things.

The link that interviewees saw between asylum and immigration policy has already been noted. A link was also often made to foreign policy, although it took various forms. For example, several saw asylum policy as linked to overseas aid and the resolution of international conflicts. Others, like M3, saw it linked to efforts to improve regional relationships, and had given preference in the refugee resettlement program to refugees from Australia’s region. And while some spoke of Australia having taken Indo-Chinese refugees because it was the ‘right thing to do’, PS2 suggested it was also a way of shoring up the fight against communism in Asia at a time when cold war tensions were high:
I think it was … Lee Kuan Yew who said if the West or the people who’ve been involved in Vietnam didn’t take these people now, you’ll never get anybody to stand up to communism or whatever else it is that is seeking to take over the countries concerned. So there was that feeling that it was a sensible thing to do because you were showing that there was an outlet for people who’d stood up and been on the side of whatever it was, truth and justice and heaven knows what.

Indeed, in PS3’s view, one of the factors affecting asylum policy was whether it was seen by the government of the day as more a part of domestic policy, or more a part of foreign policy. In his view, for example, the Howard government tended to the former view, and the Hawke government to the latter.

A second core dilemma involved global needs versus local capacity. Most interviewees used the scale of humanitarian problems worldwide as a context for their views on asylum, and saw decisions about who can and can’t enter Australia as a logical progression from a realisation that no single nation could cater for every person in need. As M2 explained,

There is absolutely no doubt that there are a great number of humans in extraordinary distress, being extraordinarily badly treated around the world. And anyone with an ounce of human compassion must acknowledge that … I believed that Australia had the capacity to play a proper role, and we always have, in taking some of these people. But I knew for an absolute fact that we couldn’t take them all … So that was the basis of it: I knew we couldn’t take them all, but we had to take as many as we could.

For many, this global-local dilemma was at the heart of the tension between providing refuge to people who arrived by boat, especially those engaged in secondary movement, and providing resettlement opportunities for people in refugee camps overseas. According to M5,

When your circumstances change, as ours did [with the rise in unauthorised arrivals aided by people smugglers], then you have to look and see what the impact of that is. Now there are some people who see the impact in terms of, ‘Oh the numbers are really modest, just keep on [taking] more and more’. There are others who say, as I do, ‘Every time you make some compromises and you accommodate people whose claims … can be the same but [are] not necessarily the same as those who are the most vulnerable [overseas], you are limiting your capacity to help the
most vulnerable. And I always saw that as important … [And] when you’re in a position that you have to make a judgment as to where the priorities should be, you … try to put in place what you think is a program that meets the needs of the most vulnerable and has a sensible balance in relation to them.

Finally, a third core dilemma involved, for want of a better description, virtue values versus political values: that is, the desire as both an individual and a government to be ‘decent’, ‘compassionate’, ‘humane’, ‘moral’, ‘pointing to a better way’, versus the desire to be ‘pragmatic’, ‘effective’, able ‘to deliver’, ‘accountable’, and ultimately, able to win and hold office. The two sets of values were not seen as necessarily antithetical – indeed some sort of union was aspired to and claimed by all interviewees of their own time in government – but nevertheless as difficult to marry and present well. According to most, their aim had been to have, and be seen to have, ‘tough policies’ that gave confidence to locals that the government was ‘in control’ and that deterred unauthorised arrivals, people smugglers and ‘bogus refugees’, but that were ‘always humane’. M2 described it as having a ‘tough love’ policy:

I think you can have tough policies – when I say tough I mean clearly enunciated and upheld – but you can do that with care and compassion and explanation. I think the impression you give is enormously important. You can be tough, but you can be seen to be fair and clearly enunciated. There is a phrase I’ve seen around the place called ‘tough love’, which has some adherents, and it seems to me that is what I would describe as tough policy. I had in my time tough policies. We said we will make the decision who comes and who doesn’t come, who stays and who doesn’t stay. They were tough policies, but I think we presented those in a different way [to the Howard government].

However, in addition to differences of view on what could validly be called humane or inhumane policy, both critics and defenders of particular measures would often ironically turn to virtue-type values to support their views. For example, while some interviewees argued that measures like offshore interception exceeded the bounds of the tough-but-humane nexus, others defended them as helping to protect the interests of the ‘forgotten’ refugees in overseas camps. In the words of M5,

The thing that most people who are advocating here want to focus on is whether or not I feel some greater responsibility for those who are actively confronting me – and them – in terms of
their position as asylum seekers, and what I see as being more vulnerable people who we might have been able to help if we weren’t beset with [those confronting us] … [They] are not easy issues, and it’s a question of judgment and perception.

Similarly, where M4 claimed that in recent years both government and opposition had conspired ‘to destroy basic Australian values because they think it’s good for votes’, and asked ‘who is there except refugee activists … to put a contrary point of view’, PS3 claimed that many of the activists were ‘involved in an anti-government campaign, not a pro-refugee campaign’, and were guilty of using asylum seekers as political ‘fodder’.

Turning next to how interviewees addressed these sorts of dilemmas, as noted earlier they shared a few basic principles to light their way. These included acting lawfully, adhering to rules and orderly procedures, meeting real need, keeping numbers within ‘absorption capacity’, being accountable to party leaders, parliament and voters, and being guided by reason rather than emotion. Where disagreement occurred, it was less over these generic principles than whether or not one government or another, or one minister or another, could validly claim to have acted in accord with them, or taken them to extremes, or distorted the balance between them.

The first two principles – acting lawfully and being firm on rules and order – need little explanation, although it is important to note that the latter reflected a concern more for fairness and impartiality than scrupulosity. An anecdote of M2 illustrates:

I remember one particular situation when I was visiting a particular refugee camp in Thailand … And this woman came up to me with two little kids. And you know how attractive those Asian kids can be, appealing brown eyes and so on. And she said to me, ‘You the Minister’? I said, ‘Yes’. She said, ‘You can save me and my family’s lives. Please let us in’. And I knew that I could. The real temptation of course is to turn around and say to the Secretary, ‘Take this woman’s name and make sure that she gets in’. I couldn’t do that. Could not do that. It would have been an abrogation of my responsibility as a minister … to administer fairly the refugee admittance program. She had to be considered along with everybody else. I don’t know what happened to her after that. I didn’t check.

A similar concern underlay M5’s view that the proper place for compassion in a fair and impartial asylum system was in the exercise by ministers of their discretionary powers
to grant entry or stay to a failed asylum seeker, rather than in the decisions of public servants and the judiciary, who should instead be governed by the rules and regulations of the administrative system, the law, and the principles of procedural fairness.

The third principle, meeting real need, generally had two aspects to it: firstly, minimising abuse of the asylum system, and secondly, tailoring policy to cater for relative need. Perceptions of people abusing the system ranged from those who made fraudulent claims about protection needs and identity, to those who arrived on normal visas and subsequently claimed asylum. Of the latter, for example, M4 said,

Well, people who come by air, it’s always been a deceit … They’re the ones who have cheated. They’ve got papers. The figures show that these ones have very little chance of getting refugee status. The ones who come by boat generally do, about 90 per cent.

The concept of relative need was more problematic, but equally pervasive. According to PS3,

Other than the ones who came here directly as a country of first asylum, for all three ministers [with whom I worked] there was the feeling that the people who were turning up on our doorstep, either with valid visas or as boat people, were not necessarily and indeed were probably not the ones who really needed resettlement. The rhetoric was different between the ministers, but fundamentally that question, the ones who were choosing rather than having to seek, were not in the greatest need.

However, some, such as PS1, were wary of how the concept could be abused through factual distortions and prejudicial terminology:

The [Howard] government makes the case that the asylum seekers coming by boat particularly are jumping the queue, and that more deserving people should merit our compassion in refugee camps and whatever around the world. Frankly, I think that’s wrong. There is no such thing as a queue … With twenty million refugees and asylum seekers around the world it’s sheer luck if they happen to get selected for Australia. [And] there is no hierarchy of needs … Camps will be picked over … [for] those who will settle best … We have a quasi-migration program under the guise of a refugee program … To say that there is some hierarchy of needs, and that the least deserving are those who come by boat as asylum seekers is nonsense … I think I could make a case that those who are coming are probably more deserving than the others we select.
The principle of meeting real need underlay a general acceptance that asylum seekers were typically a mixed bunch, and that it was important to determine who were ‘genuine’ refugees, and to ‘send home’ those who weren’t. For some, the distinction between asylum seekers and refugees, and asylum policy and refugee policy, was vital. To them, a failure to make and respect the distinction muddied a complex issue, and let people off the hook in the sense of not forcing them to clarify the values and priorities they brought to policy debate. To quote PS3 again,

> If you asked a minister what do they think about the plight of the refugees in the world, you’ll get a fundamentally different story than you’ll get [if you ask] what do they think about asylum seekers, by the way in which few of them are refugees … What often gets passed as refugee policy … is actually a policy about the 90 per cent or whatever who aren’t refugees, who are using the asylum system. A lot of the rhetoric gets to be about those. And the few genuine refugees, the ones that get up, and within those an even smaller proportion who weren’t secondary movers, just get swamped.

Most, however, recognised need as a continuum. For example, in M3’s view a program that catered for ‘people not quite refugees in the strict sense, and [who] fell short of migration in the broad sense’, was an essential adjunct to a program designed for Convention refugees. Similarly, according to M5,

> Inevitably you end up with some situations where there are factors of a special character that you have to take into account. Some of them arise because you have signed up to other international treaties [eg the UN Convention Against Torture] … Sometimes there were other situations [like] where there were women … [who] possibly would have been subjected to female genital mutilation if they were returned … Sometimes you were dealing with people who had claims that were at the margins, never enough to get up, but had developed other Australian connections. It can be with immediate family, such as a spouse. They might have had children. Sometimes you’d find people who’d settled well … They’d been able to get some work and demonstrated that they weren’t going to be highly welfare dependent. You weighed that up along with the nature of the claims and said, ‘Well that made it sufficient to tip the balance’ … But I would always weigh up any decision I took and say, you know, ‘I recognise that in providing this place I am denying somebody who may have a far greater need for a place, and is it worthy of it?’
The fourth guiding principle, keeping refugee and humanitarian entry grants within ‘absorption capacity’, was as pervasive as the principle of real need, and just as open to differences of view – although not on a grand scale – over where tipping points lay, and by how much governments could expand them. The concept was never precisely defined, but included similar parameters to those applied to immigration generally, for example employment conditions, public acceptance and goodwill, the ability of newcomers to settle and integrate, and the implications for government budgets. Views on how it translated into numbers ranged from M5’s view of the current refugee and humanitarian intake of about 12,000 to 13,000 a year as ‘about right’, to others noting that nearly double this number of Indo-Chinese was taken in the early 1980s, and quadruple it of European refugees in the late 1940s. However, large intakes were seen as the exception rather than the rule, and linked to special circumstances, for example shared wartime experiences or a need to populate for economic and security reasons. Further, comparing the post-1945 situation with current circumstances, M1 argued that while Australia was now wealthier, changes in social and economic conditions had paradoxically reduced its absorptive capacity:

I do think that there is greater tolerance among all Australians than there has ever been … But the greater pressure on families and individuals in Australia today is the weight of debt, the weight of responsibility, and the lack of feeling you’re part of a partnership, if you like. I mean the church, trade union, whatever, even parties. … I think it has generated an incredible selfishness … The first thing that is said is, ‘Well, I’ve got the mortgage, I’ve got the debt, … I’m under tremendous pressure, I’m working longer hours, and I’m doing my best’. Okay, that’s fine, but there is no sense of security. And it’s the insecurity which is bred by the present regime – and I’m not talking about government but about thinking and acceptance – that leaves us in a state of insecurity and uncertainty. And of course you put yourself first, or you put your family first, but you don’t reach out … You just imagine if we had a massive influx. It would be incredibly difficult for us … We may not have spectacular unemployment figures, but my God we’ve got figures that indicate pressures on the individual, family and work.

In terms of asylum numbers and government budget constraints, M5 described the tension in the following terms:

The conflict is when you see a need and you’d like to address it, and you don’t have the resources to be able to connect to it, and you don’t make the decisions in relation to resourcing
alone … My heart might say well I’d like to be able to help some more, there are people who are still needy. And my colleagues will say to me, ‘Well, you’ve got a budget, work within your budget … You know, inevitably there are a lot of worthy things that you would like to be able to do as a government, but you can’t meet all of the needs. That happens.

Again, however, most saw government funding as a flexible parameter that can vary with circumstances, and particularly with perceptions of the scale of the need and government or community responsibility. For example, of the post-1975 exodus from Vietnam, M4 claimed that Australia had a ‘very special obligation’ because of its participation in the war, and that ‘if the needs of refugees were greater … more money would have been provided. There was no real upper limit’. For PS2, government funding and public acceptance of responsibility for refugees from north-west Asia post-1999 was less forthcoming than for the post-1945 and 1975 intakes because many people felt they ‘were coming from a rather further distance and, you know, why Australia’? That said, in his view,

[The] term ‘scarce resources’ is really a good public service term, or even a government term, that is often used in social policy, social program areas. And usually there are more resources available than would be indicated by the use of the term scarce.

The fifth guiding principle, being accountable to party leaders, parliament and voters, was expressed in a number of ways. The notion of accountability in regard to the first two groups – party leaders and parliament – was reasonably straightforward. For example, M3 recounted how his prime minister would thank him ‘for not taking something to cabinet and just doing it, as long as I did what he thought was right and there was no political backlash’. Similarly, M2 said that he believed that if he didn’t administer asylum policy ‘fairly and without bias’, then he’d ‘be very likely called to account before parliament sooner or later’. However, the notion of accountability in regard to the third group – voters – was a little more complex, being influenced by views on the relative merits of a ‘popular’ or ‘elite’ approach to asylum policy (a matter explored later in the section on leadership). For example, where M5 expressed respect for the ‘collective wisdom’ of people worried about unauthorised boat arrivals, contrasting himself to the ‘elites [who] are often dismissive’ and say ‘we know better’, M3 held that ‘if the people who are elected by the community are all in agreement’,
then they should proceed with the policies they consider right rather than ‘create a [public] debate we don’t need’, and which only ‘opens up the bigotry’ and hurts ‘the people who are here’.

Whether there is scope to adopt an asylum policy that genuinely lacks popular support is another matter. For example, in the view of PS2, the major parties were all anchored in political reality: ‘Most governments wouldn’t be prepared to lose an election on the basis of an issue which is very unpopular because it is the right thing to do’. Further, according to M4,

The sad thing is that both the [Liberal and Labor] parties would have supported my sort of policy in my time and earlier. But both parties support the hard sort of policies today … They all read the polls and say, ‘Ah, these polls are supporting current policies’.

He and several others criticised what they saw as the politicisation of asylum policy during the boat arrivals of 1999-2001, whereby the bipartisan approach to immigration and asylum which had prevailed since World War Two, aimed at neutralising them as political issues because of their significance and sensitivity, was abandoned in favour of a divisive populist approach aimed at winning votes. According to PS3, a criterion of success under the former approach had been ‘either that [asylum policy] doesn’t become an issue, [or], if it does, it doesn’t lose votes, and at best it gains votes’. He continued,

I would say that the first two [ministers I served] worked fairly hard not to make it an issue. And so did [the third] to start with. I can remember him being quite proud of the fact that it was still number thirteen or number eleven or something on the … [poll of] issues of importance … I can remember him saying, ‘This is good, keep it down there’. That’s the whole immigration thing, but obviously asylum policy was mixed up in that. And up until November 1999 that was it. But it fundamentally changed when we got such large numbers. Funnily enough, if those large numbers had been Acehnese … or even a bit further afield in the region, I don’t actually think it would have had the same impact. But it was just this sense of people coming from halfway around the world. And it happened so quickly, and it was so well organised, there was this sense of being besieged. When you put the juxtaposition of One Nation issues alongside, it became a political issue. [But] not by anything the government did. [It was] the numbers and the One Nation issue: they just had to show they were in control. The community expected it. The voters expected it. And if they had done nothing and just kept on applying the same policies,
one, [the asylum seekers] would have kept coming in ever increasing numbers, and [two, the government] would have lost power for that reason.

The final principle or criterion for a proper public policy decision was that reason should prevail over emotion. It is not that private emotion was seen as unwanted or harmful. Indeed, a range of emotions about asylum seekers and asylum policy were expressed during the interviews, including compassion, anger, sadness, frustration and indignation. Further, several interviewees said that they valued their emotions as ways of informing and adding strength to their convictions. However, emotion was distinguished from, and thought less important in a public policy decision-making context, than other personal qualities such as reason, common sense, values, convictions, commitments, morality and conscience. Personal emotion was, in the main, something to manage carefully, tuck in behind logic and objectivity, and keep out of public view. As M4 put it,

There is obviously a role for emotion. I think it is passion and concern that forces so many people to try and help asylum seekers in Australia. But public policy at the end of the day has got to be logical. You can’t really have an emotional law. People might get emotional about a law, but you’ve got to tackle your policy in a logical way and be able to explain it in … unemotional terms.

Similarly, according to M2,

Emotions are there with you, no matter what you are doing. You will probably have, if you’re honest with yourself, some predisposition one way or the other. And you’ve got to be very aware of that and guard against letting that overrule what should be a proper decision, a public decision … I used to agonise, although I’d try not to in public get too emotional about these things.

And to PS3,

As a senior public servant or a minister if you allow your emotions to drive you, you are in deep trouble personally, as well as not really being able to contribute … You can’t be driven by [emotion], because it may have as much to do with you as an individual as about the issue, and there is a whole range of hard facts, data and analysis that needs to be done to come up with
Among ministers, one way of managing their emotions was to stay focused on desired results or outcomes. For example, M2 acknowledged that bringing emotion and reason together was ‘very hard’, but added,

You’ve just got to keep in mind the end goal I think. And it’s easy to lose sight of the end goal. I mean, you’re never going to get directly from point A to point B. If you’ve got a government policy – which as a minister you’re bound by – … which says we will have 30,000 refugees this year, or 10,000 or 15,000, you can’t say, ‘Let it all rip’, and have all those admitted in the first three weeks of the year. I mean that’s an overstatement, but that’s the sort of thing you’ve got to keep in mind. You must keep the policy in mind, the results you want to achieve in mind, and try to marry the two. And that’s not an easy task.

Focus was also important in M5’s description of the kind of experience that, in his view, best equips policy makers for their task:

I think there is nothing better than first hand experience, particularly for those who think they have got a conscience, and a concern. We’ve all got a heart. There’s nothing better than to put yourself in a situation where you have to deliver. Where you are vulnerable to some of the blandishments from those who are trying to exploit your compassion. Where you have to remain focused on addressing need, and to recognise the ways in which you can be manipulated. It just gives you a critical capacity to think through how you are going to try and get the balance right in public policy terms. There is nothing that replaces experience.

Another way of managing emotion was to adopt a clinical, almost formulaic approach, concentrating on the ‘merits’ of cases, departmental analyses and recommendations, and issues of precedence and effect, and viewing responsible decision-making as a matter of dispassionate judgment. As M3 described it,

I think being a trained lawyer was a help in that I don’t think I allowed individual cases to sway me as much. I mean, I looked at the merits of cases and where I had discretion I would exercise it if I thought, ‘Well, here’s a case where someone is marginally short of whatever the notional points were on a particular issue’ … It was a matter of making some judgment …
While seldom mentioned, a degree of emotional distancing and psychic numbing also plausibly occurred, with occasional claims of there being little ‘room for personal connection’ in the busyness of ministers’ lives, of them being ‘overwhelmed’ or ‘distracted’ by the complexity of asylum issues, and of one minister taking the view that the interests of asylum seekers in Australia were well-enough represented, and therefore choosing to ‘connect with’ and ‘replenish his compassion bank’ by focusing on the needs of refugees overseas. According to M2,

Being a minister … is very hard. It’s very easy to be beguiled by the power and the trappings of power that surround you, … [and] people around you telling you either how good you are, or how appalling you are. But the ones you’ve got close to you are generally very supportive … You can get very isolated from what is the real world unless you make a particular effort to go out and keep in contact. So it’s very hard for ministers because you’ve really got to try and keep your feet on the ground and go and see for yourself. And put yourself in the position of people.

That said, some thought that personal emotion could have a potentially important influence on policy decisions, including in the form of public servants having the ‘courage’ to provide frank and fearless advice. For example, a number attributed the Fraser government’s determination to resettle large numbers of Indo-Chinese in the face of an ambivalent Australian community to, among other things, Fraser’s own passionate opposition to racial and sectarian discrimination. Similarly, Philip Ruddock, immigration minister in the Howard government until 2003, was said to have been more generous than his predecessors in exercising ministerial intervention powers, although some argued that his ‘compassion’ in this area of policy was overshadowed by his ‘obsession’ with people smugglers in others. In the view of PS1,

I think the minister [was] obsessed with people smugglers, as if it’s almost a personal challenge to him, which cloud[ed] his judgment and I think what I’ve always regarded as his fairly traditional compassion.

According to PS3, ministers’ feelings of frustration, harassment and grievance over some asylum seeker actions and court decisions, and especially the activities of refugee advocates, at times only stiffened their resolve over tough measures. For example, of Ruddock he said,
If you did an analysis of when Ruddock got tougher, it was nearly always straight after [asylum seekers] did something ungrateful. Kosovo stuff – he tightened up when they didn’t play by the rules. With detention he got incredibly tough after they first burned [things] down … The advocate noise just piled on that. It was like pouring petrol on fire. That’s what they could never realise. He was already feeling beleaguered and pissed off because they weren’t doing the right thing and then the advocates would argue that he was doing the wrong thing. You know, it was just one of emotion. It was almost like, ‘Well, stuff you then. My natural inclination is to tighten up and you’re making it really easy for me’.

For others, ministers’ emotions tended, chameleon like, to reflect emotions in the community. To quote PS2,

You’ve got to be a bit worried that there does seem to be a view now [in the community] that … we’ve done enough, we’re not interested in these sorts of people. There’s a fear about them. Maybe we’ve become hard-hearted. I remember going with [my minister] to see Lee Kuan Yew at the time the [Indo-Chinese] boat people were coming in substantial numbers. It was a Saturday afternoon I remember and Lee Kuan Yew, he just said, ‘No, no, no, you’ve got to do the right thing by these people. But …’. And then tears came down his face and he said, ‘But we’re just a small place, we can’t resettle these people’. He said, ‘We’ve got to grow calluses over our heart’. And the tears almost stopped immediately once he’d said that. And I think this is what the government in a sense has decided, that the politics are running very much in favour of growing calluses over your heart – without the tears.

In this context, issues relating to leadership and the shaping of public perceptions of asylum and asylum seekers also came to the fore as criteria of good governance, and to these we now turn.

Criterion 3: Providing leadership

If ministers and public servants thought they had to manage their own emotions carefully, they were even more concerned about the need to manage public emotions. The public’s view of asylum seekers, especially boat people, was considered conservative and volatile for a variety of reasons, including an innate distrust of people who are ‘different’ or ‘unknown’, fear of one’s homeland being ‘invaded’, wariness of importing the disputes of other countries, racism, sectarianism, a culture that lauds people who ‘play by the rules’, and a tendency for each group granted entry, migrants or
refugees, to adopt a ‘last one in pull up the ladder’ attitude. The mood was thought particularly volatile of late, in view of the so called war on terror, the insecurity and vulnerability wrought by decades of economic reform, and the declining influence of institutions built on a philosophy of solidarity, such as the churches and unions. As put by PS1, ‘In that environment it is so much easier to exploit and blame the outsider, and that really gets back to the key issue of leadership’.

Earlier, reference was made to differences of view about the relative merits of a ‘popular’ versus an ‘elite’ approach to asylum policy, or less pejoratively, an approach based on the ‘wisdom of the electorate’ versus the ‘wisdom of the elected leaders’. While most interviewees sought to straddle both views, those inclined to take a popular approach did so for two main reasons: firstly, because they thought it reflected democratic principles, and secondly, because they saw it as a way of containing the potential growth of negative public sentiment towards refugees and migrants more generally. Both are summarised in M1’s comment that ‘you must take responsibility for the people that you invite, and the people you represent’. As noted earlier, PS3 emphasised the democratic aspect, arguing that,

People get very disparaging about politicians who are only interested in the votes, but it is a democracy after all. And that is supposed to be the accountability method. I always find [strange] the debate that the government should lead public opinion and not just respond to it. And then [you] say, ‘Well, what happened to democracy’? Then they look at you as though you’re asking a stupid question.

On the other hand, for M5, preserving a benign environment for the overall program of immigration was equally important:

45 These differences echo those that occasionally surface over immigration more generally. As Jupp (1993: 243-4) observes, ‘Popular democratic politics is often about perceptions and prejudices. Immigration policy must take into account such perceptions and prejudices because it is concerned with the sensitive issue of who should be admitted to the society, under what circumstances and for what reasons … Many surveys suggest that public policy has been ahead of public opinion since the 1940s. But elected politicians must at least explain what they are doing, aided by their public servants. This has been a central feature of public policy in this area, with the avoidance of overt partisan differences being one of many devices used to control and modify public reactions. The regular demand for a “debate” on immigration is, in reality, a demand to raise the temperature on this and related issues’.
One of the things you’re looking at in terms of framing the immigration program is how you regard popular support. What factors are in people’s minds when you start to develop that program? That’s why I took you through the rationale for economic migration, the rationale for family reunion, the rationale for a refugee program. Because I think when you can go out and put that in a way which leaves people feeling confident that the program is working as it should, it enables you to deliver public support, and it undercuts those whom I think would distort it and debase immigration.

Those inclined to take the elite or vanguard approach to leadership did so because they thought it led to policy that was more factually based and liberal. In M3’s view, for example, it stopped ‘phobia’ coming into it, and in PS2’s view, leaders could ‘always influence … where people draw the line’. Supporters of the elite approach expected leaders to be people of ‘vision’, and were confident that over time the public would catch up, their initial fears and reservations being allayed by experience and their own ‘better angels’. According to PS1, many people hostile to boat people paradoxically believe that Australia is an ‘open, humane, generous, strong country’, and want leaders to be midwives to ‘something bigger and nobler in themselves’. He continued,

There is in every person elements of selfishness and generosity. I would hope that over a period we have leaders who encourage the best and the most noble and generous within society and within people.

Like others in this group, M4 recalled examples of leaders who had acted contrary to public opinion on immigration and asylum issues, and had been judged well by history for it:

If we go back to the beginning of migration, with Calwell and the unions, if he’d asked the ACTU to have a poll of their members, 600,000 men and women waiting to be demobilised, wanting jobs, seven years since twenty to thirty per cent unemployment, there’s no way they’d have voted yes. So he persuaded the union movement that it was necessary for Australia. They persuaded their union members. The opposition supported it. And over a long period of years there was a bipartisan view that people should not say things that would create angst against other people, migrants or people from other places. If you’d asked Melbourne people would they have wanted to become the biggest Greek city outside Greece, they would have voted against it. Now that it’s happened, they’re proud of it. If I’d asked people … do you want
thousands of Indo-Chinese to come to Australia in the next twenty years, they would have said no. But if you do it, and state why you’re doing it … then people will accept it.

Some argued too that the elite approach was justified by the fickleness of public opinion polls, and by what PS3 called the ‘schizophrenia’ of public opinion, whereby people can be critical of a group in general, but get on well with ‘the guy next door’. For example, according to M3,

You know only too well with opinion polling: put a question a certain way and you’ll get a certain answer, put a question in another way and you’ll get a different answer. And as they say about a plebiscite or referendum, so many questions can’t be answered by ‘yes’ or ‘no’. But you get on. You provide the leadership. You allay fears by performance. And then people accept or don’t accept. But they don’t feel too disturbed. There would still be some people who say, ‘Well, I’m going to sell because I don’t want Greeks or Vietnamese on either side of me. I’m going to move. They’re going to take over.’ But the others who will actually get to know them say, ‘Well, they’re not too bad’.

From the elite perspective, leadership was about taking decisions first and winning popular acceptance of them later. In the view of M4 again,

In older days, you might have had some idea in your gut that you’ve got a difficult job selling this policy or that, but if you got then a poll that said so, then you’ve just got to argue harder to get the policy [accepted]. I mean the decision would have been already made and out.

A corollary view was that asylum, being potentially so sensitive, was not an issue on which leaders should ‘play politics’, in the sense of seeking to win votes by introducing or emphasising policy differences between parties, or by using it to divert public attention away from other areas of government performance. According to M1,

If you feel you’re on a winner, an election winner, sometimes you’ll have to rein in that wonderful expectation because the results of division would be awful to contemplate.

Despite the different expectations of leadership described above, the implications for policy were less clear. Support or opposition to specific asylum measures – including offshore interception and processing, temporary protection, efforts to deter people smuggling, and the detention of unauthorised arrivals – did not divide neatly according
to whether an interviewee was inclined to the popular or the elite view of leadership. Further, while interviewees were vague on the numbers of refugees Australia could absorb on either a temporary or permanent basis, no one proposed a radical increase in the size of current annual intakes. Constraining all views, it would seem, was a belief that political leaders had to work within fairly rigid parameters: a public susceptible to crude imagery and simplistic judgments about asylum seekers, the need to be and be seen to be ‘strong’ and ‘tough’ on border control, and the need to ensure decisions on asylum did not adversely effect immigration policy or public attitudes to immigration.

Criterion 4: Shaping perceptions

Controversy about how political leaders shape the public perceptions of asylum seekers is not new. For example, as noted in chapter three, sixty years ago the Chifley government worked hard to persuade an ambivalent public to welcome refugees from Europe, while at the same time depicting wartime refugees from Asia who refused to leave after hostilities ended as opportunistic and undeserving. Similarly, commenting on public perceptions of Indo-Chinese asylum seekers after the Vietnam War, Viviani (1996: 155) claims that,

> Ministers, senior bureaucrats and members of parliament together control the debates, police the margins of what is acceptable and either take a constructive lead or let the debate run.

In her view, governments and oppositions alike spoke ‘with forked tongues’ about the Indo-Chinese:

> Former Immigration Minister Grassby’s ‘Family of the Nation’ statement (1973), Prime Minister Fraser’s statements on multiculturalism and Prime Minister Hawke’s *National Agenda for a Multicultural Australia* (1989) were serious and partly effective attempts to lead public opinion in constructive ways to deal with ethnic diversity and racism. But other, more powerful counter opinions have been heard: Bob Hawke, when president of the ACTU, saying that the boat people ought to be sent back; Howard, Blainey and Graeme Campbell on too many Asians; McPhee on ‘economic’ refugees; Ministers Hand and Bolkus on illegal immigrants; senior officials of DILGEA on influxes of boat people. Both reports of the Joint Standing Committee on Migration (1992, 1994) were strongly negative on the boat arrivals and both Senator Jim McKiernan (chair
of the committee) and Senator Jim Short (then opposition spokesperson on immigration) had extensive press attention for negative statements on boat people.

More recently, the Howard government too has been criticised for its presentation of unauthorised boat arrivals, especially during the upsurge of 1999 to 2001. Many analysts accuse it of having propagated negative and incomplete images and information about the arrivals, prejudicing public emotions and hindering constructive debate (Romano 2004, Gale 2004, Klocker & Dunn 2003, Leach 2003, van Acker & Hollander 2003, Pickering 2001, Corlett 2000). For example, according to Corlett (2005:75), the government legitimised ‘a sort of racism that is not based on biology but on culture’:

Asylum seekers from the Middle East and Central Asia were said to threaten Australia’s culture and way of life. Certain grisly forms of protest by asylum seekers incarcerated in Australia’s Spartan detention regime were said to be culturally based and to demonstrate the inassimilability of the asylum seekers with the rest of us. Then in late 2001, the dog-whistle politics of the cultural racism which began in 1999 became a politics of the megaphone as asylum seekers arriving in Australia by boat were falsely accused of throwing their children into the sea. The truth of the claims mattered less than the sense that these people were less human than ourselves.

The assumption being made in all of this is not that leaders should avoid shaping public perceptions – after all, as Lippman (in Enderby 2004: 8) claims, the manipulation of public opinion is ‘a self-conscious art and a regular organ of popular government’ – but rather that they should shape them in particular ways. The ministers and public servants interviewed in this study would appear to agree. Virtually all seemed to accept that shaping public perceptions was a natural and legitimate role of government, providing great scope for leadership and a measure of good governance in its own right. However, they identified not one but four different audiences that leaders needed to address in the field of asylum: Australian audiences, overseas audiences (other governments and multilateral bodies), people smugglers, and asylum seekers. Further, while they disagreed about the nature of the perceptions generated by various Australian governments, and the appropriateness of the balances they had struck in juggling one audience against another, they did share some common views on the basic perceptions that all governments should at least try to generate.
The most important of these perceptions to cultivate was that the government was administering asylum policy effectively, and was protecting the interests of Australians. In the words of PS2, ‘You always had to demonstrate that you were a sound government that had the whole thing [asylum policy, boat people, refugee integration] within reasonable control’. Here, as noted earlier, the main aim was to instil confidence in the Australian public that it had a government that wouldn’t ‘be taken for a ride’, and was willing and able to select and enforce whom it granted entry to, and on what conditions. According to PS1,

It is essential for … public confidence that the efficacy of policy and administration be clearly demonstrated. That’s why in my view tough requirements are essential. Mandatory detention is another issue, but toughness, firmness, comprehensive policy is essential.

Similarly, in the view of M2, the presentation of asylum policy had to

… be done in a way which maintains public acceptance, in other words, the public feels an understanding and reasonably secure about what is being done. They don’t feel, as a whole, that their society is being torn apart or put at risk.

Again, as noted earlier, it was not just votes that were considered at stake, but public support for the entire immigration program and the government’s freedom to structure it, and the pace of change generally, according to broad socio-economic objectives. An image of a government in control was also thought to deter people smugglers and ‘shysters and crooks’ among asylum seekers. As put by M5,

People have a perception of me [as tough]. I think it’s a flawed perception, but I never struggled too much to correct it because I suppose I didn’t mind that people abroad developed a view that Australia was going to be rigorous in managing its borders … At the moment people are going elsewhere because they perceive us as tough. So I mean I’ve never minded a perception of toughness.

However, if an image of strength and rigour was considered non-negotiable, most interviewees argued that it should be complemented by governments also promoting two other perceptions: firstly, a sensible and compassionate view of asylum seekers domestically, and secondly, a reputation internationally for a practical, cooperative and
generous response to asylum situations. For example, while acknowledging that the Howard government’s ‘incredibly hard, narrow’ rhetoric ‘has been very effective as an anti-smuggling strategy’, PS3 expressed a concern of many when he went on to say,

I think the real issue … [is] what has it done in terms of people’s attitudes to refugees, and what has it done to Australia’s capacity to play an international role?

For the purposes of this thesis, the answers to these questions are less important than that they were being asked in the first place, for they point to the broad sweep of values thought important by interviewees, and their belief that governing well involves a delicate juggling act in which imbalances can easily and quickly arise. That said, a fairly common view among interviewees was that the Howard government’s presentation of asylum and asylum seekers during 1999-2001 had been provocative and divisive domestically, that it had fuelled discriminatory sentiments in the community, and that it had harmed Australia’s reputation with at least UN bodies and international human rights groups. Answering his own questions, for example, PS3 claimed,

I think that the amount of harm that people say it’s done to our international standing has been grossly overstated. It depends what environment you move in. Going to a UNHCR ExCom or standing committee dominated by Nordics, mainly by aid agencies or foreign affairs, a few ambassadors around the place who work in their spare time on other things like human rights … you know, we’re completely on the moon. But if you talk to people from the central governments, you talk to immigration type people, there is a huge amount of respect for what the government has been prepared to stand up and be counted for. And in fact of course what we’re seeing now is a lot of [Australia’s] policies being looked at [by other governments] because they work … [But] I think the real thing is how to repair some of the, you know, get the genie back in the bottle as it were, domestically: how to repair what’s been done, that’s made it okay to make allusions or direct comments that are close to being racist in implication.46

---

46 Millbank (2004) too suggests that the view of European governments to Australia’s asylum initiatives is probably much less critical than many claim, in view of their own difficulties with asylum seekers. In her view (at 36), ‘The lesson from Australia for Europe is that public opinion can be generous to refugees, providing their entry is seen to be managed by the government. The lesson is also that the open-ended obligations and spontaneous arrivals of the asylum system may not be compatible with morally sound refugee policy’. 
Several interviewees claimed that the Fraser government’s response to Indo-Chinese asylum seekers had been more balanced in its juggling of different audiences and desired outcomes.\textsuperscript{47} According to M2, it succeeding in maintaining not only political bipartisanship and a broadly receptive public attitude to the Indo-Chinese, but it also

\begin{quote}
... virtually stopped the boats coming … to Australia, and [got] international acceptance of a national responsibility for taking some of the people. We have Indo-Chinese refugees in virtually all of the European countries, quite significant numbers of them. So that worked. People were resettled, we took our share, and Australia had a tremendous name for compassion and workable solutions.
\end{quote}

However, again, perceived imbalances in the Howard government’s approach to asylum did not necessarily lead to a desire among the interviewees to revoke some of the measures it had introduced, for example boat interception, offshore processing, or the grant of temporary rather than permanent protection visas. Most recognised the effectiveness of these measures in stopping unauthorised boat arrivals, and their role in clearing the way for public acceptance of high levels of ethnically diverse temporary and permanent immigration. Rather, what was sought was a slightly different mix or topping-up of measures to better serve the full range of values and audiences involved, and to create the desired perceptions. As can be seen in the following comment by M3, the alternatives that were put forward to current policies generally involved grafting on Fraser era measures:

\begin{quote}
That’s what should have happened this time … Straight away to say … we’ll handle them all offshore. We will do it on a multinational basis, especially with the UN auspices … We ask all our neighbours to cooperate in stopping people smugglers … Our navy will not just take them back into international waters … [but] to one of the many uninhabited islands in the archipelago of Indonesia, … and set it up under international auspices. We will in fact pay for the first … We’ll process people in accordance with international law under the Convention. And if there are some marginal cases which don’t strictly become refugees but we think they’re worthy of asylum, we’ll categorise them as special humanitarian programs. We expect our neighbours to do likewise, and other caring civilised nations around the world to do likewise. Meanwhile we’ll
\end{quote}

\textsuperscript{47}Commentators such as Colebatch (1994) and Viviani (1996, 1984) offer more critical assessments of the Fraser government’s approach to the Indo-Chinese, but on balance they would probably not dispute these claims.
drop bombs on those that are causing them to leave. And if peace and stability is restored in their country of origin, we will invite them to be repatriated, because after all, most of them would probably be rather back there. But if there are some who for reasons of education or some minority ethnicity are discriminated against, they’ll be welcome here. Now that’s what I would have said and that would have worked. The very people who responded to us twenty odd years ago would have responded even more so now because there is twenty more years of experience. That is leadership.

Turning to the strategies that interviewees said they had used to shape public perceptions, they fell into three broad, interdependent categories: channelling debate, kneading emotions, and buttressing integration. Significantly, interviewees noted the potential for governments to encourage negative as well as positive perceptions, either actively or by omission or neglect.

The first category, channelling public debate, covers strategies such as providing ‘the facts’ about asylum and asylum seekers, explaining the reasons for government initiatives, enlisting the help of ideologies or moral codes that oppose prejudice and discrimination, limiting open discussion, and ‘neutering’ outbursts of negative sentiment. For example, M3 spoke of ‘very consciously’ downplaying asylum issues and refusing to give ‘an airing’ to presenters known for their ‘racist outbursts’, while M2 spoke of the need for ongoing education and explanation:

It is the responsibility – because it is such an emotional area – of political leaders, particularly political leaders at the highest level, to explain and continue to explain to the Australian people what you’re on about, and why you’re on about it, and why you’re making these decisions … And it’s not just a question of standing up once … It’s really a continuation of an effort to educate people, because you’ve got people getting older and young people coming up who haven’t been thinking about it or never heard of it before.

For M4, channelling debate included abiding by the ‘view that people should not say things that would create angst against other people’, and trying to ‘diminish tensions that are not really based on anything substantial … [except] fear’. Taking the view that, ‘the responsibility of government … is to try and describe what the situation is, accurately and honestly, and verify it’, he gave examples of how the same situation could be used to foster different public perceptions, and consequently different public
responses. The first involved the interception of the *Tampa* in August 2001, carrying 438 asylum seekers:

If you get a question which says, ‘Do you support tough measures, putting heavily armed troops on a ship that is threatening to bring … prostitutes, drug runners, crooks, queue jumpers, illegals’, of course you get that answer [ie a ‘yes’ response]. But if you’d said, ‘Do you want to put those troops on a boat that’s bringing a lot of women and children who’ve fled the most terrible circumstances? There may be one or two amongst them who aren’t genuine refugees, but we’ll sort that out. We know from past experience that about 90 per cent are. A lot of them are mothers, a lot of them are children’. They’d say, ‘Well, what do you want to put the troops on that sort of boat for’?

The second example involved the interception in October 2001 of the *Olong*, an Indonesian fishing boat carrying 223 asylum seekers, and government claims that they were throwing themselves and their children into the water to ensure they would be rescued and brought to Australia by Australian authorities.\(^{48}\)

If you tell the Australian community that people who are different are terrible people and that they throw their children overboard and they don’t have normal maternal instincts, then that scratches the raw nerve of a lot of Australians. And if I’d been the leader of the opposition, I’d say I don’t want as prime minister someone who could so quickly come to an assumption that any mother, irrespective of colour, race, ethnicity or religion, will be prepared to treat children in that way.

To M1, referring to asylum seekers in pejorative terms like ‘illegals’ and ‘queue jumpers’, or hinting at their possible links to international terrorism, amounted to ‘demonising’ them, and was an example of leaders – and the media – encouraging negative perceptions. For PS3, omitting to propagate certain perceptions, either on purpose or not, could have a similar effect:

---

\(^{48}\) Details of the incident that prompted these claims, and its use by Howard, Ruddock and other government ministers during the lead up to the 2001 election, can be found in Marr & Wilkinson (2003). They note (at 209) that the claims ‘almost disappeared from the repertoire’ of ministers once doubts rose over their veracity, but that their ‘impact on the electorate was immense: here was damning proof of the base instincts of these “illegals” from which the Howard Government was saving Australia’.

224
My criticism would not be what [Ruddock] said, but what he didn’t say, because if you actually look closely at the things that he said, generally speaking it was carefully put and absolutely legitimate. But what he didn’t then go on and say was that within this group there are people who Australia would be proud to assist. And he didn’t make enough about the great things that we were doing for refugees.

Finally, most interviewees spoke of enlisting the support of ideologies or moralities that challenged prejudice and discrimination and provided an alternative ‘world view’ to those generated by cultural conservatism and racism. Those cited included multiculturalism, Australia’s Judaic-Christian heritage, the principles of what M1 called ‘the Australian view that used to operate at every level – a fair go’, and a liberal and cosmopolitan internationalism. According to M3, for example,

I’d put to anyone at all times the multi-faceted nature of [asylum policy]. I wouldn’t just appeal – just because I thought that my audience was, say, interested in compassion to individuals … – to help people integrate, settle … I would put it much higher and say, it’s crucial for Australia’s security and place in the world and contribution as a caring, thoughtful, neighbourly nation.

However, some popular ideological or moral concepts, notably those expressed in terms such as ‘fair play’ and ‘doing the right thing’, were seen as potentially double-edged swords, working to both weaken and strengthen sympathy for asylum seekers, especially boat people from beyond Australia’s immediate region. According to M2, for example,

If somebody does play by the rules then they’re more likely, it seems to me, to get a positive [public] response. The basis for that being that if somebody is playing by the rules why shouldn’t they be given that consideration, and somebody who has broken the rules, deliberately broken the rules, why should they get an advantage over those who haven’t broken the rules.

Similarly, in PS3’s view,

[Ruddock] was very aware of the fact that his government was dependent on the ethnic vote, and that they would be among the first to desert the government if it was seen that the ones who’d [gained entry] the right way didn’t have to, you know, they could have got around it. The most strident opponents of people breaking the law are the one’s who’ve had to play by it.
The second category of measures to shape public perceptions, kneading public emotions, covers strategies such as ‘hosing down’ some emotions, nurturing others, and responding to bouts of public angst about asylum seekers by adopting a three-phase approach: ‘hanging on’ when fear and hostility first surges, providing ‘confidence’ that the government was in control and ‘reassurance’ that people were secure, and then appealing to ‘the best in human nature’ rather than the worst. Most of these strategies are evident in PS1’s description of the way the Fraser government responded to the first boatloads of Indo-Chinese asylum seekers,

I think the way through that [public fear and opposition] … was to first highlight the obligations that Australia had because of our involvement in Vietnam … [Then] that Australia had a proud record of accepting previous waves of refugees. So [Fraser] made Australians proud of what they’d done in the past and this was just going to be another wave and despite the problems we can get through it. At the end we’d be proud of what we’d done. And we are. But it was pretty hazardous at the time … It’s a political environment, it’s so easy to frighten people. That’s why Malcolm Fraser and [immigration minister] Ian Macphee, when the boats were arriving in Darwin, put on a show of strength and toughness. They made statements about these people will not be able to exploit the system, that they will be processed, and if not genuine refugees they will be sent back very, very quickly indeed. So they had to give a demonstration that the government was in control.

According to several interviewees, the ‘tricks’ of eliciting compassion and pride among Australians as to how they responded to asylum seekers centred on people ‘getting to know’ and becoming ‘involved’ with them, especially at local community level, and on leaders and the media ‘telling the human story’ of the suffering and courage of individuals, and the national story of Australia’s ‘historical achievements in accepting foreigners’. For example, according to M2,

One of the interesting things I used to do was to go out … to these public meetings and I’d say, ‘Right, right, I hear what you say, and I want you as individuals, in this room tonight, you are the minister for immigration, and I will give you five cases which are real cases. I won’t tell you their names of course, but you have to make the decision as the minister for immigration. And once you have made that decision I want you to tell me why you have made that decision’ … And it was fascinating … but suddenly the whole room started to understand the difficulties and the dilemmas and the value judgments that you have to take into consideration.
Similarly, according to PS2,

Maybe I’m missing it, but the media doesn’t seem to be all that interested [in supporting the
taking of refugees], and now it’s more about security and terrorist threats and so forth … There’s
been no real attempt, I don’t think, to explain to people in the Australian community that there
are in fact good reasons for receiving into the fold people who do have a well-founded fear of
persecution … If you did that, and if you got the media onside, and had some good stories about
people. There’s been a couple of good stories about where young refugee kids have played
soccer and so forth, and that gets people onside and that’s the sort of thing you’ve got to do all
the time. In the past there’d be all these stories that came from the papers, and people probably
thought, ‘Oh, that’s very interesting’, and so forth. But of course it was all organised to get the
stories in there and to have a good public relations campaign.

However, some claimed that it was easy for leaders to neglect the third stage –
appealing to ‘the best in human nature’ – and limit themselves to riding the outbursts
and enjoying the trust inspired by a tough response. For example, in the view of M4,

Well I think the [Howard] government has described its point of view very coolly, because it is
such an emotional issue. To win the point which the government has got to win they have got to
touch the emotions of Australians, but at the same time make the people think they’re just
behaving rationally and logically.

Indeed, according to PS1, leaders had the potential to ‘chloroform’ and ‘dumb down’
public emotion and conscience by means of both the rhetoric and measures they
employed. In his view,

We unfortunately have had a government that … sees political advantage in chloroforming our
conscience and describing these people as less than human; that hides them away as best it can in
remote parts of Australia; that describes them as terrorists or likely to be terrorists; that they’re
so inhuman that they throw their children overboard and sew their lips together. So there has
been a quite deliberate policy to describe these people as less than human, so that any sense of
fairness, generosity, decency … could not be put to the test, and we can be comfortable in our
selfishness.

The third category of strategies for shaping public perceptions, buttressing integration,
covers the practical measures that leaders thought could hasten public acceptance of
asylum seekers and refugees. These ranged from English language classes and other
settlement support programs, to harnessing the support of community groups and influential community leaders, or as M3 put it, to lead by reference to supportive community groups rather than opinion polls:

And they’re there, the infrastructure is there, the volunteers are there … It’s tapping in, that’s leadership. Leadership is tapping into the tolerant influences in the community … I just won the support of the people that mattered, whether they were newspapers, unions, church groups … Dialogue was vital, constant interaction.

Contrasts were again drawn between the methods used by the Fraser government and those used by the Howard government. For example, according to PS2, the Fraser government was more willing to seek advice from outside the public service on the reception of asylum seekers and refugees, and to enlist community leaders to enhance public perceptions of them. In his view,

Back in those days … we [had] the Australian Population and Immigration Council, where you had the leading trade unions … the leading employers … [and] a few people from the Australian Refugee Council … You know, a number of people from around the community who were influential, and the churches and so forth as well … It may well be that these were people who were used to the post-second world war situation, with resettlement of large numbers of refugees from Europe … But in that instance you had the very highest level people from what were the key sorts of interest groups … giving leadership to the community as well. I think that’s one of the interesting things at present, is that the government has really taken the lead rather than getting key people in the community, the key interest groups, making the running in terms of public pronouncements, public advice and so forth … It now seems to be much more concerned about security and the intelligence community and so forth. That’s a significant change.

Others claimed that community leaders were still listened to, but that not only were the circumstances of many asylum seekers different, but that many refugee support groups too were now different, and that government and advocacy group views had polarised. For example, according to M5, asylum issues had become a conduit for anti-government activity by socialist left groups not open to a ‘considered’ point of view:

There was a willingness to engage on these issues [by the socialist left] in a way which we hadn’t seen before, even though detention policy had been around for a long time, kids had been held in detention, people were sent back. All of that had been happening under [Labor
government ministers] Ray, Hand and Bolkus. There may have been something a little different in terms of the dimension and persistence of the problem, but all the same issues were there.

Similarly, in PS3’s eyes, many current advocacy groups ‘just haven’t done their homework well enough to be given the respect and to be treated as true stakeholders’:

It’s almost like the volume of their stridency has been accompanied by a reduction in their analytical capacity. The louder they’ve got, the less involved in sensible matters. All the way through, the ones that have had the most impact on governments have been the ones that have done their homework, been balanced, quietly constructive.

Criterion 5: Caring for asylum seekers and refugees

The final criterion for governing well to emerge from the interviews, either directly or implicitly in references to how asylum seekers should be treated, was caring for their welfare. The concept took two broad forms: caring dispositions and caring actions. Caring dispositions were associated with political leaders having personal feelings or attitudes of generosity, solidarity, empathy, fairness, kindness, truthfulness, and moral codes or conscience. Caring actions were associated with governments taking initiatives such as increasing resettlement opportunities and refugee support services, relaxing the detention regime, presenting the circumstances of asylum seekers to the public in a fair and balanced way, processing refugee applications quickly, giving claimants the benefit of the doubt, granting residence to those who do not meet Convention refugee criteria but have other compelling reasons to stay in Australia, minimising abuse of the asylum system, and stopping people smuggling (on the grounds that it is exploitative and dangerous).

In terms of caring dispositions, in their own way all interviewees spoke of being moved by the plight of individuals seeking sanctuary, and of empathy for their situation. M1, for example, replied ‘the refugees’ when asked what mattered most in asylum policy, M2 claimed ‘a very great fellow feeling for these people’, M3 said he ‘always makes a point of smiling at [Muslim women] and saying hello’, M4 expressed sadness and anger at ‘the terrible things [that] occur because of prejudice and discrimination’, and M5
pointed to his record of intervening to allow failed asylum applicants to stay in Australia on general humanitarian grounds.

Further, most identified certain ‘private lights’ – experiences, passions or principles – as contributing drive, conviction or focus to their feelings of care for asylum seekers. For some, visiting refugee camps overseas had been a particularly formative experience. M2, for example, said that his brush with Palestinian refugee camps when travelling as a young man contributed to his ‘abhorrence’ of such camps, and a determination years later as minister to ensure that asylum applicants in Australia were processed quickly, and to enlist international help in resettling camp-based Indo-Chinese refugees:

Kids had been born in these camps. They had been brought up in these camps. They had absolutely no hope … So I’ve always had an abhorrence of refugee camps because a) they’re dehumanising for people, b) they breed the sort of problems that we’re seeing around the place at the present time … violence, terrorism, whatever. So I was very firmly of the view that we shouldn’t have, if at all possible, refugee camps in Australia. We should deal with people who claim refugee status as quickly as we possibly could … But at the same time we … promoted, in fact called, two UN conferences on … Indo-Chinese refugees. And I spent a lot of time in the countries of south-east Asia talking to the leaders there to see if we could control the movement of these people and expand the number of countries that accepted responsibility for taking some in.

In M5’s case, visiting refugee camps led to a standard for assessing relative need, and a conviction that the ‘most vulnerable’ refugees were often those in the camps rather than those arriving unauthorised in Australia:

For some people the only focus is on those [asylum seekers] who confront you … My wider dimension flowed from the first visits I did to refugee camps – I remember it very, very clearly – …. when I visited the Afghans who fled the Soviet … installed regime … It was the time when they were under canvas and tents. That was my first experience. Thereafter …. I went to … a refugee camp out of Vienna, which was receiving people from Eastern Europe. My next visits were to Malaysia, Thailand and Hong Kong … [then] Cambodia … There were a series of opportunities I had to work amongst refugees in a variety of situations. So when I became minister I was certainly focused on the form of our obligations in relation to these issues.
Further, for him the experience of visiting individuals who had been repatriated after their claims for asylum were rejected encouraged a belief that blurring the distinction between Convention refugees and ‘economic migrants’, or granting entry to groups simply to allay pressure from ‘constituencies’ in Australia, ‘didn’t deliver just outcomes’:

I went to Vietnam … to see the people who were being returned as rejected asylum seekers. I mean ninety per cent of people from Vietnam after about 1990 were rejected as asylum seekers. And in one case I went into a home and met a couple who had just returned to be reunited with their baby … They were living in a very luxurious home … Their father was leader of the local communist party and manager of the factory in which he was working … Now what did they return to? … Nobody was going to persecute them … I saw others who’d paid people smugglers, who had resettled, weren’t in any particular situation of vulnerability, and were able to go home … Now if somebody was focused purely on Vietnamese, they might well say, ‘Our view is that anybody in Vietnam who is opposed to the present regime regardless of whether or not they are going to be persecuted, is entitled to settle in another country’. And I understand that point of view, but it doesn’t necessarily mean it’s right in comparison, that you accommodate it.

Feelings of care for asylum seekers – and expectations of them – were often attributed to a general concern for ‘fairness’, or as M1 put it earlier, ‘a fair go’. Allied to this were widespread expressions of dislike for racial and religious prejudice, with most interviewees identifying non-discrimination as one of their core principles. Speaking of a former prime minister, for example, M3 claimed that racism ‘was one issue on which he’d make a stand at whatever cost to his career, and I was the same’. Similarly, according to M5,

If somebody had said to me, ‘Administer a program for immigration but there will be no refugee program’, or they’d said to me, ‘Administer an immigration program but you have to have a discriminatory program when it came to this issue’, I’d have said ‘Thank you, but no thank you’. So there is a point in public life where there is not an issue at all of compromise. It’s black and white. You can’t serve.

For some, another formative experience had been the ignorance, hostility and barriers they had witnessed or personally experienced as children, for example between Catholics and Protestants, Irish and English, whites and non-whites, and old and new Australians. For example, according to M4, the public perceptions of asylum seekers
from north-west Asia that he believed political leaders either fostered or let run during the boats influx of 1999-2001 undermined a half century of advances in tolerance of people who are ‘different’:

I don’t know how much of it is just boats, or an instinct also that you’ve got to try and preserve a homogenous society. But in my book it is far too late for that. We’re not a homogenous society. We can’t re-establish one. We shouldn’t re-establish one. And up to recent years the Australian … experiment in multiculturalism has been extraordinarily successful. Now imagine what Muslims feel when walking down Collins Street? Is somebody going to throw a stone at them, or push them into the gutter? … I can remember after the Galbally Report was accepted [in 1978], a friend of mine who is Italian-born … a very successful businessman … said, ‘I came here over 20 years ago and for the first time I feel no need to look over my shoulder’. Now that’s an Italian. The sort of divide for an Afghan woman is [today] clearly more like a wall … I feel strongly about it because I can’t stand discrimination. In all sorts of ways, I’ve seen too many wrongs, ills, disasters, calamities that flow out of discrimination.

That said, many saw the religious and cultural profile of the 1999-2001 boat arrivals as a new challenge in Australia’s evolution as an accommodating society. In their view, most Australians have become accustomed to non-white migrants and refugees, but found the north-west Asian asylum seekers particularly confronting because of their mainly Islamic faith and Arabic culture, and especially in the wider milieu of concerns about radical Islam and terrorism. However, most thought that public concern about the arrivals could have still been allayed if the political will to do so had existed. As PS1 put it, ‘it could have been managed if the prime minister had wanted that, I’ve got no doubt in my mind of that’.

Other ‘private lights’ guiding the views of interviewees about asylum seekers appeared more idiosyncratic, in the sense of being mentioned by only one or two, although more may have shared them. They included, in the case of M3, a desire to forge closer links between Australia and south-east Asia:

My convictions started at the age of eleven. I can recall looking at a map and saying to my parents, ‘Why do people call Britain home?’ I could not comprehend it … And I was puzzled by this, looking at the map and all these countries. And from that moment I became fascinated by the Asia-Pacific and Indian Ocean region. And I determined virtually at that age to go into federal politics to try to get Australia integrated into our region. That really drove me for the rest
of my life … I would like to think that I ultimately practised this combination of pragmatism and emotion, and a sense of Australia’s place in the world, and that governed in a sense where we brought refugees from.

In the case of PS1, a similar source of inspiration was the obligation in the Judaic-Christian tradition to receive and treat ‘foreigners’ or ‘outsiders’ generously:

In the Judaic-Christian tradition, which we have inherited, that obligation to the foreigner stands out. And it is always a hard one because it is so easy to focus resentment and hostility on the foreigner, on the outsider, whether they’re Aboriginal or refugees or whatever.

By contrast, for PS3, inspiration came from a more general commitment to human rights:49

I think the human rights framework as a whole is absolutely critical. You called it a hammock or something before. It’s more like a trampoline. It gives a bit of power to it all. That basic thing about people’s right to be safe and secure, and protected by their own country, and have at least basic levels of food and medical care and shelter and all the rest of it, are really what’s behind all this.

These ‘private lights’ were clearly important for the individuals who held them, providing a source of extra meaning and structure to their thinking about asylum issues besides their ‘public lights’ of nation building and good governance. They added to the range of values to be juggled when developing policy, and in some cases compounded the tension between what Romano (2004:59) calls ‘values of compassion’ and ‘values of caring for one’s own first’.

In view of the complex mix of private and public lights among interviewees, and their differences of opinion about the performance of different governments in the areas of nation building and good governance, it is not surprising that they also had different views on whether current asylum policy and practice could be described as caring. However, while a degree of ambivalence was evident about aspects of offshore

---

49 According to PS3, a human rights framework in approaching asylum issues should be distinguished from a welfare framework, the former being ‘affirming’ of asylum seekers and refugees, the latter ‘patronising’.
processing, temporary protection, standards in refugee determinations, and forced deportations, two issues attracted almost unanimous disquiet, suggesting a real clash with the values of most interviewees. These were the perceptions of asylum seekers generated by the Howard government during the 1999-2001 boats influx, and the long-term detention of unauthorised arrivals and failed asylum seekers, especially women and children.

Matters relating to perceptions, including the criticism of how the Howard government presented asylum seekers, and its focus on people smugglers to the detriment of other audiences, have already been addressed. However, in the case of the second issue, detention policy, M1 probably expressed the sentiments of most when he said,

> Of course if they do wrong things then they go. If they’re checked out and found not to be genuine refugees then they go. But you don’t put them in gaol. And above all you don’t put women and children in prison. This is not the Third Reich. My goodness! And to have young children, six, eight and nine in that sort of atmosphere, I mean, really, I just can’t understand the thinking of that.

Similarly, according to M3,

> I would have no problem if we had treated Afghans and others humanely when they came, and really identified who they were, whether they were from major groups who would, under a proper UN-run regime, be able to be integrated and accepted back into Afghanistan. I have no problem with them having temporary status. But not behind barbed wires.

**CONCLUDING COMMENTS**

Despite its accession to the 1967 Protocol in 1973, there has been no diminution in the efforts of successive Australian governments to control the grant of asylum and asylum conditions, and to shape asylum policy according to immigration and foreign policy

---

50 The criticism of offshore interception and processing arrangements was directed less at the concept itself, than aspects such as the location of the centres, the cost of running them, the failure to provide access to legal assistance, and the difficulties in resettling those found to be refugees in other countries in the absence of a pre-determined comprehensive resettlement agreement.
objectives. Rather, new asylum challenges, whether in the form of unauthorised boat arrivals or an ‘interfering’ judiciary, have led to a proliferation of measures to shore up this control. The bone of the Refugees Convention may have been well and truly scraped in developing and defending these measures, but as DIMIA (2002: 128-131) has pointedly observed, from a state’s perspective international law provides plenty of flexibility for states to act in this manner:

First, States have the sovereign right to control their borders and to determine who will enter their territory … Secondly, under international law asylum is for States to provide rather than a right of the individual … Thirdly, the Convention may qualify but does not remove the prerogative of States to intercept, exclude, expel or deport illegal entrants, even if they are refugees … Fourthly, there is no binding obligation in the Convention that requires a State to provide access to a refugee status determination procedure, either in that State’s territory or elsewhere. Indeed the Convention is silent on what procedure might be appropriate to determine refugee status, where it might take place, and who might undertake it … Finally, Article 31 [on refugees in a state’s territory without authority] does not do away with the right of States to require entrants to enter lawfully. Rather, it involves recognition of the fact that a genuine refugee’s quest for asylum may reasonably involve them in breaching those laws.

The measures that have been developed are impressive in their detail and sweep. They range from a comprehensive refugee status determination system, an orderly refugee resettlement program, and development assistance for countries of first asylum, through to anti-people smuggling operations, the mandatory detention of unauthorised arrivals, offshore interception and processing, and a multitude of asylum visa arrangements (including various forms of temporary as well as permanent asylum, and different packages of supports). Together they have kept Australia at the forefront of what Crisp (2003) describes as a paradigm shift in the global response to asylum seekers in the last two decades, from reactive receptivity to proactive and technocratic ‘migration management’.

---

51 For contrasting views on whether Australia has actually breached Convention obligations, see, for example, Edwards (2003) and DIMIA (2002). In at least one area it almost unquestionably has: its policy of not issuing travel documents with return rights to refugees issued with temporary protection visas appears in direct contradiction to its obligations under Article 28 (including the attached schedule).
In this respect, the findings of this chapter, and the two preceding ones, support the view that Australian asylum policy is driven by a desire for control on the part of its political leaders, which manifests itself in a culture of control in its immigration bureaucracy (Lopez 2003, Mares 2001, Nicholls 1998, Viviani 1996, Cronin 1993). However, explaining asylum policy in these terms is ultimately unsatisfactory, not just because controlling the entry and stay of non-citizens is a standard task and expectation of governments, but because it begs the questions of why and to what purpose.

Here, a number of possibilities exist. Among the more colourful is that it reflects deeply ingrained threads of insecurity, racism and xenophobia in the Australian community (Jayasuriya et al 2003, Crock 2003, McMaster 2002, 2001). Another, that it reflects an amoral or immoral populism on the part of certain political leaders, who know that they can win votes by playing to these ingrained threads (Marr & Wilkinson 2003, MacCallum 2002). Yet another, more generously, that it is

... a rational – and emotional – response to a variety of challenges by a young, geographically isolated, extraordinarily ethnically diverse nation ... [engaged in] a civic, social and ideological struggle for an identity, independent of the race, creed, or national origins of [asylum] applicants ... a rocky, yet transient path of adolescent self-discovery (Lopez 2003: 23-24).

Other possibilities include that it reflects the neutralisation of morality, via a bureaucracy slavishly addicted to ‘playing by the rules’ and upholding the law, and discouraged from exercising judgment and discretion in their application (Bauman 1994). Another that it reflects merely a leadership and bureaucracy that is pragmatic, broadly utilitarian in its concern for majority opinion and the efficacy of its management tools, and primarily focused on outcomes (Collins 1985). Another, that it reflects the lack of a strong alternative paradigm, for example ‘either an historical commitment to asylum or a mythology of providing refuge to those on the run’ (Nicholls 1998: 75). Or indeed a global shift in the balance of liberal and democratic principles being struck by governments: that is, from an emphasis on the value of universal human rights to the value of membership, and from an open and inclusive view of outsiders to closure, restriction and a ‘particularistic understanding of responsibility’ (Gibney 2003: 32). Or again more generously, that it reflects ‘rational
compassion’ (Ruddock 2002: 97), a perspicacious balancing of caring for one’s community and caring for the ‘most vulnerable’ of asylum seekers worldwide.

The complex nature of asylum policy – built on a humane impulse to protect people whose lives and liberty are at risk, moulded around a slim, weak and porous body of international law, and otherwise at the mercy of volatile social, political and economic forces – means that there is probably a measure of truth in all of the above. Further, aspects of each can probably be found in varying measure in different specific events or periods. However, it also means that, standing alone, each explanation is facile. Further, each has flaws. For example, statistical analysis of voter survey results during the 2001 election points to more diffuse and sophisticated sources of public concern about asylum seekers than racism and xenophobia (McAllister 2003), as does the immigrant and ethnically diverse composition of the Australian community. As Brett (2005a: 91) observes,

> The claim ‘We decide who comes here and the circumstances in which they come’ is for many a statement of the modern state’s fundamental purpose. And when assessing the degree to which racism has re-entered the heart of the state under Howard, we have to remember that his government has continued to support a non-discriminatory immigration program and rising numbers of immigrants.

Similarly, the idea that morality in asylum has been ‘neutralised’ by bureaucracy neglects the fact that law is often itself the fruit of efforts to institutionalise moral principles such as justice and mercy, and that the introduction of bureaucratic discretion in its administration can itself be a source of unfair and inconsistent decision making. It also neglects the fact that reference to international norms and moral principles is not uncommon in political debates on asylum policy. The problem is, as Steiner (2001) shows in his study of European parliamentary debates, they can selectively be used to

---

52 According to McAllister (2003: 456), ‘The predominant influence on attitudes to asylum-seekers is views about the level of immigration, followed by national identity (in the form of national pride), procedural fairness (respect for authority, rather than satisfaction with democracy) and, finally, racial prejudice’. Further, using regression analysis to explore the link between views on immigration and asylum seekers, McAllister (at 458) found that ‘slightly less than half of the effect of wanting to return asylum-seekers can be traced to simple opposition to further immigration’.
support both loosening and tightening of asylum controls. Similarly, the view that Australia’s policy is based on ‘rational compassion’ and a concern for refugees languishing in overseas camps, sits awkwardly with government willingness to trade intake of the latter against refugees granted asylum onshore to keep the overall refugee and humanitarian intake within the 13,000 or so annual limit, and to tolerate periods of incarceration of persons arguably out of all proportion to their ‘crime’ of unauthorised entry.

This chapter may seem to afford merely another explanation for the quest for control of asylum: the desire on the part of political leaders to build the nation and to govern it well. That is, to build Australia’s economy, culture and standing in the shape and direction they see fit and for which they have received broad electoral endorsement, and to govern Australia well in accordance with a particular set of criteria, namely preserving the freedom to govern, making proper public policy decisions, providing leadership, shaping public perceptions, and caring for asylum seekers and refugees. However, there are three reasons why this explanation should be taken seriously, and seen as having advantages over others. Firstly, it captures the values and aspirations of the actual makers of asylum policy, as understood by them rather than by critical outsiders. Secondly, it can accommodate other explanations, although more as minor rather than major narratives. For example, the issue of racism can be considered as part of the challenge leaders face in moulding culture as part of nation building, or shaping public perceptions as part of good governance. Similarly, the issue of populism can be considered as part of the concept of good governance, and particularly the challenges associated with making proper public policy decisions and providing leadership. Thirdly, the concepts of nation building and good governance provide a language in which debates about asylum can be conducted in a focused and constructive manner, and in terms meaningful to policy makers. They are the lanes along which policy makers see themselves running, and the key areas on which they judge their own and others’ performance.

That said, what does not emerge from the analysis is a sense of common standards, with the interviewees often casting different judgments about the performance of a particular

53 See fn 10 of this chapter for further details of this offset arrangement.
government, or the merits of a particular policy measure. To continue the athletic analogy, they might agree on the lanes that they’re running in, and the nature of the hurdles they need to jump, but they are yet to agree on the height at which these hurdles should be set. In chapter six we will explore the potential usefulness of an ethics of care as a language and practice in which to couch such considerations, and the directions in which it would be likely to have policy go. However, one reason for thinking that higher hurdles might be countenanced is the fact that nearly all interviewees shared disquiet about at least mandatory detention and the perceptions of boat people generated during the 1999 to 2001 influx. For many, these matters engendered a strong and uncomfortable sense of value dissonance. To borrow a line from M5, they might well have joined in a common chorus,

Hey look, they haven’t got it quite right. We don’t know what it is, but we just suspect that what they’re doing is not appropriate.

However, one last ‘value mapping’ exercise is to be undertaken before we consider an ethics of care approach to asylum, and to this we turn in the next chapter.
CHAPTER FIVE: OTHER LEADERS, OTHER VALUE MAPS

What we need ... is a political philosophy that isn’t erected around the problem of sovereignty ... We need to cut off the King’s head: in political theory that has still to be done. (Michel Foucault)

The geography of the spiritual world is very different from that of the physical world. In the latter, countries touch each other at their borders, in the former, at their centre. (CS Lewis)

In the previous chapter, we have seen that Australian policy makers explain their wish to control the grant and conditions of asylum primarily in terms of nation building and good governance. However, we have also seen that they have few clear and agreed standards for assessing performance in regard to these values, other than adhering to the bare bones of the Refugees Convention, adopting non-discriminatory asylum processes, and achieving broad outcomes like stopping unauthorised boat arrivals, controlling asylum numbers and selection processes, and reassuring the public that they have a strong and effective government at the helm of their country.

In this chapter, to cast the values map of these policy makers into greater relief and leaven later discussion of an ethics of care approach to asylum, we undertake another value mapping exercise, this time of two groups with visions theoretically less constrained by sovereign interests and national narratives. The first group comprises leaders of the European Commission, a supra-government body seeking, among other things, to harmonise European Union (EU) members’ responses to asylum seekers, and working arguably to winnow out particularistic values and elevate shared ones. The second group comprises leaders of the Jesuit Refugee Service (JRS), a non-government organization working with asylum seekers and refugees worldwide, and free of the responsibilities and tensions of democratic government. As noted in chapter one, speeches and other written documents are the primary source of data in the case of Commission leaders, and interviews in the case of the JRS leaders.
In the early 1990s, the number of people seeking asylum in the EU reached well over half a million a year, swelled by the collapse of the Soviet Union and the former Yugoslavia. In total, about 5.5 million asylum applications were made in the EU from 1990 to 2003. Of these, about forty-one per cent were made in Germany, sixteen per cent in the United Kingdom and nine per cent in France, although the heaviest concentrations occurred in countries like Sweden, Austria, Denmark and the Netherlands (House of Lords 2004). At their peak, applications reached 127,937 in Germany in 1995, 43,894 in the Netherlands in 2000, 103,080 in the United Kingdom in 2002, and 59,770 in France in 2003 (UNHCR 2006a, 2005). With no EU member operating a formal immigration program of any real size, asylum seekers made up roughly a third of all migrants to the EU (Newland 2003).

The arrival of such numbers, and their uneven distribution among EU members, led to asylum becoming a highly contentious issue. Several factors added to public and political concern. Firstly, rather than arriving as part of an organised refugee resettlement program, some ninety per cent of asylum seekers arrived unauthorised (ECRE 2004a), often with the assistance of people smugglers. Secondly, processing arrangements for asylum applicants became characterised by lengthy delays, large backlogs and spiralling costs. Thirdly, and perhaps most important, most applicants ended up staying, despite nearly three quarters failing to meet the criteria for

---

1 According to the House of Lords (2004), EU asylum seeker numbers averaged about fourteen per 1,000 inhabitants during the period in question, although numbers in the latter states averaged roughly double this.

2 Unlike the United States, Canada and Australia, EU members have never had formal refugee resettlement schemes of any substance. In 2003, only six EU members (Sweden, Finland, Denmark, Netherlands, Ireland and the United Kingdom) provided entry under such a scheme, with numbers ranging from about sixty refugees a year in Ireland to about 1,000 in Sweden (van Selm 2004). A few others have had ad hoc resettlement arrangements with the UNHCR. Total numbers resettled in the EU under all of these schemes has averaged only about 5,000 persons a year.

3 Processing times of several years or more were not uncommon, with one 2004 estimate putting support and legal costs in the vicinity of US$10,000 per asylum seeker (United Kingdom’s Minister for Home Affairs, in House of Lords 2004).
Convention refugee status or other forms of protection.⁴ In these circumstances, the asylum system was viewed as having become an attractive avenue for people seeking to migrate to the EU, a purpose for which it was never designed.⁵ According to the European Commission,

There is a crisis in the asylum system, more and more striking in certain Member States, and a subsequent growing malaise in public opinion. [The Commission] notes that abuse of asylum procedures is on the rise, as are mixed migratory flows, often maintained by smuggling practices involving both people with a legitimate need for international protection and migrants using asylum procedures to gain access to the Member States to improve their living conditions. This phenomenon … is a real threat to the institution of asylum and more generally for Europe’s humanitarian tradition…⁶

EU members responded to the asylum influx by introducing a range of measures to reduce numbers and regain a sense of control. These included stricter border controls, carrier sanctions, accelerated procedures for certain categories of asylum seekers, tightened status determination procedures, the withdrawal of work rights, reduced welfare provisions,⁷ various forms of subsidiary and temporary protection,⁸ limited

⁴ Of all asylum applicants in Europe in the period 1994 to 2003, only about fifteen per cent were determined Convention refugees (including after appeal or review), with another thirteen per cent qualifying for a subsidiary form of humanitarian protection (UNHCR 2005). The proportion of all unauthorised arrivals needing international protection is estimated at only around four to five per cent (Bertozzi & Pastore 2006). Efforts to locate and remove failed asylum seekers have met with limited success, eg according to the United Kingdom’s National Audit Office (2005), between 1994 and May 2004 United Kingdom authorities rejected some 363,000 applications for asylum but removed only 79,500 failed applicants (about twenty-two per cent). In Germany, the Interior Minister in 2000 claimed that there were an estimated 400,000 failed asylum seekers that the authorities were unable to remove (Gibney & Hansen 2002: 5).
⁵ According to the International Labour Office (Abella 2005), about half a million migrants without appropriate documentation enter the EU each year, although it is not clear whether this figure includes asylum seekers.
⁷ This includes the replacement of cash benefits with in-kind subsistence benefits. Bommes and Geddes (2000) describe the trend as one of ‘welfare state deterrence’.
⁸ The development of these forms of protection, which typically provide lower levels of benefit and security of stay than those provided to Convention refugees, can be traced to various factors. On the one
detention arrangements, restrictions on freedom of movement, the negotiation of return agreements with countries of origin, the provision of development assistance to countries and regions of origin, and humanitarian interventions as in the case of the former Yugoslavia. In 2001, a study of EU members noted that,

The increased influx in persons seeking international protection in Europe … has forced the revision of the asylum and reception systems in almost all fifteen member States. Between 1998 and 2000, thirteen of the fifteen countries have either implemented amendments to or complete revisions of the legal frameworks governing the pre-asylum phase … Many countries have amended their legislation several times (European Community 2001: 31).

That year, Robert Evans, a British member of the European Parliament, observed that, ‘In recent years it sometimes seemed that EU countries were competing to become the least attractive to potential asylum seekers’. He was referring to the ‘race to the bottom’ that some observers feared would ensue as each EU member sought to deter and deflect asylum seekers away from their own country.

hand, they reflect international commitments given by the countries involved, the expansion of domestic human rights legislation, and recognition that the Refugees Convention addresses the needs of only a limited group of persons with protection and humanitarian needs. However, according to Hieronymi (2001: 83), they also reflect a means whereby governments can ‘respect the principle of “non-refoulement” while at the same time making clear both to the national electorate and to the asylum seekers that the recipients of such protection cannot count on permanent asylum and integration in Europe’.

According to an ‘index of policy toughness’ developed by Hatton (2005, 2004), in which a tightening of policy in any one of a number of policy dimensions is represented by a switch from zero to one, there has been a significant toughening of policy since the early 1990s. Gibney and Hansen (2002: 2-3) summarise the trend as follows: ‘EU member states have restricted access to asylum as much as they can while still respecting the 1951 Geneva Convention and their own national constitutions. Indeed, in some instances they have violated the spirit if not the letter of both … There has been a proliferation of asylum policy reforms designed to reduce, deter and rationalise asylum claims and processing’.

Debates of the European Parliament, 2 Oct 2001, http://www2.europarl.eu.int [accessed 24 Jul 2003]. Other EU parliamentarians have expressed similar views. For example, according to Flautre, ‘We must determine why Member States are competing in an unfair and negative manner to win the prize for being the most off-putting State in terms of the way it welcomes nationals from other countries. It is this competition which is creating the tragic situations that we are now seeing, on a daily basis, in the Sangatte refugee centre, at Tarifa, in Italy, and in many other parts of Europe’; Debates of the European Parliament, 25 Apr 2002, http://www2.europarl.eu.int [accessed 12 Sep 2004].
The tone of public debate on asylum in Europe also reportedly changed during the 1990s. For example, according to some critics the popular image of asylum seekers shifted, initially from them being bearers of rights to burdens on public welfare, and then ultimately to them being threats to orderly and harmonious local and national communities (Lavenex 2001, Abiri 2000, Blommaert & Verschueren 1998). Countering this is some evidence that people often distinguish between ‘genuine’ and ‘bogus’ refugees, and that their criticisms are directed mainly at the latter (Hatton 2005). Further, that they see the media’s approach to asylum issues as often more negative than their own (MORI 2002). However, these nuances aside, the responses of EU member governments to the asylum influx unquestionably exhibit the same paradigm shift that has occurred among governments elsewhere in the world: a shift from being ‘reactive, exile-oriented and refugee specific’ to being ‘proactive, homeland-oriented and refugee specific’ (UNHCR, in Joly 2002: 2-3).

Today, asylum seeker numbers in most EU states have fallen from their earlier peaks, with the EU as a whole receiving forty-six per cent fewer applications in 2005 (237,840) than in 2001 (438,990), being the lowest number since 1988 (UNHCR 2006a). The focus of public attention has generally shifted to broader issues of concern relating to unauthorised entry, and in particular the flow of irregular migrants from Africa across Europe’s southern borders. Nevertheless, asylum remains a lightning rod for public concern about other issues, including national security, community harmony, welfare policy and migration and population policy, and tough new measures continue to be introduced.

---

11 An idea of the scale of the fall can be seen by comparing the number of applications received in 2005 by the countries listed at the start of this section on the European Commission, with the number they received in their peak years: 28,910 in Germany (127,937 in 1995), 12,350 in the Netherlands (43,894 in 2000), 30,460 in the United Kingdom (103,080 in 2002), and 50,050 in France (59,770 in 2003).

12 In 2006 more than 30,000 Africans sought entry through Spain’s Canary Islands, about six times the total for 2005. Thousands more are believed to have died while attempting the sea journey.

13 Since 1997, four major legislative revisions have been made to asylum policy in the United Kingdom. More recent changes include a ban on asylum seekers taking up employment, penalties on employers who employ them in breach of this ban, the removal of welfare benefits from failed asylum seekers who refuse to leave voluntarily, the replacement of an ‘indefinite leave to remain’ category for non-Convention refugees with an initial five-year temporary category, a move to replace grants to persons granted asylum
In the midst of this politically charged milieu, the EU has since 1999 been seeking to develop a common asylum policy. In the section below, a brief review is first made of progress towards achieving this goal, followed by an exploration of the values that European Commission leaders have brought to the task.

**Progress towards a common asylum policy, 1999-2004**

With the gradual dismantling of internal border controls after the 1985 Schengen Agreement, the attention of EU members turned increasingly outward, to the related issues of external border control, immigration and asylum. In 1993, the Maastricht Treaty set out three ‘pillars’ for growth of the EU: the first covering the free movement of goods, services and persons, the second foreign policy, and the third justice and home affairs. First pillar matters were subject to EU-wide policy and binding legislation, the other two primarily to inter-governmental cooperation. Asylum remained under the third pillar, as a matter for only intergovernmental cooperation.14

*The Treaty of Amsterdam*

This changed with the entry into force of the Treaty of Amsterdam on 1 May 1999, when asylum policy was moved into the first pillar and became open to specifically EU with loans, and the ongoing pursuit of plans to deport failed asylum seekers. Even countries traditionally viewed as among the most open and liberal in Europe have become increasingly restrictive. For example, Denmark has abandoned the concept of a humanitarian status for people fleeing war and generalised violent chaos, moved to a restrictive interpretation of the Convention, and delayed refugees’ eligibility for permanent residence permits from three years to seven (Newland 2005, AFP 2004), and Switzerland has introduced arrangements whereby asylum seekers who cannot produce a valid travel document or national identity card can be excluded from asylum processes, and information on applicants maybe shared with home governments after an initial rejection, even if a negative decision is being appealed (Newland 2005).

---

14 A degree of policy harmonisation was pursued during the 1980s and 1990s, but mainly via non-binding ministerial resolutions and conference recommendations. The main exception was the 1990 Dublin Convention, which set out rules regarding who had responsibility for processing an asylum application (see later discussion).
policy development and law making.\textsuperscript{15} Responsibility for overseeing this ‘communitarisation’ of asylum policy was given to the European Commissioner for Justice and Home Affairs, a new position covering issues ranging ‘from asylum to judicial cooperation, from immigration to fundamental rights, from organised crime to racism and xenophobia’.\textsuperscript{16}

Several months later, at a European Council meeting at Tampere in Finland, EU members agreed that the cornerstones of the new policy would include ‘absolute respect of the right to seek asylum’, ‘the full and inclusive application of the [Refugees] Convention’, ‘the principle of non-refoulement’, and the availability of ‘subsidiary forms of protection offering an appropriate status to any person in need of such protection’. According to the Council’s conclusions,

> From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law … This freedom should not, however, be regarded as the exclusive preserve of the Union’s own citizens. Its very existence acts as a draw to many others world wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe’s traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory … The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity.\textsuperscript{17}

However, the Council rejected a Commission proposal for a single EU-wide asylum system, in favour of a common policy whereby members would observe minimum standards and cooperate in common strategies, but otherwise have the flexibility to

\textsuperscript{15} The Treaty of Amsterdam added a new section (Title IV) covering ‘Visas, asylum, immigration and other policies related to freedom of movement of persons’ to the treaty establishing the European Community. Pending passage of the proposed Constitution for Europe, the Treaty will probably remain the main mandate for EU asylum policy developments.


pursue their own asylum initiatives. Further, they envisaged the common policy being developed in two stages. The first stage, to be achieved by 1 May 2004, would involve installing four ‘building blocks’ of Community legislation: a regulation to replace the 1990 Dublin Convention on the rules for deciding which member would handle an asylum application, a reception standards directive, an asylum qualifications directive, and an asylum procedures directive. The second stage, to be achieved over an unspecified period, would involve slowly increasing the level of policy harmonisation, including achieving a uniform status valid throughout the EU for asylum recipients.

Caution permeated arrangements to develop the common policy. In addition to agreeing to focus only on minimum standards, the Council explicitly linked asylum and border control issues, stipulating that asylum policy should take ‘into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes’. More importantly, member states retained considerable power over the pace and nature of policy change. The adoption of the standards would require unanimous rather than qualified majority support, members would share with the Commission the power to initiate them, and they would be issued as EU directives rather than regulations, giving members more latitude in their implementation. The European Parliament would be consulted: something better than its right only of information under the third pillar, but still not as strong as its co-decision powers on most first pillar matters. The authority of the European Court of Justice was restricted, with only the highest court or tribunal of a member state being able to request a ruling. Finally, Denmark, Ireland and the United Kingdom all had the ability to avoid being bound by the new legislation.

19 Under Community law, regulations are usually precise, limited in scope, and legally binding on all member states as soon as they come into force. By contrast, directives stipulate only the results that must be achieved. They leave it largely to members as to how to transform them into national law (although a time limit is usually set), and national policy and practice does not have to be changed unless in conflict with the directive.
20 The United Kingdom and Ireland secured an amendment to the Treaty of Amsterdam that allows them to opt out of specific laws enacted under it. Similar powers have been negotiated by Denmark.
In the light of these arrangements, observers had mixed feelings about the prospect of a common policy. Some were optimistic. Boccardi (2002: 152), for example, highlighted the secrecy of previous intergovernmental arrangements on asylum, and argued that ‘democratic accountability, judicial control, the rule of Community law, a legitimate role for the Commission and principles on openness and transparency’ would now prevail. Others noted that when the EU expanded from fifteen to twenty-five members in 2004, the legislation would introduce an asylum regime to some states where only rudimentary arrangements had existed before, and by promising to incorporate subsidiary forms of protection, would ‘extend protection obligations of all EU members to include large numbers of people who, in the assessment of many commentators, have no right to it under current international law’ (Piotrowicz 2002: 488). The influence of refugee advocates was also thought likely to grow, their arguments potentially having more sway over the ‘bureaucrats of Brussels’ than member governments, with their larger and more varied constituents to consider, and their sensitivity to the electoral cycle. Finally, for any who had concerns, there was the perceived safety net of obligations EU members had under other international instruments, in particular the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

However, others were more guarded in their expectations. For example, some claimed that the unanimity requirement

---

21 As Geddes (2001: 65) notes, ‘The legal, political and social foundations of the EU have the effect of “channelling” political action … [A] distinct feature of much EU level lobbying is that NGOs seek to build alliances with EU institutions. The result has been that pro-asylum advocacy is channelled through an institutional context which has a strong technocratic (via the Commission) and legalistic (via the European Court of Justice) ethos that privileges epistemic (knowledge-based) networks coordinated through Brussels-based “umbrella” organizations such as the European Council on Refugees and Exiles (ECRE)’.

22 Other instruments included the 1966 International Covenant for Civil and Political Rights, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1989 Convention on the Rights of the Child, and, in 2000, the EU’s Charter of Fundamental Rights. However, most commentators consider the ECHR the likely basis for most future legal challenges to the actions of EU members on asylum; see, for example, Noll (2000), Boccardi (2002) and Gibney (2001).
… could very well lead to a situation where no measures are taken at all, or only after lengthy
negotiations, increasing the likelihood that the outcomes will tend towards the lowest standards
(Niessen & Rowlands 2000: 13).

In April 2000, the new Commissioner for Justice and Home Affairs, Antonio Vitorino,
himself warned of this risk of ‘downward approximation to the lowest common
denominator’.23 Further, the Select Committee on European Union of the United
Kingdom’s House of Lords (2004: ch 2, para 30) highlighted the danger

… of a lowering of national standards in countries which currently offer a high level of
protection, since it would suffice for them to comply with the (potentially lower) EU minimum
standard.

Others predicted that the adoption of a common policy, when combined with the
proliferation of safe country principles, readmission agreements and assistance to
countries and regions of origin, would be used by inner EU members to shift the burden
of asylum seekers to new, outer rim members, if not to countries outside the EU. In
other words, that it would increase the pool of states to which asylum seekers could be
returned. As Byrne (2003: 354) argued,

The useful advance of protection standards in the east may need to be assessed against new
baselines. For when pushed to develop asylum policies with joint objectives of protection and
redistribution, the latter motivation is likely to prevail. In the absence of genuine burden sharing
mechanisms that extend beyond situations of mass influx and are governed by the principles of
equity and solidarity, individual Member States will have the incentive to shape national and
regional refugee policy in such a way as to deflect and redistribute asylum seekers elsewhere.24

---

23 ‘Common European asylum system’, speech to the conference on a new Aliens Act, The Hague, 6 Apr
24 It should be noted that an element of burden-sharing if not burden-shifting also characterised the
aspirations of European states involved in founding the Refugees Convention. According to DIMIA
(2002: 126), part of the then desire to set minimum standards in the way states received and treated
refugees was ‘so that no country became significantly more or less attractive as a destination than others’.
The hope was that refugees might then be more inclined to move away from the countries in which they
were clustered, including to countries outside Europe, relieving the burden on the former.
For its part, the UNHCR (2001: para 7) warned,

The question of access to territory is key to a common asylum procedure and a uniform status. Having the best asylum procedure and the most generous refugee status is of no use unless refugees can actually gain access to territory and admission to the procedures. The Tampere European Council’s commitment to the absolute respect of the right to seek asylum cannot be fulfilled so long as the European Union maintains an increasingly tight ‘migration fence’ around its external borders without putting in place adequate safeguards to mitigate the negative effects of migration control on people who need international protection.

A detailed analysis of the extent to which these various expectations of the common asylum policy have been realised is beyond the ambit of this thesis. However, as will become evident in the following review of legislative progress by the May 2004 deadline, the caution about relinquishing sovereign rights that EU members displayed when setting the rules for negotiating the common policy carried on into the negotiations themselves. They may not always have gravitated to the lowest common denominator, but they rarely ventured much above it. Further, as time went on, the focus was as much on ‘whole-of-EU’ arrangements to protect and contain asylum seekers outside EU borders, in regions of origin, as on arrangements to receive them once inside – a focus that as van Selm (2004: 11) notes, can ‘be viewed positively as capacity building, or negatively as burden shifting’.

The building blocks of a common policy

Within a year of Tampere, the Commission had initiated all of the steps needed to achieve stage one of the move to a common policy on asylum. It had drafted the four legislative building blocks, in the form of the ‘Dublin II’ regulation and the three directives on asylum reception, procedures and qualifications. It had also drafted a directive on minimum standards in regard to granting temporary protection in the event of a mass influx of asylum seekers (like those that followed the crises in Bosnia and Kosovo), a proposal for a European Refugee Fund to assist members in the case of such mass influx, a proposal for an automated system for comparing asylum seeker fingerprints to assist with Dublin II (called Eurodac), and Community readmission agreements with several countries to facilitate the return of failed asylum seekers and
other unauthorised arrivals. The last item released was the draft directive on asylum qualifications, covering the definitions and rights of both Convention refugees and others in need of protection. In doing so, Vitorino stated,

This proposal deals with the most fundamental questions in the asylum field: ‘Who is a refugee?’ and ‘who is otherwise in need of international protection?’ It completes the Commission’s work on a set of ‘building blocks’ for the first step of the Common European Asylum System called for by the 1999 Tampere European Council … We have respected the timeframe and political mandate agreed upon in Tampere, and laid down the foundations for the negotiations on a common European Union asylum policy. The ball is now in the court of the Member States.25

The member states readily agreed to the European Refugee Fund26 and Eurodac.27 By the end of 2001, they had also agreed to the directive on temporary protection in the event of a mass influx28 and mandated the Commission to negotiate several readmission


26 Initially, the Fund was set up to run from 2000 to 2004, primarily as a financial reserve in the event of a mass influx of asylum seekers. In 2004, its life was extended to 2010, its size increased, and its coverage extended to include the co-financing of members’ initiatives in receiving and processing asylum seekers, integrating those provided protection, and repatriating failed asylum seekers; see Commission press release of 13 Feb 2004, ‘European Refugee Fund II: financial solidarity for the benefit of the common asylum policy’, IP/04/203, [http://europa.eu.int](http://europa.eu.int) [accessed 12 Aug 2005]. The Commission has since proposed further changes to the Fund, to speed the funding of emergency responses to asylum influxes.

27 Eurodac is a computerised database containing the fingerprints of anyone over the age of fourteen who applies for asylum in the EU. It became operational in January 2003. Managed by the Commission and readily accessible to all members, it aims to help prevent abuse of asylum procedures (eg alerting officials when a person makes multiple asylum applications) and support the effective operation of the Dublin II regulation (eg where Eurodac reveals that the person’s entry or application has already been recorded in another member state, the asylum seeker can be sent back to that member). According to a 2005 report on its operations, some thirteen per cent of asylum applications in the EU were multiple applications; Commission press release of 21 Jun 2005, ‘Eurodac guarantees effective management of the Common European Asylum System’, Memo/05/214, [http://europa.eu.int](http://europa.eu.int) [accessed 12 Aug 2005].

28 Council Directive 2001/55/EC of 20 Jul 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. The directive provides for temporary protection for one year, with the possibility of an automatic extension for two further six-
agreements.\textsuperscript{29} However, progress on other measures was slow, and was complicated by an increased focus on security after the terrorist attacks in the United States on 11 September 2001.\textsuperscript{30} In September 2002, Vitorino repeated his earlier plea that members look for ‘added value’ rather than the lowest common denominator:

\begin{quote}
I shall not hide the fact from Parliament … that negotiations [on the draft asylum directives] are giving some cause for concern. To be precise, I do not believe that the solution lies in a form of harmonisation that is tied to the lowest common denominator. This is clearly not where the added value of a European asylum policy lies.\textsuperscript{31}
\end{quote}

Contributing to Vitorino’s outburst was no doubt the amount of manoeuvring occurring on the asylum reception directive. Members had agreed on a draft in April 2002, but the United Kingdom then sought a revision to accommodate restrictive provisions it was introducing into national legislation, notably the ability to withhold support from persons who did not apply for asylum within a reasonable period of time after arrival (Refugee Council 2004). Germany, too, managed to insert a provision allowing governments to restrict the freedom of movement of asylum seekers, so that it could continue its existing practices in this regard.

\begin{flushleft}
\textsuperscript{29} By the end of 2001 the Council had agreed to the Commission negotiating Community readmission agreements with Russia, Morocco, Pakistan, Sri Lanka, Hong Kong and Macau. In 2002, it added Ukraine, Turkey, Algeria, Albania and China. To date, agreements have been finalised with Hong Kong, Macau, Sri Lanka, Albania and Russia.
\textsuperscript{30} Meeting a week after the attacks, EU members agreed to develop an ‘action plan’ on terrorism, including measures to help identify terrorist suspects at an early stage in border control and asylum procedures. In December 2001, the Commission issued a working paper for use by members, focusing on the balance to be achieved between improving security while observing international protection obligations; ‘The relationship between safeguarding internal security and complying with international protection obligations and instruments’, COM(2001)743, 5 Dec 2001; Council press release of 6 Dec 2001, ‘Asylum: Commission paper seeks balance between improving security and protecting refugees rights’, DN:/IP/01/1754, \url{http://europa.eu.int} [accessed 23 Jul 2003].
\end{flushleft}
A final version of the reception directive was agreed in December 2002.\textsuperscript{32} Even refugee advocates agreed that it would benefit asylum seekers in some EU countries, such as Italy and Greece, where support services were minimal, and France, where access to social benefits had previously been limited to one year (ECRE 2004b, Refugee Council 2004). However, it was a watered down version of the Commission’s original draft. For example, as noted, it gave members scope to restrict the movement of asylum seekers and to withhold support from them in cases of perceived abuse of the asylum system. It also provided them scope to prevent asylum seekers being employed for up to one year, to stop them accessing vocational training, and to have their children educated in asylum seeker accommodation centres rather than local community schools. Further, where the Commission’s draft had proposed that reception conditions should ensure ‘a standard of living adequate for the health and the wellbeing of applicants … as well as the protection of their fundamental rights’, the final version said only that they should ensure ‘a standard of living adequate for the health of applicants and capable of ensuring their subsistence’.

Agreement was also reached in December 2002 on Dublin II.\textsuperscript{33} The Commission based the draft regulation on the same principle as the Dublin Convention: namely, responsibility for examining an asylum application would generally lie with whichever member had played the greatest role in letting the asylum seeker enter the EU. However, to overcome the problems that had made the first Convention largely


ineffective\textsuperscript{34} – and prevent members indulging in ‘pass the parcel’, as some European parliamentarians put it\textsuperscript{35} – the Commission proposed that greater responsibility be accepted by members who allowed asylum seekers to live unauthorised for long periods in their territory, and shorter procedural deadlines to encourage rapid processing. It also proposed new provisions to aid the cause of maintaining family unity. According to Vitorino,

\begin{quote}
We have attempted to find a balance, which is fairly difficult I admit, between firstly the legitimate interests of the Member States in combating the phenomenon of ‘asylum shopping’ and the same individual submitting multiple applications in order to remain on European Union territory for as long as possible, and secondly the interests of asylum applicants to have their application examined within reasonable time limits and so that they are not kept apart from their family members for lengthy periods, when there is no real reason why their application should not be examined in the same Member State.\textsuperscript{36}
\end{quote}

EU members approved most of the Commission’s proposals in regard to procedural deadlines and family unity, but limited their responsibility in regard to letting a person enter unauthorised to twelve months.\textsuperscript{37} While this latter change would potentially work to the advantage of outer rim members, the overall effect of the new regulation was to increase the incentive for all members to stop unauthorised entry, and failing that, to locate and process unauthorised arrivals and asylum applicants as quickly as possible.

By March 2003, agreement was still to be reached on the two core directives covering asylum qualifications and procedures. This was despite the Commission having already

\textsuperscript{34} According to one study by the Danish Refugee Council (Liebaut 1999), the numbers transferred to and from countries such as the United Kingdom, Germany, Austria and Belgium under the Convention amounted to only one or two per cent of overall asylum applicants.

\textsuperscript{35} Ludford, Debates of the European Parliament, 2 Oct 2001, \url{http://www2.europarl.eu.int} [accessed 12 Sep 2004]; Hannan, Debates of the European Parliament, 29 Mar 2000, \url{http://www2.europarl.eu.int} [accessed 12 Sep 2004]. Such comments were directed as much at countries like France (eg by the United Kingdom over the gathering of asylum seekers at the Sangatte Centre, near the channel tunnel at Calais), as at countries on the EU’s outer edges.

\textsuperscript{36} Debates of the European Parliament, 8 Apr 2002, \url{http://www2.europarl.eu.int} [accessed 12 Sep 2004].

\textsuperscript{37} After this period, or where the place of entry could not be determined, responsibility would shift to whichever member had hosted the person for more than five months.
issued a watered down version of its first draft of the procedures directive to give members more latitude on asylum controls and efficiency measures. Reporting on progress since Tampere, the Commission yet again criticised the level of ambition members were displaying towards the common policy, and attributed it to the need for unanimity and the weight being given to domestic political agendas:

Significant progress was made in implementing the legislative programme for the first phase … and in developing support measures to flesh out this new policy. But progress still lagged behind, even if it met the deadlines set by the Seville European Council. Moreover the price to be paid for it was sometimes a reduction in the effectiveness of the harmonisation or a very low level of agreed standards. The need for unanimous adoption of Community instruments is the main cause, while the difficulty met by the Member States in abandoning their national agendas is another.

Shortly afterwards, prompted by far-reaching asylum reform scenarios from the United Kingdom and UNHCR, the Commission tabled a further set of initiatives dubbed

40 The United Kingdom proposals (House of Lords 2004: app 5) centred on breaking the so-called asylum-migration nexus, whereby an asylum seeker usually stays in whichever country they arrive and lodge an application in. Among other things, the proposals involved establishing regional protection areas outside the EU, third country processing centres (similar to Australia’s offshore processing centres in PNG and Nauru), and an orderly EU-wide refugee resettlement scheme. The UNHCR proposals (House of Lords 2004: app 6 & 7) initially involved a three-pronged strategy: a region-of-origin prong, involving strengthening protection capacity in countries closest to the states fled by asylum seekers; an EU prong, involving common EU reception and processing centres for certain categories of asylum applicants, located inside EU borders; and a domestic prong, involving improved national asylum systems. In late 2003, concerned at the risk of slippages in EU refugee determination standards and how new EU members would cope with asylum seekers transferred back to them under Dublin II, the UNHCR made further proposals in regard to the EU prong, including increasing the categories of asylum seekers to be processed at the EU centres, the centres taking responsibility from member states for registration and pre-screening of asylum applicants, and establishing a consolidated EU asylum procedure, a European Asylum Agency, and an independent EU Asylum Review Board.
Tampere-II.\textsuperscript{41} Under this new vision, the EU would seek to manage asylum seekers globally rather than merely within the EU. Its objectives would include a greater sharing of the burden and responsibility for asylum seekers with regions of origin as well as among EU members, the orderly and managed arrival of refugees in the EU, efficient and enforceable asylum decision-making and return procedures, and reduced abuse of the asylum system by ‘economic migrants’. Among the measures the Commission proposed to achieve these objectives were three extra legislative building blocks to complement those agreed at Tampere: one to provide the basis for an EU-wide refugee resettlement scheme, one for asylum processing or ‘protected entry’ procedures in regions of origin,\textsuperscript{42} and one for additional financial and other support to boost the protective capacity of regions of origin. As the Vice-President of the Commission explained,

\begin{quote}
The new approach we are exploring … indicates a change in focus: to move away from what we can do to reduce numbers of applications but rather to make progress towards what we can do to improve our work, that is to say, in order to better protect a number of refugees – which we suspect will be greater at global level – trying to find new ways to improve accessibility, fairness and management of the international protection system. It is therefore also a question of a better use of funds and of the budgets available to us.\textsuperscript{43}
\end{quote}

The European Council responded by asking the Commission to

\begin{quote}
… explore all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international protection, and to examine means and ways to enhance the protection capacity of regions of origin … [Also, to examine] the possibilities to further reinforce the asylum procedures in order to make them more efficient with a view to accelerating, as much as possible, the processing of non-international protection-related applications (in House of Lords 2004: para 57).
\end{quote}


\textsuperscript{42} Under this proposal, asylum seekers could approach EU members outside the EU with a claim for protection, and have an entry permit granted in case of a positive response.

\textsuperscript{43} De Palacio, Debates of the European Parliament, 31 Mar 2004, \url{http://www2.europarl.eu.int} [accessed 12 Sep 2004].
The notion of boosting protection capacity in regions of origin – worthy in itself, but also a buffer for the EU – was clearly attractive to EU members, since they agreed to the Commission’s proposal for a regulation covering such financial and technical support within six months. The program meant that asylum issues could become a standard agenda item in diplomatic dialogue on development cooperation between the EU and third countries, and promised extra leverage in areas proving especially difficult, like the negotiation of return agreements.

With strong public support for the common asylum policy, EU members finally adopted the directive on asylum qualifications and reached political agreement on the directive on asylum procedures a few days before the May 2004 deadline set by the Treaty of Amsterdam.

---


47 Council directive 2004/83/EC of 29 Apr 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; Commission press release of 30 Apr 2004, ‘Commission welcomes Council’s agreement on Common European Asylum System’, IP/04/572, [http://europa.eu.int](http://europa.eu.int) [accessed 12 Aug 2005]. Members were given until October 2006 to transpose the directive into national legislation.

Like the reception directive, the qualifications directive included a number of measures that were welcomed by refugee advocates (UNHCR 2004, ECRE 2004a, 2004b). For example, by specifying that both state and non-state agents could be a source of harm, it made it easier for a person to qualify as a Convention refugee in EU member states that traditionally recognised actions only by the former, such as Germany and France.\footnote{Unlike the Convention, the directive also makes specific reference to persecution on the grounds of gender, although many argue that the existing Convention definition of a refugee, properly interpreted, already encompasses gender-related claims; see, for example, ‘Summary Conclusions – Gender-Related Persecution’, San Remo Expert Roundtable, 6-8 Sep 2001, organised by UNHCR and the International Institute of Humanitarian Law.} Further, it obliged EU members to extend asylum to persons who were not Convention refugees, but met other criteria for international protection: not an insignificant breakthrough, since EU members had previously exhibited major differences in practices in regard to the grant of asylum to persons other than Convention refugees, and the benefits accorded them (Bouteillet-Paquet 2002). That said, the directive permits members to grant Convention refugees only a renewable three-year residence permit in the first instance, and subsidiary protection recipients a renewable one year permit. Further, the criteria for subsidiary protection were made more restrictive than the Commission originally proposed, and possibly more limited than obligations under existing international law.\footnote{According to Rodriguez (2004), the criteria for subsidiary protection in the directive were drawn from non-Convention international human rights instruments and the case law of the European Court of Human Rights. However, the ECRE (2004b) has claimed they do not reflect the full spectrum of these obligations or interpretations, the UNHCR (2004) that they could have been broader, and Piotrowicz and van Eck (2004) that they failed to fully codify existing member practices.} Subsidiary protection recipients could also be given lower benefits and rights than Convention refugees, including in access to employment, health care, residence permits, settlement programs, travel documents and family reunion.\footnote{Subsidiary protection recipients were not covered (except in the preamble) by the directive on family reunification rights agreed in 2003, which was aimed primarily at migrants in general; see Council directive 2003/86/EC of 22 Sep 2003 on the right to family reunification.}

Of all the directives, however, the one on procedures was the most important, since even the best asylum criteria and conditions amount to little in the absence of fair and effective status determination procedures. It also proved the most contentious. There
were few existing international obligations in this area, and members were divided on several important matters, including legal assistance and appeal rights, the application of safe country principles, and whether the directive should cover applicants for subsidiary protection. As previously noted, as early as June 2002 the Commission had sought to accommodate members’ demands for more efficient procedures by issuing a revised version of its first draft of the directive. The revised version expanded the range of asylum applicants for whom members could operate accelerated procedures, allowed them to detain asylum seekers for up to two weeks when quick decisions were possible, listed circumstances where they didn’t have to invite an applicant to a personal interview, provided for one rather than two levels of appeal by an asylum seeker against a negative decision, and allowed members in limited circumstances to deport a failed applicant before their appeal was finalised. However, disagreements and compromises continued to pervade the negotiations, forcing further changes in the draft. As the Commission itself stated,

The level of ambition shown by Member States in the text to be agreed is not as high as the Commission envisaged when it presented the Amended Proposal [of June 2002]. Clearly, this is a consequence of the unanimity requirement and the sensitivity of asylum issues in many Member States.

52 The Convention, for example, provides no guidance on what procedure are appropriate to determine refugee status, where it might take place, or who might undertake it. As noted by UNHCR (1992: para 189), ‘The determination of refugee status, although mentioned in the 1951 Convention, is not specifically regulated. In particular, the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status. It is therefore left to each contracting state to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure’.


Others were less restrained in their criticism. Towards the end of negotiations, various NGOs became so concerned about the directive that they asked it to be withdrawn from the EU negotiating table, claiming that the EU ‘would be better off with no rules than adopting joint standards lower than international law’ (Black 2004). The ECRE (2004b: 10) described the end result as ‘gravely flawed’. The UNHCR (2004) said it included ‘serious deficiencies’:

Taking a very good European Commission draft as its starting point, the long process of inter-state negotiations has resulted in an Asylum Procedures Directive which contains no binding commitments to satisfactory procedural standards, allowing scope for states to adopt or continue worst practices in determining asylum claims.

Much of the criticism centred on the perceived inadequacy of provisions relating to ‘safe’ countries to which asylum seekers could be returned, and the lack of a guarantee that appeals against a negative decision always had suspensive effect. To many, the directive contained insufficient safeguards against refoulement, was inconsistent with obligations under the ECHR and other international instruments, and left too much discretion to members in regard to the detention of asylum seekers.

---

56 The directive provides for EU members acting either collectively or individually to categorise a country as a ‘safe third country’ or ‘safe country of origin’, with implications for whether or not they need to examine asylum applications from people coming from this country, or how they examine it. However, EU level agreement on a list of such countries has proved difficult, not to mention agreement within the Commission itself.

57 The directive leaves it open for members to deport certain categories of failed asylum seekers before the outcome of any appeal they may have lodged, eg asylum seekers whose applications had been judged inadmissible, abusive or manifestly unfounded.

58 For example, according to the UNHCR (2004): ‘Under [the safe country] rules, asylum seekers may not have access to either an individual examination of their claim or an effective opportunity to rebut the presumption that a given country is safe in their particular case. People can now be denied access to an asylum procedure altogether in the EU if they have travelled via so-called ‘super-safe’ third countries. UNHCR considers the lack of adequate safeguards in the super-safe and safe country provisions to be potentially dangerous to refugees. Refugees may find themselves forced back to their home countries, in direct contravention of international law, as a result of chain deportations by a string of countries, starting with an EU member state. UNHCR said the restrictions on appeals contain a similar risk, pointing out that in some EU countries between thirty and sixty per cent of refugees were only recognized after an appeal. The directive also permits a number of other restrictive and highly controversial practices that are
the qualifications directive, it covered applicants for Convention protection, but not subsidiary protection, something the European Parliament claimed left ‘an unjustifiable legal vacuum’.\(^5^9\)

Despite being clearly disappointed in the final directive, the Commission sought to emphasise its positive aspects.\(^6^0\) It argued that the directive would benefit asylum seekers by ensuring that all twenty-five EU members operated fast and simple procedures that were consistent with or exceeded the ‘essential guarantees’ in the UNHCR’s handbook for refugee status determination.\(^6^1\) Further, that it ‘added value’ to standards previously agreed among EU members, which had been neither legally binding nor judicially reviewable. Contrary to the view of the ECRE and others, it claimed the directive was consistent with obligations under the ECHR and other international instruments, and did not vitiate members’ obligations under these instruments. Ultimately, it said it would be a matter for the European Court of Justice to decide on possible transgressions, for example on whether a particular member’s practices in regard to deporting failed asylum seekers before the outcome of an appeal currently contained only in one or two member states’ national legislation but could, as of 1 May, be inserted in the legislation of all twenty-five EU states. Examples of this include rules that allow unaccompanied children over the age of sixteen to be denied adult representation in the asylum procedure’. Similar criticisms were made by the ECRE (2004b), which at one point said (at 17): ‘ECRE believes that there are five minimum guarantees from which there should never be derogation (even in so-called accelerated procedures): access to free legal advice, access to UNHCR/NGOs, a qualified and impartial interpreter, a personal interview and a suspensive right of appeal. Four out of the five are not guaranteed by the Procedures Directive’ (the exception being access to UNHCR/NGOs).


\(^6^1\) This reference is to procedures recommended by ExCom in 1977, and included in the UNHCR’s handbook on procedures and criteria for determining refugee status (UNHCR 1992: 46).
were compatible with the notion of an effective remedy in the ECHR. The Commission also emphasised the directive’s benefits for members, pointing in particular to the flexibility it gave them to address abuses of the asylum system and impediments to procedural efficiency, and its potential to help reduce ‘asylum shopping’, or the secondary movement of asylum seekers within the EU. For example, it argued that,

The Directive will add significant value and contribute to a level playing field in the area of asylum in the 25 Member States. This will be the basis for mutual confidence in Member States’ systems in the EU single asylum space where only one Member State is responsible for a particular application.

The passage of this directive – though not formally adopted until December 2005 – completed stage one of the common EU asylum policy, and opened the way for progress on the second stage, namely the move to a common asylum procedure and uniform status valid throughout the EU. It also opened the way for a change in EU

---


63 Commission press release of 28 Apr 2004, ‘Justice and Home Affairs Council – Analysis of the Asylum Procedures Directive’, Memo/04/98, http://europa.eu.int [accessed 12 Aug 2005]. The directive preamble (at para 6) states, ‘The approximation of rules on the procedures for granting or withdrawing refugee status should help to limit the secondary movements of applicants for asylum between Member States, where such movement would be caused by differences in legal frameworks’. In practice, a reduction in secondary movement seems less likely to occur from asylum seekers believing it will not be to their advantage procedurally to move to another EU member state – for they will continue to be attracted to certain EU members over others for non-procedure related reasons – than from members being more confident about returning people under Dublin II, and asylum seekers believing that they will be returned.

64 Council directive 2005/85/EC of 1 Dec 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status.

65 The second stage is expected to be completed by 2010, with developments occurring under the auspices of the Hague Programme, a suite of policies agreed by EU members in November 2004 to enhance the overall operation of the EU as an ‘area of freedom, security and justice’. By the end of this period,
decision-making processes on asylum, to voting by qualified majority rather than unanimity in the Council, and co-decision with the European Parliament rather than consultation.66

In June 2004, reflecting on the progress made in the previous five years, the Commission was restrained but positive:

The bases have been laid for a common policy on asylum … The level of ambition of the Commission’s proposals was not always respected but the policy of advancing step by step brought considerable progress within reach and this has had and will continue to have a positive impact in guaranteeing equal treatment for third-country nationals residing legally in the Union and ensuring a common minimum level of protection and procedural guarantees in all Member States for all those who genuinely need international protection as regards asylum.67

Others were more critical, with disappointment often deeper because expectations had once been so high (Bertozzi & Pastore 2006). For example, while Rodriguez (2004: 5) described the passage of the asylum legislation as an ‘essential milestone’ in the construction of a common policy, she noted that ‘many provisions allow for a great, perhaps even excessive, margin of appreciation for national legislators’, and that this could lead to a continuation in the kind of disparities between members that Tampere sought to address. Others, such as the ECRE (2004b: 28), focused on the unfulfilled potential of the negotiations, and areas of adverse effect for asylum seekers:

members are expected to have developed, among other things, a single procedure for dealing with all applications for international protection, a common approach to country-of-origin information, and mechanisms to address pressures on particular members’ asylum systems and reception capacities because of their geographical location; Communication from the Commission to the Council and the European Parliament on strengthened practical cooperation, 17 Feb 2006, Brussels, COM(2006)67.

66 A commitment to these new decision-making arrangements was made under the Hague Programme, and EU members agreed to implement them from 1 Jan 2005 (the United Kingdom, Denmark and Ireland will retain the right to opt out of any EU action they do not support). The arrangements do not depend on passage of the draft EU Constitution, although it contains similar provisions, would clarify and enlarge the EU’s powers in regards to asylum, and would widen the jurisdiction over it of the European Court of Justice (Peers 2004).

There is no doubt that during the last five years, some positive progress has been made in the agreement of certain minimum standards on asylum and improving the capacity of existing and new Member States in meeting their international obligations to refugees\textsuperscript{68} \ldots \ [But] overall progress has been disappointing, hampered by a distinct lack of solidarity between Member States as well as their lack of political will to translate the commitments made at Tampere into binding obligations \ldots \ The negotiations have mostly focused on upholding the lowest common denominator to allow countries to continue with their narrow national priorities in a way which has in some cases turned restrictive national practices into Community law. Deterring persons fleeing persecution from seeking asylum in the EU seems to have become the only common European goal upon which all Member States are in agreement.

Similarly, annoyed at the extent to which its comments on the draft directives were not accommodated, the European Parliament passed a resolution saying it

\ldots \ deplores the fact \ldots \ that harmonisation is based on the lowest common denominator of the Member States \ldots \ [Further], the still only partial establishment of the first stage of the European common asylum policy presents serious structural shortcomings which threaten Europe’s humanitarian tradition, and that in order to improve the management of asylum in the context of an enlarged Europe it is necessary to achieve, by means of gradual application, objectives which are to complement rather than replace the European common asylum policy envisaged at Tampere.\textsuperscript{69}

\textsuperscript{68} According to the ECRE (2004b: 4-5), the positive aspects of the common policy include: that EU legislation affirms the Convention as the ‘standard of reference’ for refugee protection, which ‘is particularly positive in light of the fact the legislation now applies to 25 countries in an enlarged EU’; ‘the requirement on all EU Member States to grant asylum to persons who qualify as a refugee according to the 1951 Refugee Convention, to grant subsidiary forms of protection and to recognise non-State actors of persecution’; the fact that ‘the standards agreed in relation to the reception of asylum seekers are for the most part adequate \textit{minimum} standards’; and that, ‘The minimum standards agreed should help raise protection standards in Central and Eastern European Member States’.

\textsuperscript{69} ‘Resolution on asylum procedure and protection in regions of origin (2004/2121(INI))’, 15 Dec 2004, paras 2 & 6, \url{http://www2.europarl.eu.int} [accessed 16 Aug 2005]. The resolution expresses support for measures such as regional protection programs focused on conflict prevention or resolution, a single EU asylum processing procedure (including provision for an accelerated procedure), and the sequential consideration of an applicant for Convention and subsidiary protection by the same authority. It opposes measures such as holding centres in non-EU transit countries, the proposed EU return and readmission policy (which among other things paves the way for European charter flights to return failed asylum seekers), and a central EU asylum authority and EU asylum processing centres.
Developments since mid-2004 suggest little change in EU asylum policy trends, despite a lack of hard evidence as to the specific impact of different initiatives on asylum numbers. Containment and efficiency remain as important as protection and humanitarian objectives, and interest in the extra-territorial dimension of asylum policy has continued to grow. This is reflected in moves to establish regional protection programs in Eastern Europe and North Africa (including for asylum seekers intercepted at sea), an orderly EU refugee resettlement program, and improved

---

70 This is a difficult area to research in view of the large number of variables involved. In one study of asylum policies in the EU from 1990 to 2000 (ie before the current emphasis on extra-territorial interventions), Zetter et al (2003) conclude that direct pre-entry measures (eg carriers’ sanctions, visas, passport control, border control, in-country processing) had more impact on applicant numbers than indirect post-entry measures (eg reception facilities, detention regimes, withdrawal of welfare benefits). However, broader contextual factors need also to be taken into account, such as changes in country of origin conditions, family and community networks, and so forth. Hatton (2005: 14-15) perhaps sums the situation best when he writes, ‘On the whole, the evidence suggests that, while asylum policies do influence the number of applications, such effects are often dominated by other powerful forces’. For related discussion see Neumayer (2005, 2004), Thielemann (2003a), Robinson and Segrott (2002), and Koser and Pinkerton (2002).

71 The term ‘extra-territorial dimension’ is used here to refer to the wide range of tools designed to control and deter entry and build protective capacity in countries of transit or regions of origin. They include visa regimes, sanctions on carriers, the stationing of immigration liaison officers in country-of-origin or transit countries, readmission agreements, regional protection programs, and so forth. To some they represent a delegation or ‘outsourcing’ of asylum controls, to others a natural and desirable development in light of today’s post-bipolar and turbulent world, and a way of working with countries hosting large numbers of refugees to better assist both them and the refugees themselves.

72 The regional protection programs aim to build the protection capacity of third countries close to the home countries of asylum seekers, including through financial and technical assistance for asylum and refugee support systems, as well as general development assistance. Pilot projects are being organised by the Commission, in conjunction with the UNHCR, and include the establishment of asylum seeker reception and processing centres. For a description of the programs see Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes, 1 Sep 2005, Brussels, COM(2005)388; Commission press release of 10 May 2005, ‘Commission agrees 5 year roadmap for freedom, justice and security’, IP/05/546, http://europa.eu.int [accessed 12 Aug 2005]; Commission communication, ‘Improving access to durable solutions’, 4 Jun 2004, COM (2004) 410. For critical comment see Afeef (2006), Bertozzi and Pastore (2006), Noll (2003). The concept of establishing processing camps outside the EU to which certain categories of asylum seekers in the EU could be transferred, as proposed by the United Kingdom in 2003, is no longer being actively pursued. However,
cooperation on asylum matters with EU neighbours, especially around the Mediterranean.\textsuperscript{74} The pressure for EU internal integration in the area of asylum has eased with the reduction in asylum seeker numbers, and considerable work is still to be done in transposing, implementing and evaluating the directives and regulations agreed between 2000 and 2004. Nevertheless, efforts continue to improve cooperation between members’ asylum services,\textsuperscript{75} introduce a ‘one-stop-shop’ asylum procedure for Convention and subsidiary protection, establish common standards on the return of failed asylum seekers, organise joint flights to return failed asylum seekers,\textsuperscript{76} and complement the European Refugee Fund with a European External Borders Fund to upgrade border control infrastructure and a European Return Fund to facilitate the return of failed asylum seekers and other unauthorised arrivals.

support for such a measure continues to occasionally be expressed by countries such as Italy, Austria, Denmark and the Netherlands (Expatica News 2004).

\textsuperscript{73} An EU resettlement program is seen by the Commission as an important means of reassuring third countries of the EU’s commitment to ‘genuine burden sharing and not shifting’; Vitorino, ‘The future of the European agenda on asylum, migration and borders’, speech to the conference of the European Policy Centre and King Baudouin Foundation, Brussels, 4 Oct 2004, European Commission Speech/04/435, \url{http://europa.eu.int} [accessed 12 Aug 2005]. Under a pilot program initiated by the Commission in 2005, each EU member will be asked to accept a fixed number of refugees or other displaced persons selected each year from refugee camps in non-EU countries (Smith 2005).


\textsuperscript{75} The long-term objective is a European support office on asylum matters, akin to the European Agency for the Management of Operational Cooperation at the External Borders, which was established in 2005 to improve operational coordination and facilitate the application of EU measures relating to the management of external borders.

\textsuperscript{76} The first such flight took place in September 2005, and involved the return of 125 Romanians by Spain, France and Italy (Expatica News 2005). According to Walker (2005), ‘Britain, Spain, Germany, France and Italy have agreed to use a single plane, stopping in each country, to send the illegals home, after an initiative from French Interior Minister Nicolas Sarkozy, acting on the assumption the outcry from human rights activists would be muted if enough countries joined in’.
Whether the nature and pace of EU asylum policy development\textsuperscript{77} is viewed negatively as a triumph of sovereign powers over human rights and proof of a rush to a ‘fortress Europe’,\textsuperscript{78} or positively as an achievement of ‘the highest common factor between competing national interests’\textsuperscript{79} and proof of the responsiveness of governments to the concerns of domestic constituencies, is largely a matter of perspective. In the next section, we turn to explore in more detail how Commission leaders have themselves viewed developments, and the values they have sought to emphasise.

\textbf{Values of the Commission leaders}

The disappointment of Commission leaders that EU members could not agree to higher standards in the asylum directives has already been mentioned. Nevertheless, they always appear to have been fairly pragmatic about the likely pace of progress and outcomes. In 2000 the Commission said that the idea of ‘a common asylum system which would go beyond the minimum rules’ was a ‘long-term’ rather than immediate aim,\textsuperscript{80} and even in 2006 a senior Commission official described the common policy as still ‘at an embryonic stage’ (Bertozzi & Pastore 2006: 7). Further, despite the occasional expression of frustration and disappointment, the Commission’s public

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{77} The communitarisation of asylum policy might seem slow, but it is occurring quite fast if compared to achievements on some other EU policy fronts. As Rajoy Brey, the European Council’s President-in-Office, said in 2002, ‘We should remember that the area of security, justice and freedom was born in practice in Amsterdam, that it entered into force in 1999, and that a very important dimension of the Union, the economic dimension, has existed for many years, but that almost fifty years passed before we had the euro, and even now many member states, as is their legitimate right, still do not have it. Therefore we should not be too pessimistic when it comes to progress’; Debates of the European parliament, 14 May 2002, \url{http://www3.europarl.eu.int} [accessed 24 Jul 2003].
\item \textsuperscript{78} The US Committee for Refugees (2003: 27) quotes Bertel Haarder, Danish Minister for European Affairs, as saying, ‘To those of you who say they are building a fortress Europe, yes, but remember it is a very kind fortress Europe’.
\end{itemize}
\end{footnotesize}
comments on the directives and broader asylum issues have usually focused on the positive rather negative aspects of policy developments.

The restrained, diplomatic approach of the Commission’s leaders can be attributed in part to their essentially supportive rather than driving role in EU decision-making arrangements, and their need to maintain working relationships with EU members. However, it can also be attributed to the aim of a common asylum policy being set within the context of three broader aims, sometimes pulling in different directions: firstly, and primarily, building the European Community; secondly, preserving a European reputation for hospitality, humanitarianism and human rights; and thirdly, promoting solidarity on asylum policy, not only among EU members, but also between the EU and the regions of origin of asylum seekers. Each aim is explored in turn below.

Building the European Community

Under a proposal announced by the Commission in September 2005, all migrants to the EU would be required to swear an ‘oath of faithfulness’ to the Union, either in addition to or in place of oaths of allegiance required by the EU member state in which the migrant resides. According to Franco Frattini, the current Commissioner for Justice, Freedom and Security,

> All those who enter Europe must respect European laws. We can insist on respecting the basic values of Europe, and we can demand full respect for existing laws (in Browne 2005).

The proposal faces stiff opposition. For example, Timothy Kirkhope, the leader of the Conservatives in the European Parliament and a former British immigration minister, responded by saying,

> You can laugh, but it worryingly shows the views of people who should know better. I swore an oath of allegiance to the Queen. I am not going to take kindly to an Italian gentleman telling me to swear allegiance to unelected people, or to swear allegiance to something I don’t agree with – a unified European state (in Browne 2005).
Whether or not the Parliament and Council approve the proposal, it reflects the importance placed by the Commission on trying to build ‘our European house’, as Romano Prodi, the former President of the Commission, once called it.\footnote{Speech at the inauguration of the European Monitoring Centre on Racism and Xenophobia, Vienna, 7 Apr 2000, Speech/00/128, \url{http://europa.eu.int} [accessed 24 Jul 2003].}

The ‘Community’ that Commission leaders seek to build is of course rather unique. The EU’s history, level of public support and institutional framework is at a nascent stage compared to many of its member states. Further, Commission leaders speak of the Union ‘adding value’ to members, not of supplanting them, and of pursuing integration via subsidiarity,\footnote{In general terms, the principle of subsidiarity means that ‘nothing should be done by a higher agency which can be done as well, or better, by a lower agency’ (McBrien 1981: 1257). In the EU context, Chris Patten, former External Affairs Commissioner, describes it as meaning that, ‘decisions should be taken as closely as possible to the people they will affect: that decisions should be taken at the European level only if they have to be’; ‘Sovereignty and democracy in the European Union’, Chatham Lecture, Trinity College, Oxford, 26 Oct 2000, European Commission Speech/00/402, \url{http://europa.eu.int} [accessed 24 Jul 2003].} not homogeneity. To quote Prodi, they want the Union to be ‘both supranational and also respectful of the nations and states that it is composed of’.\footnote{‘An enlarged and more united Europe, a global player’, speech to the College of Europe, Bruges, 12 Nov 2001, European Commission Speech/01/528, \url{http://europa.eu.int} [accessed 24 Jul 2003].} They also often speak of wanting to increase the Union’s accountability and democratic legitimacy, and argue that the concerns of EU citizens are important influences on EU policy. For example, according to Vitorino,

> The [EU] area of freedom, security and justice exists to facilitate the daily life of citizens [of EU member states], both when it comes to exercising their individual and collective rights and when they need to turn to the courts to have those rights enforced … The area of freedom, security and justice exists on behalf of and in the interests of citizens. Its creation needs to be transparent and involve the people it is being created for.\footnote{Commissioner’s welcome, Justice & Home Affairs website, undated, \url{http://europa.eu.int/comm/commissioners/vitorino/index_en.htm} [accessed 24 Jul 2003].}

These Community building principles – providing added value to members, and operating according to the concept of subsidiarity and on behalf of and in the interests
of EU citizens – permeate the approach of Commission leaders to asylum policy, whether by choice or necessity. The concept of subsidiarity, for example, underlies the choice of a common rather than homogeneous asylum policy, the adoption of a minimum standard rather than best practice approach, and the use of directives rather than regulations to give the standards legal form. Similarly, the concepts of adding value and working on behalf of EU citizens underlie the four main criteria that the leaders appear to expect the common policy to meet: firstly, that it help stop secondary movement of asylum seekers within the EU; secondly, that it allow EU members to operate efficient asylum procedures; thirdly, that it meet international protection obligations; and finally, that it build a sense of security and confidence among EU citizens that the asylum seeker influx is under control, numbers can be limited, and the system is not being abused.

For example, shortly before the end of his term of office in late 2004, Vitorino declared that his main aims on asylum were to ‘level the playing field’ and ‘lay the foundations’ of a common policy. In his view, these were necessary measures to achieve the first of the two criteria just mentioned, namely stopping secondary movement and improving procedural efficiency. As he explained in regard to the decision to have the qualifications directive cover both recipients of Convention and subsidiary protection,

> If we wish to combat secondary movements, if we wish to combat ‘asylum shopping’, it would be of little value merely to include only the [Refugees] Convention. The essence of ‘asylum shopping’, the essence of secondary movements, lies in the competitiveness of subsidiary protection systems.

He continued,

---

85 This is not to say that Commission leaders did not consider the principle at times abused by EU members. For example, early in negotiations on the procedures directive, Vitorino declared to the European Parliament that, ‘The Council is about to adopt a very famous rule based on one rule with 15 exceptions. If this was achieved in the field of chemistry it would probably merit a Nobel prize, having one rule with 15 different exceptions, one for each of the 15 Member States’; Debates of the European Parliament, 23 Sep 2002, [http://www3.europarl.eu.int](http://www3.europarl.eu.int) [accessed 24 Jul 2003].

Only by dealing with the harmonisation of subsidiary protection will it be possible to adopt the so-called single procedure … in which requests for asylum are studied in order of priority in a single administrative process and are subject to a single final decision … [as] a way of rationalising procedures that saves time, administrative means and money.87

The reception and procedures directives were similarly portrayed as helping to reduce secondary movement and increase efficiency. For example, the main aims of the reception directive were described as being not only to ensure a ‘dignified standard of living’ for asylum seekers, but parity of reception rules and living conditions, ‘avoiding, therefore, asylum shopping’.88 Many of the recommendations made by the European Parliament on the directives were rejected for like reasons. For example, its recommendation that provisions on accelerated procedures be removed from the qualifications directive was rejected on the grounds that it would be incompatible with the pursuit of ‘swift and efficient procedures’.89

In regard to the third criterion, as previously noted Commission leaders routinely defended the consistency of the directives with international protection obligations, against opposing allegations. That said, they have recognised that the European Court of Justice might need to rule on contentious practices, and have put upward pressure on standards by encouraging the exchange of information among EU members, including on best practices, and transparency in the way members manage their national

88 Commission press release of 19 Dec 2002, ‘The reception of asylum seekers in Member States’, Memo/02/300, http://europa.eu.int [accessed 23 Jul 2003]. Greater parity between members was also believed likely to help combat people smuggling. For example, in regard to asylum procedures the Commission said, ‘Emphasis is put on the fact that differences between the procedures that apply in the various Member States lead to secondary migration within the Union; this makes it more difficult to combat the criminal networks that exploit the desperation of people who migrate in search of a better life. In this respect, closer alignment and, in certain cases, harmonisation of the rules could have an immediate positive impact in all Member States’; Commission press release of 22 Nov 2000, ‘Asylum and immigration debate’, IP/00/1340, http://europa.eu.int [accessed 23 Jul 2003].
They have also consistently emphasised that members can introduce or maintain more favourable provisions than those set down in the directives, and that improvements in the EU’s asylum framework may still occur. As Vitorino explained in October 2004,

> My aim was to create minimum standards which fully respect our international obligations and I believe that we have done that. Some may say that the standards are too low – and I certainly admit that they are often not those which the Commission originally proposed; or as is the case with the procedures Directive that they are even insufficient and allow for too many national derogations to the detriment of the integrity and efficiency of the whole [Common European] Asylum System. Nevertheless, they are set in European law and therefore a process of monitoring and evaluation is now beginning which can lead to improvements in the future.⁹¹

However, it is likely that Commission leaders see the nature and pace of these future ‘improvements’ as dependent on achieving the fourth criterion, namely a sense of security and confidence among EU citizens about the asylum system. For as Vitorino continued,

---

⁹⁰ In 2002, the Commission announced it would seek to apply to asylum policy the ‘open coordination method’ of policy development and harmonisation used in some other policy areas, including encouraging information exchange, the open monitoring and reporting on member achievements, the setting of specific goals and timetables for action, etc (in other words, employing peer pressure rather than legislation to encourage harmonisation). According to Vitorino, ‘The open coordination method does not go against legislation … It’s objective is to complement the insufficient outcome that I acknowledge will most probably be the concrete result of this first-generation legislation’; Debates of the European Parliament, 23 Sep 2002, http://www3.europarl.eu.int [accessed 24 Jul 2003]. Following the adoption of the asylum procedures directive in December 2005, the Commission renewed its push to realise the goals set at Tampere and in the Hague Program, proposing further ways of effecting practical cooperation between EU members; see ‘On strengthened practical cooperation: new structures, new approaches: improving the quality of decision making in the common European asylum system’, Communication from the Commission to the Council and the European Parliament, 17 Feb 2006, COM(2006) 67, Brussels. See also Council decision of 5 Oct 2006 on the establishment of mutual information mechanism concerning Member States’ measures in the areas of asylum and migration, 2006/688/EC.

On these foundations further structures have to be built to safeguard the EU as a single asylum space and to ensure that our citizens have confidence in a system that gives protection to those who require it and deals fairly and efficiently with those who do not.

Achieving the confidence of EU citizens became a particular concern for Commission leaders as issues relating to asylum, unauthorised immigration and terrorism became fused in public debate. Shortly after the terrorist attacks in the United States in 2001, Prodi stated,

Government has become more difficult in the world since 11 September ... Europe does not consider itself a fortress under siege, nor does it want to erect new walls. Frontiers do not guarantee European unity and national, regional or local diversity; the sharing of fundamental principles does. However, at this particular moment in time effective border controls are essential to internal security and public confidence.92

Similarly, in June 2002, when addressing the European Parliament, he argued,

Discussions now underway on legal immigration and the right of asylum could break down if we do not take on board our fellow citizens’ worries about illegal immigration.93

For Prodi and other Commission leaders, asylum issues therefore involve juggling the desire to preserve civil liberties, including the rights of asylum seekers, with the desire to instil feelings of security, stability and comfort among European citizens. To quote Vitorino,

I am convinced that the public genuinely expects, and even demands, the addition of European value to national policies whose limitations are becoming even more apparent, whether they be

---

security policies or policies to protect civil liberties. To achieve an objective of this kind and identify the European added value which we can bring to national policies, I believe that we should take into account both the security imperatives and the respect for values which are the common defining values of our European Union.94

While there are differences of view about whether they are getting this balance right, it is indisputable that security aspects have become more important. One illustration is the management of asylum being listed among measures aimed at enhancing EU security in the Commission’s work program for 2005 to 2010.95 That said, to focus only on the security theme would, in the view of Commission leaders, be to miss the point of it: namely, the need to reassure EU member governments and their citizens that Community cooperation on asylum pays, and is consistent with principles of justice in the sense of preventing abuse of the asylum system. As Prodi argued in 2002, ‘Border controls are bound up with asylum policies, [and] security is linked to ensuring fair treatment for all’.96 Or to quote Frattini,

In my view, each Member State can benefit from common procedures in asylum issues … Asylum seekers may be false asylum seekers. In the absence of common procedures, there are Member States which allow the entry of false asylum seekers, and that is extremely dangerous. That is why I suggest the following: strengthen cooperation and strengthen mutual trust. In my view it is the only way to indicate where there is a possibility to have an added European value.97

In Frattini’s view, removing perceived threats to the Community – whether in the form of terrorism or unauthorised arrivals – is linked to both the enjoyment of freedom by EU citizens, and the protection of their fundamental rights. In his view,

---

95 Jose Manuel Barroso, ‘Helping Europe to change’, speech to European Economic and Social Committee, Brussels, 10 Feb 2005, European Commission Speech/05/80, [http://europa.eu.int](http://europa.eu.int) [accessed 12 Aug 2005]. Security is one of the Commission’s three primary strategic objectives for the EU during this period, the other two being prosperity and solidarity.
The principles of Freedom and Security are inextricably linked. The symmetry among these concepts is in fact at the very basis of the creation of an Area of Justice, Freedom and Security.98

Preserving an identity

In the eyes of their citizens, and sometimes also outsiders, a nation state is often viewed as ‘standing for’ certain principles or ideals. The EU shares this phenomenon. The Treaty of Amsterdam states in its first paragraph that the Union is founded on ‘the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law’. At Tampere, the leaders of EU members went further, claiming,

[The freedom enjoyed by EU citizens] should not, however, be regarded as the exclusive preserve of the Union’s own citizens. Its very existence acts as a draw to many others worldwide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe’s traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory.99

In this context, it is not surprising to find that in addition to Commission leaders viewing asylum as a medium for building the European Community, they want this policy to embody traditions, values and ideals that they believe are distinctively European – or at least distinctive to ‘old’ Europe.100

For example, according to Prodi, the EU is being built ‘on the fundamental values that have fashioned it in the course of its history’ rather than ‘the realpolitik that we ourselves invented’:

100 Speaking in 2002 when the EU comprised only fifteen members, Prodi stated, ‘The ethical principles that inspired our Union … have won the hearts and minds of European countries that are not yet members. They now want to join us and slowly but surely adopt our values and objectives’; ‘Europe and ethics’, speech to conference on politics and morality, Vienna, 7 Dec 2002, European Commission Speech/02/621, http://europa.eu.int [accessed 24 Jul 2003].
The ideas behind Europe, its insistence on principles and values as the basis for political action – our belief in and practice of human rights for instance – are perhaps the best example of the balance we Europeans try to strike.\textsuperscript{101}

Similarly, according to Frattini,

Fundamental rights are at the core of the Union’s values and this should be the first priority … Europe should be the guarantor of values and should represent a point of reference for non-European people and cultures in this delicate aspect.\textsuperscript{102}

From this perspective, Europe is a ‘project’ inspired by a moral as well as a political and economic vision. As Prodi puts it,

The European project has roots that go back far into the past. And they remind us too, as we build our future, that Europe’s taproot is its values, and they draw nourishment from the ethical and spiritual dimension.\textsuperscript{103}

For Commission leaders, the values Europe stands for include human rights, the rule of law, hospitality and humanitarian action. Further, in their view, the ‘unity in diversity’ or ‘composite’ model of integration adopted by the EU highlights certain qualities of the European character – tolerance, understanding, respect for culture – that distinguish it from the ‘melting pot’ model of the United States. As explained by Prodi,

Our European family is made up of many peoples and cultures … And our diversity will grow as the peoples of eastern and southern Europe join the Union. I cannot think of any other experiment on this scale anywhere else in the world. There are other approaches to integration – as in the United States, where different peoples have merged and fused into a new people. Europe’s approach is different. Ours is a composite model. It preserves each people’s identity,


each individual brick that goes to make up the common edifice. And binding this edifice together is the cement of tolerance and mutual understanding. They have kept us united in our respect for each other’s culture.104

Imbued with this moral vision of Europe, when speaking about asylum Commission leaders routinely appeal to a ‘tradition of European hospitality’,105 Europe’s ‘long and proud history of offering refuge to those fleeing from persecution, war and conflict’,106 its ‘humanist values’,107 and so forth.108

Nevertheless, a hesitation, or at least a conundrum, is at times discernible, centred on a perceived potential tension between living by these values while trying to preserve strong local identities and build a Community identity. For example, while Prodi asserts that ‘having torn down the iron curtain we must not replace it with a “rich man’s ditch” along the EU’s borders’,109 he also says on people’s concerns about communitarisation and globalisation that,

We need only to listen to the questions on our citizens’ lips: Will the cultural points of reference that shape our identities and are our true wealth be eradicated?110

---


108 In this regard, they fall within the political and public policy tradition of ‘ethical liberalism’ that Boswell (2002) suggests is one of several ideologies that shape debate about asylum and immigration in Europe (the others being neo-liberalism, welfare protectionism and ethno-nationalism).


Further, the EU’s ability to be a good global citizen is viewed as linked to internal Community development, and as needing public support to be sustainable. As Prodi comments elsewhere,

> Since our wider aim is to spread stability, prosperity, freedom, democracy and respect for human rights throughout our continent, we need a solid policy of constructive cooperation with our new [post-2004] neighbours … Stabilising the continent through our enlargement and neighbourhood policies is one aspect of the European project: but at the same time we have to deepen and consolidate the Union and ensure that the whole project has the maximum democratic legitimacy.111

In other words, while Commission leaders want to maintain their beloved ‘European tradition’ of hospitality, humanitarianism and human rights in regard to asylum seekers, they also feel obliged to respect concerns that local community identities are being eroded, and to nurture a new identity, namely that of the European citizen, belonging to the European Community.

Promoting solidarity

Solidarity is a value often invoked by Commission leaders in seeking to negotiate this terrain of potentially competing desires. However, the concept has a different meaning for them than the JRS leaders, who, as will be seen in the next section, use the term to describe the achievement of a particular quality of relationship with asylum seekers. By contrast, the Commission leaders use it to describe the achievement of a unified policy approach to asylum among EU member states, and the development of ‘partnerships’ between the EU and the countries and regions of origin and transit of asylum seekers.

---

For example, early in negotiations on the common asylum policy, Prodi told the European Parliament,

We cannot let people think that a return to nationalistic solutions can provide a valid answer to cross-border movements of people that overwhelm the capacity and scope for action of individual States. Such movements can be tackled and managed only at EU level.\(^{112}\)

A few weeks later he added, ‘the effectiveness of various decisions and measures within the EU depends on relations with non-member countries and on development cooperation too’.\(^{113}\) Vitorino agreed:

It is now recognised that without a close dialogue with third countries, which seeks to create partnerships and cooperation over issues which are more and more seen as of common interest, it will be impossible to manage successfully EU policy. Discussions must be broad, ranging from procedures for admitting legal migrants to issues of integration, the control of illegal migration, readmission and return.\(^ {114}\)

Chris Patten, the then EU Commissioner for External Affairs, also highlighted the synergies between the EU’s domestic and external policies:

I just want to say how much importance both Antonio Vitorino and I attach to … the relationship between … [asylum and immigration policy] and external policy. There is plainly an intimate connection between our success, for example in promoting sustainable development, and


demographic pressures. There is clearly an important role for us to play in helping other countries to deal with illegal trafficking in human beings, which is just as much a threat and, in some cases, a greater threat to them than it is to those richer countries which are the targets for those who traffic in human beings.\footnote{Debates of the European Parliament, 14 May 2002, \url{http://www2.europarl.eu.int} [accessed 12 Sep 2004].}

This quest for solidarity – whether between states or policy portfolios – is based partly on a cost-benefit based logic. For example, harmonising policy within the EU is a sensible move if one wants to reduce secondary movement and avoid members resurrecting internal border controls, as is building the protection capacity of regions of origin if one wants to contain or reduce asylum flows into the EU. However, for Commission leaders the quest also has a norm-based logic. As shown earlier, they have sought to defend the common policy as entrenching a set of minimum standards higher than those previously existing in at least some EU member states, and a policy platform open to further refinement. Similarly, according to Prodi, developing a ‘ring of friends’ around the EU is as effective a way to express the Union’s ‘political, civil and human traditions’ as it is to reduce ‘the untrammelled migratory flows that so alarm our citizens’.\footnote{‘Building our future together’, speech to the European Parliament, 10 Feb 2004, European Commission Speech/04/67, \url{http://europa.eu.int} [accessed 12 Sep 2004]. According to Prodi, ‘When we talk about European identity we mean adding a new dimension to what we are, sharing a common destiny and developing new joint ways of expressing solidarity: solidarity within the European Union, between rich and poor regions, for example, but also between North and South in the world as a whole. Solidarity like this is often thought of solely in economic terms, but in fact it has an important value, and it is around this key concept that we should build our new model of coexistence in a united Europe’; ‘The European project in the world: between values and politics’, Lecce, 13 Jun 2003, European Commission Speech/03/303, \url{http://europa.eu.int} [accessed 12 Sep 2004].}

In short, for Commission leaders, the quest for solidarity has its origin in a mix of principles and enlightened self-interest. It encapsulates the so-called ‘European project’, a venture summed up by Prodi as lying ‘between values and politics’.\footnote{‘The European project in the world: between values and politics’, Lecce, 13 Jun 2003, European Commission Speech/03/303, \url{http://europa.eu.int} [accessed 12 Sep 2004]. In the writer’s view, Prodi’s distinction, while a common one, perpetuates the myth that politics is devoid of values. This is true only...}
THE JESUIT REFUGEE SERVICE

A quite different venture, which Prodi would no doubt put closer to the value end of his spectrum, is the Jesuit Refugee Service. The JRS is an international Catholic organization established by the Society of Jesus (Jesuits) in 1980 to respond to the plight of ‘de facto refugees’, and to coordinate related Jesuit activity. It currently works in over 40 countries. No mode of assistance is excluded, but drawing on Jesuit, religious and lay personnel, including de facto refugees themselves, most services are direct and personal, for example pastoral care, education, health care, social services and counselling. Advocacy on behalf of individuals or groups is also undertaken, by JRS staff or through partnerships with Jesuit social institutes and research bodies or non-Jesuit human rights organizations.

According to its charter (JRS 2000: 15-16), the JRS aims, like other Jesuit social works, ‘to build … a fuller expression of justice and charity into the structures of human life’. However, its specific mandate is ‘to accompany, serve and defend the rights of refugees and forcibly displaced people’. The inspiration for this work, the charter says, is drawn mainly from the lives of two people: the founder of the Jesuits, St Ignatius of Loyola, who in the 1500s gave shelter to homeless people in Rome and established organizations to continue these services, and Jesus, by biblical accounts a compassionate if confronting character as a man and, for Christians, as the face of God. The charter concludes,

to the extent we equate values with a particular cluster of ethical principles or virtues, rather than anything we consider important and worth striving for.

118 In the JRS charter (2000: 15, fn 9), the term ‘de facto refugees’, taken from Catholic social teaching, is used to cover everyone driven from their homes by conflict, humanitarian disaster or violation of human rights, including those internally displaced as well as those who cross national borders. It therefore covers a broader range of people than the Convention definition of a refugee, which is limited to persons with a ‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’. In this chapter, ‘de facto refugees’ is used in preference to ‘asylum seekers’ or ‘refugees’ when discussing the views of the JRS leaders, as a more accurate depiction of their mandate and experience, and of the focus of many of their interview comments.

119 The work of the JRS in Australia is detailed in its annual reports (eg see JRS Australia 2003).
To accompany refugees is to affirm that God is present in human history, even in most tragic episodes. Jesus as an infant fled with his family into exile. During his public life, he went about doing good and healing the sick, with nowhere to lay his head. Finally he suffered torture and death on the cross. In companionship with Jesus Christ and serving his mission in the midst of refugees, JRS can be an effective sign of God’s love and reconciliation. The biblical welcome offered to the widow, the orphan and the stranger is the JRS model of authentic pastoral service (JRS 2000: 16).

Operating within a religious and NGO context, it is not surprising that, when interviewed for this study, JRS leaders had a different approach to asylum issues to that of ministers and public servants. In broad terms, rather than nation building, they were concerned with building a more just and humane world, and rather than observing the criteria of good governance, being good companions for de facto refugees. The rest of the discussion explores the values clustered within these two themes.

Parenthetically, it should be noted that while comfortable with the languages of secular society, the interviewees often used the language of their religion to explain their views; that is, the language of Catholic faith and theology rather than say, the language of human rights or politics. As J2 explained,

We don’t tend to use the faith language so much, but we don’t shy away from using it either. When we’re working in a multi-cultural, multi-faith environment, and also when we’re working in a secular NGO environment, the common language I think is the language of human rights. I think that’s something which is universally shared and … there is a familiarity with and respect for, say the Universal Declaration of Human Rights, as a basis for a civil society, that there needs to be that sort of respect. So that’s probably more the language that we use. But I think for our own workers and for the culture of the organization itself, we tend to use the language of faith.

Typical of their bi-lingual approach is J3’s recounting of how the work of the JRS was perceived by a former head of the Jesuits, Pedro Arrupe, who equated the pursuit of greater justice and humanity with serving the ‘kingdom of God’:
By being present to the victims, he explained, we join with those who seek to rebuild humanity. Serving those whom we see in need, we serve also the kingdom of God. God is calling us through these … people.120

Building a just and humane world

Like Arrupe, the interviewees saw the work of the JRS as primarily about pursuing just structures and humane relationships. The values underlying this quest were a faith inspired view of human dignity, the spirit and aims of the Jesuit order, and a humanitarian response to need. Each is explored below.

Asylum and protecting human dignity: ‘a God-given gift’

As already noted, the interviewees were comfortable with the language of human rights. They were also conscious that they could appeal for support for their views using the language and logic of various social and academic disciplines. For example, in J3’s view,

> When you argue that children should not be in detention centres, it can easily be an emotional argument. But … you can also have very strong arguments from psychology, from precedent, you know, from many levels.

However, it was not human rights, or psychology, or politics, or law that lay at the core of their views on asylum, but a morality and sense of justice fired by a notion of human dignity, and by the spirit – call it compassion, care, love, whatever – in which they believe God relates to people.

For example, asked what really matters in asylum policy, J2 replied, ‘Well, I think first of all it’s the dignity of the human person, trying to protect that at all times’. J1 spoke in similar terms, adding that it was important to convey how God feels about de facto refugees:

120 Quoted from a document written by J3, to which he referred during the interview.
We are just providing them everything we can in order to give them a sense of God’s love in the world … Because we are an expression of God’s presence in the world, can we do something to express that love to other people, to the poorest of the poor?

In J3’s view, the concept of justice revolves around this human dignity and the feelings experienced when it is thought abused or stripped from people:

Compassion is a feeling, but it’s also a value isn’t it. It’s recognition of the human dignity of a person and it’s a sense of distress that the dignity is offended. So that’s fundamentally why compassion … [is] central. It’s because of the sense of outrage at the offence against human dignity, which diminishes all human beings in the value system that I would hold. Diminishment of what the human is affects us … Education of the feelings are secondary. Primarily the question is more related to justice in terms of human dignity. Which arouses feelings certainly, but which has a fundamental philosophical, moral basis, namely the dignity of the human person.

The notion that people have or are owed dignity has a Kantian ring to it, but the interviewees indicated that it came from their religious beliefs. As J2 explained,

I think for us [respect for human dignity] comes out of our faith. JRS is a faith organization. It’s a Christian, Catholic NGO, and our philosophy comes very much from our Christian faith, and our belief that the dignity of each person is a God-given gift, that it’s a human right given by God. Each human person reflects God to us. So it’s a faith perspective.121

The interviewees also drew on their religious beliefs for two other images to help explain and illustrate their view of de facto refugees. One was that de facto refugees were ‘family’ rather than ‘outsiders’. For example, according to J1,

We need to look at … the refugees, to open the door and treat them with human dignity as our distant cousins, brothers and sisters, rather than the unwanted people who we fear taking over Australia’s resources and employment.

121 In this the JRS leaders are reflecting the broad moral and philosophical approach of the Catholic Church, which takes the view that persons are created in the image and likeness of their God, and that what is ‘just’ should be determined ultimately by reflection on this core quality or identity of each person rather than by conventions such as law (Martino 2005).
The other image was of a God who is partial to the poor and disadvantaged. For the interviewees, if you believe the image of Jesus painted by the Christian gospels, you must believe that he would be concerned for the welfare of de facto refugees. In their view, to empathise with such people and seek to protect their dignity models how Jesus would relate to them. As J4 explained,

Well the public things JRS always tries to promote of course are the dignity and worth of the individual, particularly the one who is the outsider, particularly the one who’s been rendered a refugee. You know, it’s all there in the rhetoric in terms of Jesus himself and the holy family were refugees, and Jesus would have a sense of identification with the one who has been marginalised in this way.

*Asylum and fidelity to organisational mission: ’towards justice’*

If an image of a loving God and the concept of human dignity underlay the views of the JRS leaders, a close ally was their sense of mission as Jesuits, namely ‘to serve faith and promote the justice of God’s Kingdom, in dialogue with cultures and religions’ (JRS 2000: 13).

References to justice were in fact nearly as common in the interviews as references to human dignity. They were dominated by two themes. Firstly, at an institutional level, the work of the JRS was considered a sign of the fidelity of the Jesuits to their mission of promoting justice, and to the mission of the Catholic Church. Engaging with de facto refugees was, in effect, seen as a litmus test of the commitment of the Jesuits and the church to working with poor and marginalized people. Secondly, de facto refugees were viewed as pointing to a wider world of injustices that needed to be addressed, not only by Jesuits, but governments. Indeed, they were seen as having a unique ability to spark people’s interest in these injustices, and to thereby help propel reform.

Both of the above themes are reflected in the following comment by J3:

Well, [another] one of the things why refugees were chosen is because they have an impact on the imagination of people, … [and] a capacity to mobilise us in ways that we couldn’t. You know, we’d spent a decade discussing faith and justice, and we really hadn’t had the strong
mobilisation of our resources that was witnessed in a couple of instances of response to the refugees. So it was realised that [refugees] sparked our imagination. But it was also a way to help people understand that there are some fundamental structural problems in the world, and the refugees help point the way to those. I think that you could rightly claim from the Jesuit documents of the 70s and 80s that there was a motivation towards justice in the world that they’d been talking about a lot. The refugees offered a connection for us as an international body committed to justice to join forces across the globe in responding to one manifestation of injustice, that could then lead us on to further action.

They are also reflected in the way in which the interviewees referred to de facto refugees, for example as among the ‘abandoned’ and ‘marginalised’ groups of the world, the ‘poorest of the poor’, and the ‘losers’ in a global order dominated by sovereign states, power politics, and the desire for security. In the words of J4,

Yes, we admit there are people smugglers. We know that there are shysters who wrongly claim asylum. But we know that in most of the desperate situations we work, there is no way in the world that you would set yourself up in a refugee camp, saying, ‘I am a refugee’, if you weren’t. So … the JRS starting point, I think, is from the situation that basically those who are in these [refugee] camps are the big losers of the new world order, in that since the end of the cold war and post-September 11, there … is less political benefit for the big players in saying, ‘You’re ours’. And so they really are the very abandoned people of the world in the new way of it seeing itself. I think there is now a very wide gulf between those from organizations like JRS who see these people, put the human face on them, and see that they’re the big losers out of a yet to emerge newly defined world order.

The values that the interviewees thought political leaders should bring to asylum policy at a national level will be discussed later. Suffice to say here that they believed that redressing the kinds of injustices revealed by de facto refugees required global as well as domestic changes, including in areas such as equity, security, and governance. For example, in J3’s view,

Asylum policy in twenty years time will depend on a lot of factors. Nowadays, we all know that all of these issues of poverty, global warming and all of this are all really connected. If adequate steps are taken towards the development of the economies of Africa and towards just trade practices, then these things might help to ease the pressure of the movement of people. If they’re not taken, then asylum policies … will be more and more fortress policies.
Similarly, according to J2,

Most forced displacement, apart from natural disasters, is caused by wars and by power struggles amongst undemocratic and corrupt regimes. If there was a system of world government that could address those problems of corruption and dictatorship, we wouldn’t have anywhere near as many refugees … The other whole area is poverty and systems of trade and who gets economic advantage … It’s not just about having a way of policing international law, there also has to be a way to try to institutionalise a more equitable sharing of the world’s resources.

Asylum and humanitarianism: a compassionate response to need

To attribute the desire of the JRS leaders to build a just and humane world merely to an unadorned care for human welfare is unsatisfactory, since it fails to capture their two culturally specific values mentioned above. However, some of the comments of the interviewees did reflect such a simple attitude of caring, independent of religious trappings. Further, according to J4, the lay people who work for the JRS do not necessarily share the same ‘sort of fairly elevated spirituality and rationale’ of the Jesuits, and basic values like compassion and generosity may for them constitute sufficient explanation of their engagement. A third value should therefore be added to those of human dignity and fidelity to mission: that of humanitarianism, defined in a broad dictionary sense as ‘having the interests of mankind at heart’ (Wilkes & Krebs 1988: 548).122

For example, one of the reasons the interviewees gave for the establishment of the JRS was that it was merely a pragmatic response by a global organization to a global need, motivated by three main factors: the extent of the need, an ability to do something to alleviate it, and compassion. To quote J3,

I think the intensity of the need, the numbers of people involved, … the realisation of the capacity we have to actually do something and to mobilise support, [all these were factors]. But

---

122 It should also be noted that a broad humanitarian tenor permeates Catholic social teachings. For example, in the church’s 1965 pastoral constitution, Gaudium et Spes, humankind is conceived as simultaneously comprised of rights-bearing individuals and social beings living interdependently in community (O’Brien & Shannon 1977).
the intensity of the need would I think be the strongest motivating factor … There are a lot of other areas where we would also work. But … at that time there was a perception by a body which works in 120 countries that it could respond to a pattern of displacement which was also at least as global as we were. And in each of these places we had some established base, so we were very well prepared to be able to respond.

And J2,

I think to offer help and compassion to people who are very vulnerable and often frightened and dislocated and displaced, I think the motivation comes out of human compassion.123

The aims of the JRS too were sometimes described in ways that lack any overt religious connotations, for example in terms such as the ‘protection of people at risk’, providing a ‘good quality’ of practical support and services, advocating the ‘rights or the interests’ of individuals, families or groups, acting as a ‘leaven’ for public discussion of asylum issues, and engaging in ‘respectful dialogue’ with governments.

Being good companions

The second theme to permeate the interviews, in addition to that of building justice and humanity, was the concept of accompaniment. Defined loosely by J1 as ‘just being with them’, by J2 as ‘being with refugees where they are’, by J3 as being ‘on the ground’ and ‘in touch’, and by J4 as ‘solidarity’ and ‘presence with them on the good days or the ordinary days’, it was illustrated by J4 with the following story:

The vignette that always comes to mind for me is when I was working on the Thai-Cambodian border with JRS and our leader there was Fr Pierre Ceyrac, who was a very charismatic figure. I remember when working there, all of us working for the NGOs, it’d be what would be called situation one to situation four … Situation one was, you know, no problem, keep working. Situation two, the shelling getting closer, be careful. Situation three, pack up and leave.

123 In his letter of 14 Nov 1980 to all Jesuits announcing the establishment of the JRS, the former head of the Society, Pedro Arrupe, wrote, ‘Struck and shocked by the plight of thousands of boat people and refugees, I felt it my duty to send cable messages to some 20 Major Superiors around the world. Sharing my distress with them, I asked what they in their countries and the universal Society could do to bring at least some relief to such a tragic situation’ (in JRS 2000: 5).
Situation four, too late, hit the dust. So one day it was situation three, so all of the NGO people all get out. Because of course situation one to four has nothing to do with the refugees who just have to stay in the camp. So an hour later all of these NGO vehicles are lined up along the side of the road … and in a scene that I’ve often said could have been scripted by Graham Greene, in the opposite direction comes Pierre Ceyrac in his little utility. Drives in, gets access, and stays the night in the camp. Now even the Cambodians were very upset or worried, because they said, ‘Well, we’re used to shelling and Fr Pierre is not, and we’d hate anything to happen to him’. People like the Georgetown medical team were very upset, saying, ‘Well, if Pierre had been shot this would have been an international incident which could have jeopardised the whole of the international relief operation’. Pierre, in his JRS and sort of French way, says, ‘What could I do? I had to be with the women and children’.

As noted earlier, to accompany de facto refugees is one of three tasks in the JRS’s mandate, the others being to serve and defend them. However, for the interviewees, accompaniment anchors the other two, giving the JRS focus and credibility. For example, according to J3,

I think that most of our action is a combination between field work and reflection, not only for the credibility of what we say, to be seen as credible, but also for our own credibility, ourselves, we have to be on the ground. It’s not just a desk job to arrive at good policy. We have to be in touch with the victims and the people affected by it, and hearing those stories. Our policy has to be informed that way.

Indeed, accompaniment was considered to have a value worth preserving at the expense of other JRS activities if these threatened access to de facto refugees, and independent of the JRS’s ability to provide practical services or achieve successful outcomes. As J2 explained,

If we were just an advocacy organization, we wouldn’t need to worry about whether or not we could have access to refugees. There are some advocacy organizations who could never get a permit to get into a camp because whatever government they were dealing with would not let them into the camps because of their outspokenness. So I think one of the costs of wanting to have access to refugees is that sometimes we have to moderate our advocacy.

Similarly, according to J3,
Success would be if the people you’re serving find a permanent solution of some sort, either to return home or to find a settlement in another country where they can make another life. Or where we can at least pull out and people themselves can take over the activities that we’ve been engaged in. But there’s probably no real success, because success would be an end in conflict-producing situations … [And] in Angola we returned with the refugees. Set up a decent program. But when UNITA recommenced the war the whole program was destroyed. It wasn’t success, but we were proud of our people in that very difficult circumstance.

However, accompaniment was by no means viewed merely as passive presence. Rather, it was viewed as a concrete objective subject to judgments of quality and efficacy according to three criteria: being with those most in need, achieving relationships of trust and respect, and behaving professionally. Each is explored below. Also explored are the values that the JRS leaders thought political leaders should apply in asylum policy, since accompaniment was believed to be a springboard for advocacy in regard to policy as well as individual matters.

**Criterion 1: Responding to the greater need**

As noted earlier, the ‘intensity of the need’ of de facto refugees was one of the reasons why the Jesuits first established the JRS, and according to the interviewees it remains a core criterion in deciding where the JRS mounts a program or presence. As stated by J2, ‘we prefer to use criteria like the need, and perhaps where others are not working, so to deal with forgotten groups of displaced people’. J3 expanded,

> Our checklist of criteria for choosing a project … comes from Ignatius’s constitutions … It’s the greater need, the capacity to do something, the lack of others to serve that need. Then there is a range of things which are rather practical, like if we already have a strong link there, or if we already have a base on which we could build effectively. But then there are contradictory things, like if people don’t want us to be there, then we might be ready to go there too.

However, the interviewees admitted that a focus on need gave rise to dilemmas that were difficult to resolve, not least that between helping the most needy, the greatest

---

124 These ‘forgotten groups’, according to J1, include sub-groups that are especially vulnerable, for example women at risk and persons with mental disabilities.
number in need, or the needy ‘at your door’. As J4 said, in a rather classic example of the potential tension between considerations of duty and effect in ethical thinking,

You start with the acceptance that there will always be millions of refugees in the world and that you’re not going to help all of them, and that from JRS’s point of view there should be some commitment to helping those no one else will help. That’s one principle to be put in place. And therefore, you know, availability to work in remote camps in Africa, or to have an eye for refugees who, for example, have acute disabilities, who have no prospect of being placed elsewhere, that sort of thing … But another and conflicting principle would be to say, ‘Look, given that there will always be millions of refugees in the world, we’ve got to try and help the greatest number that we can’. And, you know, these two are already in tension.

Similarly, for J2,

I think as well as having a policy of trying to seek out the most needy you also have to be willing to help the people who present themselves at your door. Where you have a choice, you prefer to be with the most needy. But when people are coming to you, I think that you just take them as they are and where they are … That’s just the reality, the messiness of the [asylum] situation.

Dilemmas were also seen to arise from budget constraints, which imposed restrictions on where and how the JRS worked. For example, emergency relief operations were seen as generally beyond its capacity, and when mounting any program it draws wherever possible on the resources and local knowledge of existing Jesuit and church networks. As J2 explained,

It also comes down a bit to what resources we have to be able to mount a program or presence … If there are Jesuits present, or if there is already a church presence, then we try to piggyback on that. That’s why JRS, when we go into a place, we often go straight to the local bishop or priests and we stay at their house and we use their resources, and we don’t have to set up a whole new network.

Criterion 2: Achieving relationships of respect and trust

A second criterion in assessing the quality of accompaniment was believed to be the growth of interpersonal relationships, and in particular qualities such as empathy, respect, trust and friendship. According to J2, success in this area was
… just being able to develop relations with refugees and asylum seekers that they find sustaining and consoling, and that they appreciate, and being able to live and work among refugees with a level of friendship and mutual respect … Because we rely on volunteers, sometimes it’s hard for us to recruit people. But then our volunteers bring with them a quality of relationship that refugees really appreciate. Because of the motivation of our volunteers, I think there is never any question in the minds of refugees that we really care. It’s not just a job, and we’re not earning high salaries.

J1 too focused on the importance of trust and friendship, and how these could help people recover a sense of dignity:

Success is firstly how much we accompany people. How much … the refugees accept us … as one of their friends. And that’s one success, because they trust. There is trust. At least they open up the situation, not inside them, drawn out of their head. So they open up … As I said, in [the detention centre] they just talk that only in this circle I found myself as a human being.125

For J4, the nature of the relationship desirably extended to sharing the highs and lows of the daily lives of people. In his view, ‘the best of JRS workers really do identify with the life experience of the refugees, including their daily family lives’:

The sense of identification with people, particularly in the great celebrations of life, like a baby being born in a refugee camp or something like that, can become almost symbolic for the JRS worker: of you know, this is what we are about and so forth. So it’s the old thing of sharing in the joys and the grief, the anxieties and the sorrows of those that you are with.126

He added,

---

125 Speaking about visits to talk with detainees and conduct church services at an Australian immigration detention centre, J1 said, ‘At least we treat them not like a number, but as a person with dignity, with their own personality. And in that way, in some way, we give comfort and boost their self-esteem. And it’s very important for them … Some of them say that they are treated like dust, like dirt. But even though they are not Catholics, they are Buddhists or animists or any other religion, they come into the eucharist, or the mass as we say, and they say only in this circle I find myself as a human being with dignity’.

126 The value of such close relationships for the JRS workers themselves was not lost on the interviewees. As J4 said, they offered a way of ‘almost living vicariously’ the intimacy with families and communities that the workers had left behind to live and work for the JRS.
I think with JRS, from a government perspective, there would be a sense that somehow success in JRS terms would be a bit more warm and fuzzy, probably a bit less institutional, a bit less organised, a bit more haphazard, a bit more dependent just on individual relationships developing between JRS workers and groups. But I think when it worked at its best … there is a sense of complementarity.

In addition to offering experiences of respect, friendship and dignity, other benefits were also thought to flow to de facto refugees from the development of relationships with the JRS workers. One was a feeling of safety and hope, especially in isolated or long term refugee camp situations. According to J2,

Even if you can’t offer them anything at all, the fact that you’re there, our experience has been that asylum seekers and refugees feel safer when there are people from the international community with them. When I was in Thailand for example, if refugees from Burma were just with Thai police and security people, there’d be quite a lot of insecurity on their part. But the presence of people from a more international community gives them a lot of reassurance. Also it reassures them that they are not forgotten and that there are people in the international community who do care about what becomes of them.127

Hope and comfort was also thought to derive from the pastoral and religious aspects of a JRS presence, or as J1 put it, helping people ‘get in touch with themselves, their belief, their faith in God’. A former refugee himself, he claimed that such care had been ‘the best way of helping me as a refugee of coping with daily anxiety and the worries for the future’.128

Another benefit of close relationships was believed to be the leverage they provided in resolving problems in other areas of JRS activity. For example, according to J3,

127 In the Australian context, visiting immigration detention centres to talk with detainees and provide small material goods was similarly thought to boost people’s spirits. As J1 noted, ‘People coming to Australia from other countries, they miss their own food, so it could be good to buy just a little bit of their traditional food to cheer them up. The newspapers in their own language. Sometimes we … [celebrate] their birthday. And their need for telephone cards or contact, we do help in that way’.

128 According to J2, ‘A lot of the refugees we work with are people of faith. And they appreciate that there are other people of faith who want to be with them, even if it’s not the same faith’.
If your field is education and the … custom of the people [in a de facto refugee camp] is that girls don’t get educated, there is a conflict. You work towards how you can find a way in which the girl child can have access to that right … by winning trust principally. I think that our people have been successful because they’re there, you know, they stay there. They’re clearly accompanying, serving the people, and they win trust. Then they work with the local leadership.

In this context, the independence of the JRS from governments and the UN was considered a distinct advantage. For example, J4 claimed that people in East Timor trusted the JRS because ‘they know that we’re not [there] with some big political agenda’, while J3 attributed the JRS’s success in negotiating the return of refugees to Guatemala to it being viewed as independent, and so able to move among the many groups involved.

Despite these benefits, accompaniment was viewed as not without its problems. In addition to the potential risk to the safety of JRS workers,129 there was the emotional toll that they could experience from sharing, to quote J1, the ‘bag of trauma’ carried by many de facto refugees:

The refugees or asylum seekers … have a bag of trauma, and if people are not prepared they carry over the bag of trauma, … and that’s not healthy at all … Even myself, sometimes I feel very negative because of the carryover effect. Some people in frustration say, ‘I would kill myself rather than go back to my own country’ … But to understand them, and be one of their brothers or sisters, we have to carry the emotions.

Another potential dilemma was identified as encouraging dependency among the de facto refugees, and perhaps paternalism or patrimony on the part of the JRS workers. As J2 said,

A lot of our workers are from developed countries, and I think there is always a danger, even with the best will in the world, that … it can set up some bad dynamics, like neo-colonial sorts of relationships between people who are very poor and from developing countries, and people who are very well off.

---

129 According to J2, ‘For our workers, there is this balance between courage if you’re in a dangerous refugee situation, and prudence. Because there are times when we have to pull workers out of those places, and shut programs down’.
There was also the dilemma of JRS workers potentially being complicit in the exploitation of refugee populations by armed groups, and ultimately in perpetuating conflict situations. To quote J2 again,

I think over the years JRS has learned a lot about the political complexities of some refugee situations. I wasn’t there, but on the Thai-Cambodian border, where that long-running civil war was continued and fuelled by … geo-political interests, … there were some JRS workers who were very sympathetic to one faction or another … At one point there was a strong move on the part of some JRS workers that we should in fact completely withdraw, because we were probably doing more harm than good by enabling the factions to continue to exploit these refugee populations, to recruit fighters and also to use them as bases … [But cutting aid off can be] a hard thing to do, because often one’s inclined to have a lot of sympathy for people who are fighting against a tyranny.

And J4,

Now within JRS it was always difficult to address those questions because you would often have workers, of I think very good heart, who would just say to you, ‘Look, basically we’re not into politics. That’s not our go. We’re here to bring the human face of Christ. Or we’re here just to be with these people as they work through things and they’ll make their own political decisions. We believe in self-determination and not intervening and things of that sort’. Where someone like myself would always have the thing more, ‘Hang on, each of us has to take responsibility for our own presence, and our own action, and JRS individually and collectively has to take that responsibility’.

Finally, as noted earlier, accompaniment was viewed as potentially clashing with advocacy. As J3 said,

On the ground our people have to maintain good relations with everybody. So the manner of seeking justice in a particular situation has to be quite skilfully … and shrewdly developed, both to be effective but also to be able to stay there long term and be able to continue to be effective.

**Criterion 3: Behaving professionally**

In charting a way through problems like the above, the interviewees appeared to be guided by a few broad principles or rules of thumb. These can be clustered under the
broad heading of behaving professionally, and together serve as their third criterion for assessing the quality of companionship. They include acting reflectively, providing quality services, engaging de facto refugees in policy development and service provision, forging alliances with other NGOs, and, with some qualifications, being guided by reason rather than emotion. While the concept of a profession and the nature of professional values are open to discussion (Banks 2004, Hugman 1998), the term is used here because it was used by one of the interviewees, and because the above principles are consistent with qualities often associated with professional behaviour.

In regard to the first principle, the ability of JRS workers to think critically about their involvement with de facto refugees – in effect, to engage in applied ethics – was seen as sometimes hindered by the diversity of JRS workers and the pressures of fieldwork. As J4 noted,

One of the problems for an organization like JRS is … [that] you’d always have a mix of people of different religious persuasions, different nationalities, different political perspectives, some of them a bit loopy … [Moreover], some of your staff would … be absolutely exhausted at the end of a day. I mean they’ve got to deal with climate, they’ve got to deal with health issues, they’ve got to deal with their own security, they’ve got to deal with whole cross-cultural sorts of things. They’d basically just say to you, ‘Look, at the end of the day we’re too tired to deal with [moral issues]. Someone else has to do that. We in fact just physically can’t afford to have those sorts of questions coming in on us too much’.

Nevertheless, in the eyes of the interviewees, reflecting critically about their field experience was considered a way to add value to it, especially when it offered lessons for national and international responses to asylum issues. To quote J3,

I principally encouraged people to enter into direct contact with the refugees and asylum seekers, to develop services, and out of that contact to be constantly reflective. So I didn’t so much prescribe exactly how they would do things. What I was facilitating was an assessment in local situations of what could be possible services, given the resources … [and] the needs … And I insisted on a connection between those local programs and others who were among them. And out of solid experience, I’d always have a team working at another level to draw from that, to look at international implications. So I was a facilitator basically of local engagement and of the international dialogue based among people engaged locally.
The second principle, providing a good quality of service in the health, education and other programs run by the JRS, is largely self-explanatory. However, achieving their goals in this area was sometimes thought difficult, mainly because of the problem of recruiting suitable personnel and supervising them in isolated locations.

The third principle, engaging de facto refugees in policy development and service design and delivery, was considered a way to counter the risk of dependency, as well as to capitalise on and build skills in the de facto refugee population.\textsuperscript{130} For J3, identifying and enlisting the support of traditional or emerging leaders was especially important:

\begin{quote}
In refugee situations, we put a lot of weight on the refugees themselves, and we hope we can work with their actual leaders ... The traditional patterns of leadership at home are sometimes broken down in refugee camps ... So we have to look for whoever really are the leaders at the time without offending their traditional cultural patterns if possible ... The problem often is that the authorities who make decisions about the camp don’t include them.
\end{quote}

Here, the measure of success was reasonably clear: ‘a high level of participation and sense of ownership’ of the de facto refugees in the delivery of JRS services. However, for J3 the ideal was to be able to ‘pull out’ and let the people themselves ‘take over the activities that we’ve been engaged in’.

The fourth principle, forging strategic alliances with other NGOs, was considered a way to get around the potential tension between accompaniment and advocacy. So too was the establishment of a JRS office in Geneva to lobby at peak UN and government levels. As J3 explained, both measures enabled the JRS to bring asylum issues to wider audiences, without adverse repercussions at the local level:

\begin{quote}
In some policy levels we’ve formed alliances. So there are expert bodies on human rights investigation and things like that. And the human rights investigators will have totally different
\end{quote}

\textsuperscript{130} According to J2, ‘We wouldn’t want to work in a way, or try to develop policy in a way that doesn’t engage with the real people who are affected. So not just accompaniment, but to listen to the refugees and to listen to their stories, and to ask them what they want, and what they’re seeking, and what they’re asking of us, and what they’re asking of the international community. So that would be another important thing, to develop policy and programs in dialogue with the refugees’.

297
methodologies from us, both on the ground and at higher levels ... [For example], we have a longstanding alliance with Human Rights Watch ... They used our network of local contacts [to collect information in Rwanda on rape as an instrument of genocide], but then spoke in their own voice so [they] didn’t put at risk our field people, and so that our relationships with people on the ground were not prejudiced ... Our people have to remain with these people and help them right through their crisis, whereas all the Human Rights Watch people wanted was the facts. So they hear a horrific story, but then they can’t stay around to look after the victims ... [Or] if there is a problem of inadequate food distribution in a camp, for example, if our people take up the issue even with the UNHCR, the local protection officer, they might be in trouble, because that protection officer works closely with the government and probably with the military. So they might have to take it to the country office, the head office. But even there it might be awkward. We have to know who we are dealing with. That’s why we have an office in Geneva. It’s much easier to raise it there and let it come down through their line. Very awkward sometimes too if there’s questions of corruption.

Turning to the final principle, like the political leaders, the JRS leaders basically thought that reason rather than emotion should guide policy development, and that they needed to manage their private emotions carefully when it came to decision making in regard to JRS or other matters of public significance. For example, in J2’s view emotions were ‘a bit unreliable’, in J3’s they can lead to ‘obsessiveness’, and in J4’s they are ‘more irrational’, ‘are aroused by all sorts of triggers that are quite subjective’, and can ‘distort judgment’.

Nevertheless, the JRS leaders were willing to assign an important role to emotion in several areas. Firstly, like the political leaders, they saw their emotions as a valuable way of informing and adding strength to their convictions and commitments. In J3’s view, the ‘inner movement’ caused by personal contact with de facto refugees ‘strengthens and confirms a position’. J2 used himself as an example:

Anger is [an emotion] that I [have] certainly experienced. Seeing the way that people were abused and the abuses that people were fleeing ... [And] guilt and shame that this is the way the world is, and that it is a part of human frailty that we have a world like this. Not guilt that it’s my fault, but guilt that would help me want to do my little bit in my little corner of the world to try to make it better than it is.
However, as noted earlier, the JRS leaders also thought that emotion could distort judgment. Consequently, for J3 the important thing was to ‘help people recognize their own emotions’, and how they might work to either help or hinder sound judgments. In other words, to adopt what he called a ‘classic pedagogical approach’ to emotion.

Secondly, as will be evident from earlier discussion, the experience and expression of emotion were considered essential aspects of the value of accompaniment and associated relationships. One need only recall the words of J4, about the best of JRS workers sharing in the ‘joys and grief, anxieties and sorrows’ of de facto refugees, or those of J1 about carrying their ‘trauma bag’. As J1 continued,

> When we talk [with de facto refugees], we talk with our heart and not in our mind or words. Our heart is there. The expression of heart and emotion is very important.

Similarly, according to J4,

> Basically, anyone working for JRS, if they don’t have empathy or compassion, then I think within a short period of time they’d find the work pretty dissatisfying, and they’d find the organization highly dissatisfying. Empathy and compassion are absolutely essential for the individual’s survival and thriving while working in a JRS type context.

Finally, allowing oneself to experience and listen to emotion was seen as a way to help stop values relating to national sovereignty and border control from hardening into an inflexible ideology. To quote J2,

> Maybe you don’t need to inform policy with emotions. I think you can develop principles. But I think you can’t ever completely remove principles from human relationships and human situations, because otherwise you end up with an ideology. You pursue the idea at the expense of the people. I think in a way that’s the situation [former immigration minister] Phillip Ruddock has got himself into, and the Australian government. It’s almost become an ideology: that we will decide who comes to our shores, when and how. That’s an idea that has been pursued to an extreme degree, regardless of the human consequences ... I’m contrasting ideology with a principled approach that takes account of the human situation and the messiness of the actual human situation.
Criterion 4: Achieving just outcomes (policy making principles)

The interviews with the JRS leaders focused on the values they brought to their own work with de facto refugees, rather than the values they thought political leaders should bring to asylum policy. Further, engaging in policy issues at a national level was not seen as necessarily part of their core business. It was said to depend on whether other NGOs were already involved in such a task, whether it was thought the JRS could ‘make a difference’, and whether a national JRS director had the appropriate skills and interests. That said, the interviewees had opinions on the general direction Australian policy should take, and the kind of values that should drive it.

There were some areas of praise for Australia, including for the country’s ‘history of considerable generosity’ in granting asylum, and its high refugee recognition rates.

---

131 J3 gave as an example the strong role of the JRS in the ECRE, where he said it was probably the only NGO body with a presence in most EU member states. In his view, engagement in policy issues is ‘really worth doing across countries, trying to develop some consistent principles and arguing for them, because nobody else is, or very few others are except in ad hoc ways, country by country’. He was less optimistic about the potential impact of the JRS in Australia: ‘In a place like Australia, where there is a plethora of NGOs, it’s a totally different scene. We can be just one among many, and potentially as ineffective as any other’.

132 By way of illustration, J4 contrasted the pro-active approach to lobbying UN officials that he had taken when the director of a particular country to that of his successor: ‘Now it just wasn’t part of his training or mindset or mentality to say, “Oh well, a critical part of what we’re doing is to have regular meetings with the UN in terms of trying to advocate particular issues in relation to return. There are other bigger fish in the pond that do that, and we just get on with doing our work”’. He continued, ‘So in institutional terms, I would say that it’s very much up to the individual country director as to what extent JRS involves itself in public policy issues. And the criteria then to be applied in agitating questions would be probably dependant as much as anything else on the particular skills of the country director’.

133 According to J4, ‘It has to be admitted that even though [Australia] treated the fourth wave of boat people abominably, ninety per cent of them were found to be refugees. Well, there is hardly any other country on earth with an elaborate processing system which ends up with such a high figure of those proved to be refugees’. The reasons why Australia’s recognition rates for Convention refugees may be higher than those of the UNHCR and comparable countries in Europe and North America are difficult to identify. They might include, for example, Australia’s decision makers being better (or less) informed, more willing to give the benefit of the doubt, or subject to greater levels of review. They might also include rejection being less likely in Australia than elsewhere because the consequences are more drastic.
However, there were also areas of criticism. The Australian policy environment was thought to contain several undesirable traits, including a tendency on the part of political parties to treat asylum seekers as a ‘commodity’ to be traded for electoral support, a ‘belief that control of the borders is an absolute value’, and an unwarranted ‘obsessiveness’ and inflexibility in regard to boat people. Concern was expressed in particular over the length of detention, offshore intervention and processing, the linking of onshore and offshore refugee programs to keep resettlement numbers within pre-determined limits, and areas of perceived policy inconsistency.

For J2, for example, change was particularly important in the area of mandatory detention:

> The main problem I have with the Australian government’s policy is the length of detention. That’s the only component of the policy which I think could be argued is really immoral, in the sense that to deprive someone of their freedom for a long time when they haven’t committed a crime is a pretty basic violation of the human person.

J2 also criticised the differences in treatment accorded to asylum seekers for whom Australia was the country of first asylum, and those for whom it was the country of second or third asylum (the so-called ‘forum shoppers’):

> I think the whole of the Australian government policy is based on an assumption that you can deal with some of these human problems in an orderly way, and … that once you create laws you can make the chaos conform to your laws, and that’s a way of proceeding. But … refugee and asylum seeker issues are always going to be messy … I think you have to accept that that’s just the reality.

Others were more damning. To quote J3,

> The countries that have been extremely rigid, like Germany and Australia, that have strong detention policies and deportation policies, as far as I can see, do it at a high cost. They become

(eg rejection elsewhere may not lead necessarily to deportation), or because Australian decision makers do not have as many visa options available to them when considering asylum applications as do their counterparts elsewhere (eg only the minister for immigration has the power to grant a visa according to broad humanitarian or compassionate grounds).
very expensive operations and they don’t help towards settling an international problem … [And policies like offshore interception and processing are] disastrous. They don’t achieve a desirable asylum. They’re not offering asylum.

And J4,

Where I have been unequivocally morally critical of the Australian government, is that [firstly], we have exploited our unique [geographically isolated] situation and our small [asylum seeker] problem in order to say, ‘Well, we can be more indecent than others, and perhaps find an answer’, and … [secondly, we have said], ‘Well look, if we could close our borders here – and get other first world countries to do the same – in the future we might be able to … [invest] more resources or people in situations of acute need’. Well, that would ring more true to me if for example our international aid budget was moving towards the UN suggested 0.7 per cent, instead of having gone down to its present 0.24 per cent, one of the lowest on record. It would ring more true to me if we were taking more refugees on average each year now from these offshore situations than we have since World War Two.134 But where it’s simply, ‘Oh well, we’ll put all that on the long finger once we’ve cleaned this up’, then to me it’s more suggestive of national selfishness and needless political point scoring.

The interviewees were also critical of the government’s handling of public perceptions of boat people between 1999 and 2001.135 In their view, the language political leaders

134 Elsewhere he added that it would also ring more true if the government broke the nexus between the numbers granted asylum under the onshore protection program and the numbers of refugees and others in humanitarian need resettled from offshore. In his view, ‘get rid of that nexus, which countries like the US of course have never drawn, then a lot of the argument drops away, and I think a lot of the emotion drops away’.

135 A couple of the interviewees were reluctant to speculate on the motives behind the government’s response to the 1999-2001 boat influx, or on those behind community concerns about boat arrivals, saying they didn’t have enough solid data. Nevertheless, the general view was that government motives included a desire for electoral gain, and control over arrival numbers and selection, while community concerns had their origins in provincial attitudes, insecurity and elements of racism. For example, of the government’s attitude, J2 claimed, ‘It is about getting votes’, and J1 that, ‘I see the Australian policy, or any other state policy, [as] treating the asylum seeker as a commodity and not as a person, and using the asylum seekers and refugees as a way to achieve their ends … to buy votes, to buy support from the people’. Of community concerns, J3 argued that, ‘the underlying values [of many people] don’t go beyond the immediate surrounding family and friends and work and immediate securities’, and J4 that ‘its always been a fear of the other and … a fear of people coming in boats’. However, like some of the political leaders, some of the JRS leaders were optimistic about the possibility of shifts in public sentiment. For
used to describe the arrivals, and their failure to give information that might temper emotions and lend perspective, added to public anxiety and alienation. J2, for example, argued that insufficient work was done to encourage people to ‘look at the facts rather than be ruled by their fears and misconceptions’, and to exploit the ‘generous side’ of Australians rather than their ‘meaner side’.

Despite these critical comments, the interviewees might be described as ‘soft pragmatists’ rather than ‘bleeding hearts’. They usually tempered their criticisms with an acknowledgment that asylum issues were complex, and that the JRS did not share the accountability problems of elected governments. As J2 noted,

> We’re not accountable to the broad ranging public. NGOs have that advantage in being able to set policy on the basis of principles rather than on the basis of popular support for the policy … I suppose the international director has a small council that he’s accountable to, and ultimately to the superior-general of the Jesuits. But our public, the people that support us and fund us, they tend to be very sympathetic and like-minded. If there is some accountability there, it is accountability to a very like-minded group.

They also accepted that asylum was an area of conflicting values and emotions, often impossible to resolve in a satisfactory way. J4 described it as a ‘quagmire’. To illustrate, he referred to an interview he had once heard between John Stone, a former National Party senator and head of Treasury, and Kerry O’Brien of ABC television’s 7.30 Report. As J4 told it,
John Stone was, you know, saying how terrible it was these [boat] people doing these things. And Kerry O’Brien put to him, he said, ‘Look, if you were in the same situation with your wife and children, wouldn’t you do the same thing?’ And Stone’s lip quivered and then he said, ‘Yes, but that doesn’t make it right’.

J4 continued,

I think there are extraordinary internal tensions and contradictions in this whole issue, and the real difficulty … [is] in people working through the emotions which are borne of that internal conflict, and of articulating a priority of values where there are such conflicting values. I mean, everyone knows that you can’t just have an open door policy. I think equally everyone knows you can’t just have a fortress Australia policy … Anything in between is full of compromise.

What ‘compromises’ might satisfy his expectations were not explored. However, none of the interviewees ventured ideas that could be described as particularly radical. None disputed, for example, the right of governments to control the flow of people across national borders, to detain for a limited initial period people who arrive unauthorized, or to deport those whose asylum claims were unfounded. Indeed, to quote J3, ‘there are logical reasons for [asylum policy] being tough. It has to be toughly administered’. And while J2 suggested that unless a country was in desperate straits itself, priority should be given to the needs of asylum seekers, he also thought that

… the welcoming communities, their stake and the costs to them should be recognised, should be weighed and counted … The cost of doing the right thing appreciated.

Rather, like the political leaders, the interviewees argued that the difficult but most critical task in policy was to strike an appropriate balance between compassion and control. As J3 explained,

Policy has to be realistic. That balance between legitimate control and compassion, that’s a conflict for us too: to find a policy which is compassionate but which is [also] a regulatory activity in terms of the movement of people, so that societies have the chance to develop themselves … And that means having borders which are admittedly not totally porous but which allow for a legitimate application for asylum to be processed, and allow for people to be sent back when their claim doesn’t relate to asylum but relates to some other personal need.
Similarly, as J4 noted,

The problem of course is always transposing the dealing with the individual case to that of dealing with hundreds of thousands, and trying to weigh up the according of dignity and rights to those individuals against the other objectives which are to be achieved through your public policy.

To lay the groundwork for a satisfactory policy balance, one suggestion was for governments to focus more on such concepts as the ‘common good’, which J4 called a ‘churcny’ version of the national interest. The latter was equated with a focus on the wellbeing of the Australian community and the political fortunes of its government, the former on the wellbeing of all stakeholders and the pursuit of justice. As J3 again explained,

> What we’re looking at is a just Australia … And generally it’s a longer-term criteria, you know, what will really make this just, not so much what will help through the next election or through the next budget phase … [Also to recognize] that there are many things which affect our national interest happening out there … [and that] it’s very much in our national interest that an international order be established.

Other suggestions are presented below in the form of policy maxims. They are listed without further explanation, since many are distilled from earlier discussion, and others either had none or need none. Some were made by only one interviewee, while others were made by a few, but together they constitute a cluster of desired policy dispositions, moral currents, and personal or community sensitisers that all of the JRS leaders are likely to have supported. Further, while some have a base in Catholic faith and theology, or Ignatian spirituality, they can survive without it. They include,

- when you have choice in responding to de facto refugee situations, focus assistance on the ones in greatest need, and especially the ones who nobody else is helping;
- when de facto refugees ‘present themselves at your door’,
  - do what is within your capacity to help,
– be as ‘decent’ as you can be, or at least ‘as decent as other equivalent countries’, 138
– help unless in desperate straits yourself, or if helping would on balance only add to their misery, 139 and
– don’t treat them badly simply to deter more coming, or for ‘needless political point scoring’; 140

• ground reflection on asylum policy in personal relationships with de facto refugees, or at least in exposure to their stories, 141 and include a calculation of

---

138 To quote J4, ‘I mean everyone knows that you can’t just have an open door policy. I think equally everyone knows you can’t just have a fortress Australia policy. It just can’t work in the end, and in the end it is indecent. Anything in between is full of compromise. The question is how you get to a compromise that people can own in terms of saying, “Well look, yep, we are being as decent as we can be, or at least we are being as decent as other equivalent countries’.

139 To quote J2, ‘It’s easier to justify a much harder position if you’re desperate, if everything is crashing down around your ears and you can’t see any other way to prevent even more human misery than by a hard approach … But when we’re not in a desperate situation, we can afford to be merciful … If you look at Thailand, for example, where there are a million undocumented refugees and asylum seekers, and Thai society can just cope with having all of these undocumented people living and working amongst the Thai people. And in India there’d be millions of undocumented migrant workers, asylum seekers and refugees … Sometimes our compassion is limited by our desperation, but I think we are a long way from that in Australia’.

140 To quote J2, ‘Where you have a choice, you prefer to be with the most needy. But when people are coming to you, I think that you just take them as they are and where they are … [In the Australian context] I think you have to accept that … some people will stay in a country of first asylum, other people will manage to get here without the proper documentation, and you have to deal with each group separately. I don’t think you can just be harsh on the undocumented arrivals just because they are undocumented arrivals, just because they didn’t stay in the country of first asylum … You can’t resolve that tension by abusing one of those groups or denying one of those groups natural justice. I think there are times when JRS is quite hard on individuals who present themselves for help. We just say sorry, we can’t help. But to then actually punish them I think is something JRS couldn’t do and wouldn’t do either … I think we should be doing something about the trafficking … But I think that’s the only thing we can do. Once a person has actually arrived here, I think that’s too late to try and do anything about it. The Australian government’s policy is about punishing the undocumented arrivals to discourage others from trying it, but I think that’s too late. I don’t think JRS has the solution, except that we’d say that whatever we do we can’t punish one group to be an example to another’.

141 This maxim was considered relevant to policy makers and the public alike. Like several political leaders, the JRS leaders emphasised the value of encouraging empathy via exposure to the ‘human story’.
the benefits and costs of policy initiatives for them as well as for your own community; \(^{142}\)

- protect the dignity of de facto refugees;

- engage them in service provision;

- seek a whole-of-government approach to policies that potentially influence the flow of de facto refugees (ie build consistency among policies relating to asylum, people smuggling, regular migration, access to labour markets, trade, aid, military operations, humanitarian interventions, etc);

- nurture certain public attitudes and emotions (eg ‘international responsibility’ and ‘compassion’) and contain others (eg ‘selfishness’ and unsubstantiated fears); and

- follow the ‘golden rule’. \(^{143}\)

**CONCLUDING COMMENTS**

This chapter serves as a link between the three previous chapters, which focused on mapping the values underlying Australian asylum policy over the past fifty years, and the next chapter, which explores the contribution an ethics of care might make to debate

---

For example, according to J1, when people ‘don’t have the opportunity to encounter face to face with refugees … their attitude and thinking is closed off. The fear is dominating … If there is a face to face meeting, or they hear the trauma the refugee has, the emotion will quicken their own cognition to think it through … Telling the story to touch the emotion so that they can have empathy towards refugees’. Similarly, according to J3: ‘Out of sight, out of mind. Stories, faces, images, personal contact if possible. And witness: that people who have lived experiences can talk about their experience’.

\(^{142}\) To quote J2, ‘One of the things the Australian Government may have been doing was shepherding the [boat people] situation to avoid social conflict and violent attacks on asylum seekers. It’s good to avoid those things, but can you pay any price to avoid those things? Can you pay the price of actually violating the rights of asylum seekers? Is that too high a price to pay’?

\(^{143}\) The golden rule refers to the statement attributed to Jesus in Matthew 7:12, ‘So always treat others as you would like them to treat you; that is the meaning of the Law and the Prophets’. Of his account of John Stone’s comments, J4 said, ‘I mean it’s just so much against the golden rule in a sense, that if I’m safe and secure I will actually do you in, in a situation where if I was in your situation I’d be doing everything I could in order to reach the gold mine’.
about these values and related policy directions. The link has taken the form of a detour through two alternative maps of asylum values, one used by European Commission leaders, the other by JRS leaders, to carry into the discussion of an ethics of care a broader range of practice-based values and standpoints than just the Australian experience.

In the earlier chapters, it was shown that Australian governments have consistently sought to control the grant and conditions of asylum to avoid any clash with immigration and foreign policy objectives. In the eyes of the policy makers, their endeavours have served the values of nation building and good governance. In this chapter, we have seen a comparable quest for control on the part of EU members in developing a common EU asylum policy. In a process reminiscent of the drafting of the 1951 Refugees Convention, the emphasis in drafting the EU asylum directives has been on establishing a framework of minimum standards, with individual EU members retaining a considerable amount of policy flexibility. Further, they have worked hard to limit the scope for secondary movement of asylum seekers within the EU, and to spread the effort and cost of providing asylum more evenly among members. Similarly, in a process reminiscent of Australia’s response to Indo-Chinese boat people in the late 1970s, and north-west Asians in recent years, the emphasis in EU external policy has been on enhancing the buffer capacities of neighbour states and regions of origin of asylum seekers, to contain the numbers entering the EU in the first place. In brief, the emphasis has been on providing a modicum of support for asylum seekers consistent with humanitarian principles, while preserving sovereign powers, firstly at national level, and secondly at European Community level.

Perhaps, as Foucault suggests in the quote that began the chapter, it really is this principle or practice of sovereignty that is the basic ‘problem’ behind the seemingly relentless quest for control of asylum by states, and the only ultimate solution is to ‘cut off the king’s head’. However, since the time of the French and American revolutions, sovereignty is associated with communities rather than kings, and rule by elected representatives rather than by leaders claiming some divine or familial right or moral superiority. And in this chapter we have seen that it is this same core value of community – its development, identity and solidarity – that is the main guiding light and
policy parameter for European Commission leaders in developing EU-level asylum policy.\footnote{This study has not explored the particular circumstances and specific values that may be shaping the attitude of each individual EU member towards the common asylum policy. However, various considerations are likely to be at work. For example, according to Noll (2000), Byrne (2003) and others, a key aim of the older EU states has been to contain asylum seekers either in the new outer-rim member states or in countries outside the Union. More generously, Thielemann (2003b) suggests that members see a common policy as preferable to reimposing internal border controls, which would undermine operation of the single market, and a way of avoiding the risk of asylum standards being lowered so far as to undermine the international asylum system. Also more generously, Gibney and Hansen (2002) suggest that EU members, like other western countries, are motivated mainly by the desire to make asylum seeker inflows more manageable and stable, and to be in a position where they can grant asylum to sufficient numbers to meet humanitarian objectives and placate refugee lobbyists, but not where numbers become politically intolerable. Why a ‘tolerability’ threshold exists is attributed, among other things, to irresponsible media reporting and lack of political leadership (ECRE 2004b), racism (Cohen et al 2002, Dummett 2001), and ethno-nationalism and welfare protectionism (Boswell 2002, Schuster 2002). For example, according to Betts (2004: 8), the ‘space in which asylum seekers can be accommodated in a way that is politically sustainable’ has been emptied by the ‘media-state securitisation’ of asylum, the failure of efforts to disperse asylum seekers and refugees within and around member states, and receiving community perceptions of the economic, social and political costs of asylum seekers. That said, some commentators note the existence of competing pressures in EU societies that work against the ‘space’ for asylum becoming completely closed. Steiner (2001), for example, notes how the desire for social harmony and effective governance is countered by the desire to retain a liberal identity, Boswell (2002) how the demands of party politics is countered by an embedded liberalism and international commitments, Lavenex (2001) how the quest for community security is countered by the desire to respect human rights, and Betts (2004) how the notion of state security is countered by the notion of human security. Indeed, Lavenex (2001: 200) suggests that the idea of a common EU asylum policy may have actually exacerbated these competing pressures, ‘linking national fears of losing control over immigration with the fears of waiving sovereignty to supranational actors’.}

In particular, Commission leaders have been shown to subsume EU asylum policy within their broader project of European Community building, much like Australia’s political leaders subsume it within their project of nation building. Further, while they treasure Europe’s liberal identity, they feel obliged to nurture or protect other identities as well, notably those associated with European citizenship and those of local communities within the EU that feel themselves fragmenting under the weight of forced
and irregular arrivals. Finally, any personal sense of solidarity they may have with asylum seekers is overshadowed by their desire for solidarity among EU members on asylum policy within the EU, and cooperation between the EU and non-EU states on extra-territorial measures.

In other words, for Commission leaders, the critical questions in asylum policy are not limited to ‘how do we protect the rights of asylum seekers’ or ‘how do we preserve our country’s sovereign powers’. Rather, they extend to questions like ‘how do we construct and forge community’, ‘how do we respect the identities of local communities while promoting higher level identities,’ and ‘how do we best express the unity and identity of this particular European Community.’

Few critical studies of asylum policy focus on these sorts of values and questions. And when they do, it is usually only to highlight how considerations of sovereignty or community clash with universal human rights principles, for example by sanctioning partiality, if not particularism. However, to avoid them is to fail to connect with the policy value maps used not only by Commission leaders, but all political leaders, since in politics, even at the supra-national level, pronouns do obviously matter (Brett 2005b). Further, it avoids the question that lies at the heart of asylum policy, at least

145 Not that the Commission leaders see these different identities as necessarily antithetical. For example, the Commission has actively promoted measures to combat discrimination against asylum seekers, and to encourage the social and economic integration of persons granted asylum; see, for example, the Commission’s ‘scoreboard’ on ‘fair treatment of third-country nationals’, http://www.europarl.eu.int [accessed 16 Aug 2005].

146 According to Brett (2005b: 31), ‘Pronouns matter in politics. “Uncle Sam needs you!” “We will never surrender”. “I have spoken”. “The government will be governing for you”. “For all of us”. Pronouns position speaker and audience; they gather some people together and exclude others; they elevate or disguise the self”. It is probably fair to say that, at least to date, the notion of the ‘demos’ – a people that by sentiment or tradition feels itself to be united politically – has rarely extended beyond national boundaries. Indeed, outside of moments of heart-felt sympathy or overriding strength of conviction, loyalties tend to settle or be concentrated at even lower levels, for example that of the family, neighbourhood, tribe or region. As Edmund Burke wrote: ‘To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections’ (in Patten 2000: 5-6). Or as Patten (2000: 11) observes of his experience of the EU, ‘People feel their primary loyalty in a political sense to the institutions of a nation state. When that nation state hands over
as far as the policy makers are concerned: namely ‘how can we best juggle universal values with values such as community, nation building and good governance’. Or to put it another way, how can we best care for ‘them’ while still caring for ‘us’? As former British cabinet minister, Stephen Byers, notes,

We mustn’t fall into the trap of saying … [community concerns about asylum seekers and other unauthorised arrivals] have been created by the right and if ignored will go away. That was the mistake made by a number of parties on the left elsewhere in Europe who went on to pay a heavy political price at the ballot box. This does not mean giving in to right wing populism. What it does mean is addressing the concerns that people have … [It] would be the soft and easy option to say this is not a priority and that by raising it we are playing into the hands of the racists and the right wing. But we cannot pretend to people that there isn’t an issue when for many there clearly is. To deny the concerns of people would give the appearance of being out of touch or of simply not caring (Byers 2003).147

This conundrum of ‘caring for them, caring for us’, will be explored further in the next chapter. Suffice to say here that if pronouns matter in politics, we need to also be mindful of the composition of the nouns they replace – that is, of who is being referred to by words like ‘us’, ‘we’, ‘them’ and ‘they’ – since the composition will vary between speakers and over time. Further, if we can’t avoid using pronouns, rather than decry their existence it may be more productive to focus on how we draw their boundaries, their means of access and entry, and potential bridging and integrative mechanisms. As Brett (2005b: 40) argues,

If you regard any talk of ‘us’ as illegitimate, it is not clear … who you are going to talk to. Nations are not simply formed and defined by their opposition to or difference from some Other; they are also formed and defined by shared experiences and collective memories. They have

real authority in order to protect its national interests to an international organization, the loyalties don’t travel with it. People may rationally comprehend that it’s in their interests that this should be done, but nobody feels a whoosh of pleasure when the acronym IMF or the words World Bank are [used] – nobody has yet climbed a mountain and put the European Union’s flag at the top I’m afraid – though I hope it will come to that’.

147 Former British Home Secretary, David Blunkett, expressed a similar view in 2004, when he said, ‘Governments of the left which fail to address their public’s concerns about immigration, security and law and order have been swept from power by the right, sometimes the far right. Putting our head in the sand is only an option if we want to go the way of the liberal left in Europe’ (in Sands 2004).
centres as well as borders … [Australia’s Prime Minister] Howard speaks persuasively from that centre. One does not counter him by arguing that the centre is empty, or does not exist, and that he is really only ever policing the borders. One stands in the centre with him and argues about its meanings and responsibilities, and tells different stories to one’s fellow Australians about their past and the bonds they share.  

Here the study of the JRS leaders is instructive, for in shades of the CS Lewis quote that, with Foucault’s, began the chapter, their approach to asylum issues is not dictated by the ‘geography’ of the physical world. Rather, their values were shown as simultaneously more universal and more personal than those of the other two groups of leaders surveyed. They revolve around building justice and humanity rather than building a nation or community, and around being good companions of people who lack a community’s protection rather than good governments of communities that enjoy it. They seek a strong moral code or discipline in asylum policy, characterized by a focus on just structures, respect for human dignity, and personal relationships with asylum seekers. In secular terms, they echo Kant in their claim that humans have dignity and are owed respect, and Aristotle in their efforts to practice and promote the humane virtues. However, it is their religion that is the source of their primary guiding lights, and in particular their understanding of the nature of God and their Jesuit mission, as refracted through the character and spirit of Jesus and Ignatius.

Not surprisingly, national borders do not carry the same significance for the JRS leaders as they do for Australia’s political leaders. However, they do not consider their aspirations in regard to asylum policy unrealistic or disloyal to their fellow Australian citizens. As J3 put it, ‘I have an international frame of reference, but I’m in Australia and I bring that back to Australia’. They share with political leaders the view that

148 In Brett’s (2005b: 40) view, ‘Because whenever [Howard] has evoked a national “us” he has been accused of really demonising a non-national “them”, Howard’s critics have been unable to develop any effective or plausible counter-strategies for talking to their fellow Australians’.

149 The term ‘humane virtues’ comes from Dowrick (1997: 4), who uses it to refer to the virtues of courage, fidelity, restraint, generosity, tolerance and forgiveness. Among themselves, the JRS leaders would probably use the term ‘Christian virtues’, which in the Catholic tradition covers the theological virtues (those pertaining to a person’s relationship with God) of faith, hope and charity, and the moral virtues (those pertaining to a person’s relationship with others) of prudence, justice, temperance and fortitude (McBrien 1981).
crafting policy is a juggling act, full of tensions, compromises and balances between legitimate but often competing values. Where differences occur, they stem mainly from differences in view over whose interests should normally take priority (asylum seekers), what values should be considered absolute (human dignity rather than national sovereignty), where balances should be struck (on the side of compassion and generosity), and what performance standards and measures should be included (eg international equivalence, public empathy, decency).

In their language of faith, the JRS leaders would probably sum up their values in terms akin to those previously quoted from the JRS charter, about being ‘an effective sign of God’s love and reconciliation’. Or in lines perhaps like those of Yancey (1995: 160):

In Jesus, God gave us a face, and I can read directly in that face how God feels about people …
By no means did Jesus eliminate all suffering – he healed only a few in one small patch of the globe – but he did signify an answer to the question of whether God cares.

Compared to this language of faith, human rights is a business language, good for communicating across cultural divides, or setting minimum standards for civil society, but unable to capture the real wellsprings or richness of these leaders’ values.150 It is particularly inadequate when it comes to their desire to relate to asylum seekers in ways that make the achievement of minimum standards appear only half the story, and perhaps less morally relevant than the cultivation and practice of qualities such as compassion, care, or love. Here they expose a shortfall in the language of human rights, of the kind identified by Hinman (2003: 234):

There is simply more to … relationships than rights, and to see close relationships exclusively in terms of rights is to either miss or to distort much of what is morally significant in them. When someone genuinely cares for another’s welfare for the sake of that other person, then questions about moral minimums are not usually in the forefront. Rather, the morally relevant questions are about what is best for the other person and what is best for the relationship.

150 Not that it is designed to, or would even try, for as Ignatieff (1999: 320-321) suggests, it is a mistake to conceive of human rights as a ‘breviary of values’. In his view, the language of human rights is simply a tool to ‘formalise the terms in which conflicts of value are made precise and therefore rendered available to compromise and solution’.
In sum, where Australian and European policy makers approach asylum issues with a mindset framed by concepts of nation building, good governance and community, the JRS leaders approach them with a mindset framed by concepts of justice, respect and relationship. Where the former seek a policy of minimum standards, the latter seek a spirit of accompaniment. And where the former raise the question of how policy makers can best ‘care for them while caring for us’, the latter raise the question of how policy makers can adopt a relationship-based approach to asylum seekers absent the religious vision and political freedom of the JRS leaders, and indeed whether it is right for them to even try. It is to these sorts of questions that we turn in the next chapter.
CHAPTER SIX: TOWARDS AN ETHICS OF CARE IN ASYLUM POLICY

I have always considered that the argument over whether policy should be ethical or simply carried out in pursuit of one’s national interests to be one of the more absurd debates you can have the privilege to catch on a late-night political chat show. It is without doubt the case that a policy which at least attempts to take account of ethical notions will always serve the national interest best. (Chris Patten)

In the preceding chapters, we have mapped the values being brought to discussions of asylum by Australian and European political leaders, and by leaders of the JRS. The values incorporate many aspects of human activity and aspirations, including nation building, good governance, community building, the protection or promotion of cultural identity, the quest for inter-governmental solidarity, the desire to build a just and humane world, and the desire to offer companionship to asylum seekers. A variety of personal and role-based values have also been identified.

In this chapter, we turn to the question of what we might make of all this, in the sense of locating these values in an ethical framework that is suitably unsettling and challenging to policy makers’ assumptions and fields of vision, whilst remaining within the realms of political reasonability. Once again, it entails a shift in methodological style and intent. Previous chapters have focused on understanding the meaning asylum issues have for policy makers, drawing first on archival records, then interviews, speeches and other documents, and then a comparison of the values of different groups of leaders. However, we now turn to a task of ethical reflection and imagination, teasing out and building on the implications of the ‘caring for us, caring for them’ conundrum that was identified at the end of the last chapter as something loosely shared by all the leaders, and the desire to maintain a relationships-based approach to asylum policy.

We start from a position that may not seem particularly promising. While the various groups of leaders we have surveyed may all share the ‘caring for us, caring for them’ conundrum, the values of the political leaders are clearly – and they would argue quite properly – biased towards the ‘caring for us’ side of the equation. Further, a standard dictionary definition of the term ‘care’ includes rather vague and open-ended phrases such as being ‘troubled or concerned about’, and wanting to provide ‘physical needs,
help, or comfort’, or exercise ‘protective and supervisory control’ (Wilkes & Krebs 1988: 167). Since all the values we have mapped arguably reflect these sorts of qualities, care might therefore seem too amorphous a concept to serve as anything more than a generic policy principle, and one which everyone can assent and lay claim to. Further, if it is a concept that can accommodate communal as well as universal values, it might seem potentially too hit and miss in coverage, or too much like a gun for hire, able to be appropriated in support of both opening state borders to asylum seekers, and closing them.

Nevertheless, it is this same poly-nodal quality of care that invites a closer look at it as an ethical cum political lens through which we can view asylum. Being claimable by all three sets of leaders surveyed, it has the potential to be a common language for dialogue. Further, being a relational value – that is, typically ‘other-oriented’ – it may offer a window through which a secular form of the relationships-based approach of the JRS leaders can penetrate asylum policy making, helping inform and contain growth in the ‘us – them’ divide, and potentially reducing it.

The chapter therefore considers asylum policy from the perspective of what has come to be known as an ethics of care. It begins by considering what might reasonably be asked of ethics in a public policy context. An account of the ethics of care is then provided, followed by a discussion of the problems that may be encountered in its application. In these two sections, particular attention is paid to the work of Joan Tronto, who has done more than most to lift debate about care from the realm of moral psychology into that of politics and public policy, and to change care’s reputation from being a ‘women’s ethics’ to an ethics that includes values often associated with, but by no means confined to women. Finally, aspects of Australia’s current asylum policy are reviewed in the light of an ethics of care, for what it might say about or bring to them.

The basic purpose of the chapter is to outline and justify a conceptual framework within which the design, administration and evaluation of asylum policy can take place, in which care is a central theme.
ETHICS IN PUBLIC POLICY

To explore an ethics of care without first reflecting on the broad ethical and political context within which this endeavour occurs would be a risky business. Context might not seem important when ethics is viewed as a matter of what should be in the light of abstract principles, rather than what is best here and now in light of concrete particulars. However, to not ground discussion in this way risks having one’s views dismissed as unrealistic or naïve, especially when the area of interest is public policy.¹

Several of the more important contextual features that ethics in public policy must deal with are outlined below. It is followed by discussion of the implications of these features, in terms of the criteria that an asylum ethic might need to meet to be taken seriously by states.

Features of asylum’s ethical and political landscape

Discussion of the ethics of asylum policy can be set within three broad contexts: the world of ethical theory, the world of politics, and the world of global refugee and humanitarian movements.

The fractured world of ethical theory

As Gibney (2004) notes, people who criticise asylum policy on ethical grounds often overlook the fact that ethics can itself be subject to conflicting values and different interpretations. In respect of conflicting values, we need look only to the diverse mix of values held by the Australian, European and JRS leaders surveyed in earlier chapters. In respect of conflicting interpretations, the following observation by Banks (2004: 75) on the current state of ethical theory is relevant:

At a time when the search for grand, all-embracing and universally applicable theories is in question, when the awareness of difference, diversity and pluralism is growing, the desire to

¹ Setting asylum policy within a context is also consistent with one of the ‘home truths’ of an ethics of care: that knowing the context often makes a difference to how we view and judge it.
develop or to adhere to a single systematic theory that can account for all aspects of morality is less pressing than it was in the past. Indeed, … there has been a strong critique of the whole idea of ethical theories per se, especially if ethical theories are regarded as necessarily universally applicable and foundationalist … Such theories, it is claimed, are unable to capture the ‘messiness’ of life – the particularities and complexities of each situation, relationship or conflict … This has led some philosophers to propose different kinds of theory (non-foundational, relativist or pluralist) and others to eschew ethical theory altogether.2

Of particular relevance for asylum policy is the divide that writers like Gibney, Banks and others observe between impartial, detached type approaches in ethical thinking, like those adopted by classical liberals and utilitarians, and partial, situated approaches, like those adopted by communitarians.3 As Gibney (2004: 19-20) notes, where advocates of an impartial approach to asylum see states as ‘obliged to take into account the interests or rights of the human community in its entirety in decisions on entry’, the advocates of a partial approach see them having the right ‘to decide admissions according to their own criteria by appealing to the importance of political and cultural autonomy for communities’.4

2 The popular notion that there is only one ‘really’ moral point of view – that associated with impartial reasoning and universalizable rules and principles – has certain attractions. For example, it seems to put all people on equal footing, be free us of the vicissitudes of daily life and distorting affections, and provide simple and elegant formulae to cut through the ‘noise’ generated by ethical dilemmas. However, in addition to the reasons given by Banks, tensions emerge when we turn to asking how we can best promote private and public goods like love, trust, friendship, social capital and civic-mindedness, or accommodate political concepts like representativeness and accountability. For these and other reasons, the ‘one moral view’ position faces sustained challenge from other positions, including those advanced by MacIntyre (virtue ethics), Rorty (pragmatism), Habermas (communication or discourse ethics), and Young (situatet ethics).

3 Examples of the former include Singer and Singer (1988), Carens (1992, 1991) and Dummett (2001), and the latter Walzer (1983).

4 Gibney provides a comprehensive review of both perspectives in regard to asylum policy. In his view, both are powerful ethically, but both also have weaknesses: the former failing to provide for legitimate claims and interests of citizens (eg the potential effects on unlimited entry on the welfare state), and the latter its assumption of the legitimacy of current state boundaries, its elision of the claims of states and those of nations or cultures, and its failure to account for the harm states do.
The logic of these two approaches leads in opposite directions on whether restrictions on asylum seekers can be ethically justified, but both are usually willing to make concessions to soften their harder edges. For example, impartialists are likely to concede that entry controls are justified when asylum seekers present a real and significant risk or threat to the receiving community, for example in terms of public order or security, political stability, cultural integrity, ecological capacity, economic well-being, or public support for welfare state type activities (Dummett 2001, 1992, Carens 1992). Some may encourage a form of cost-benefit analysis, whereby controls are justified if the costs imposed on the receiving community outweigh the benefits accruing to the asylum seekers (Singer & Singer 1988). Similarly, partialists may concede that a community’s right to closure is tempered if it has contributed to the cause of the asylum influx (Carens 1991), or if the costs of helping the asylum seekers are low – the humanitarian or mutual aid principle (Gibney 2004, Singer 2002, Walzer 1983). Or they may believe that if states don’t help each other out to provide access to some form of safe state membership for everyone, then the moral legitimacy of the state system as a whole will be eroded (Carens 1991). Finally, they may simply believe that states and communities are subject to similar ethical requirements as individuals, for example in regard to their practice of moral virtues such as generosity or decency (Brennan 2003).

These sorts of arguments usually help narrow the divide in the implications of adopting either a partial or impartial approach to asylum. However, depending on the extent of the concessions made, they also risk being accused of sacrificing too much ethical force for the sake of practical relevance, or being too accepting of the status quo, especially the system and structures of the modern state.5

5 For example, according to Betts (2005: 493-494) the humanitarian principle ‘remains rooted in the empirical consequences (ie the structure of the modern nation state, the “backlash” of the public, securitisation, etc) of a communitarian logic and thereby essentializes the idea of a political community based on the modern state system’. The problem with this argument is that what most accounts really essentialise is not the state system but the notion of particular political communities as distinct from one global one. The real question is whether we can conceive of any particular political community that will in practice accept an unconditional open door approach to asylum, or whether all will seek to impose restrictions of some kind.
The problems created by the fractured nature of ethical theory are compounded by a culture, at least in many western countries, in which the authority to make ethical judgments has been effectively democratised. For example, no single person or agency, including the UNHCR, churches, courts, universities, or assorted human rights bodies command universal respect as a final arbiter of merit on asylum policy. Any public expressions of moral outrage they might make sit well with people who hold similar views, but are often seen by others as sanctimonious, patronising, or poorly informed.

Another complicating factor is ambivalence about the role of reason and emotion in ethics. The idea that reason can take different forms has long been recognised, including in Aristotle’s distinction between scientific, technical and value rationality.\(^6\) However, recent writers, starting with Weber, have been at pains to emphasise how easily reason can fall hostage to particular ends, whether those of an individual, an organization, or an entire society.\(^7\) From this view, when reason is not subject to a variety of checks and balances, it risks losing its ethical integrity, if not its very reasonableness.\(^8\)

---

6 Flyvbjerg (2001: 56-57) describes Aristotle’s different types of rationality as follows: ‘Whereas \textit{episteme} [scientific rationality] concerns theoretical \textit{know why} and \textit{techne} [technical rationality] denotes technical \textit{know how}, \textit{phronesis} [value rationality] emphasises practical knowledge and practical ethics … \textit{Phronesis} thus concerns the analysis of values – “things that are good or bad for man” – as a point of departure for action’. In Aristotle’s view, value rationality is more important in politics than scientific or technical rationality.

7 Some might argue, for example, that this has been the case with Immigration’s administration of its portfolio responsibilities, with arguably reasonable injunctions – eg to ensure the lawful and orderly entry of people, and detain anyone who officials reasonably suspect is unlawful – becoming the sole parameters for reasoning about asylum policy, or about personal conduct in administering policy. Issues relating to the internal culture of Immigration are considered later in the chapter.

8 When there are contrasting claims to reasonableness, each claim must itself be subjected to reasoned assessment, and what remains agreed as reasonable is usually only what others are able to understand and accept (O’Neill 2000).
However, if reason has lost some of its shine, the reverse is true of emotion, which is increasingly being given a seat beside reason and will as a valued contributor to ethical thought and action.\(^9\) Little (1999: 8), for example, describes the emotions as being

\[
\ldots \text{the muffled but surprisingly exact language of human beings everywhere. There’s nothing that can cross national borders more rapidly, or cut through the pretensions of global capitalism more decisively, than a song – or the sound of a child crying, of men and women laughing, or even doing deals in amateur sign language face to face.}
\]

According to this line of thought, if we know how to listen to and work with emotions, they can help point to where values lie;\(^10\) add pliability to ethical vision and impulse;\(^11\) serve as a means of making or confirming good decisions;\(^12\) and fuel resolve to carry them out. Nor are they merely of instrumental value. If we consider that particular emotions – say compassion, generosity, courage, or pride in achievement – enrich and

\(^9\) According to Evans (2001), Nussbaum (2001), Tallon (1997) and others, taking emotions seriously in ethics restores to them the importance they once held for Enlightenment philosophers like Hume and Smith, and earlier philosophers like Aristotle. For example, as Evans (2001: xi) notes, ‘In [Adam Smith’s] first book, The Theory of Moral Sentiments, he proposed that emotions were the thread that wove together the fabric of society. Like Hume and Reid, Smith did not regard emotion and thought as implacable enemies. For all of these thinkers, it was rational to be emotional, and no science of the mind could be complete without also addressing the heart’.

\(^10\) For example, according to Nussbaum (2001: 1), emotions are ‘intelligent responses to the perception of value’, generating heat and intensity because they concern people, goods or projects that we hold important. For de Sousa (1987: 191), they work side-by-side with logic in determining what is rationally and ethically salient, ie ‘what to notice, what to attend to, what to inquire about’. For Damasio (1994: viii), they ‘point us in the proper direction … [and] take us to the appropriate place in decision-making space’. Damasio, a neurologist, draws a distinction between feelings and emotions, arguing that ‘emotion and related reactions are aligned with the body, feelings with the mind’, and that emotions precede feelings (2004: 6-7). However, he believes the two are intimately connected, with body and mind forming ‘the overtly disparate manifestations of a single and seamlessly interwoven human mechanism’. In his view, ‘feelings are the expression of human flourishing or human distress … Life being a high-wire act, most feelings are expressions of the struggle for balance, ideas of the exquisite adjustments and corrections without which, one mistake too many, the whole act collapses’.

\(^11\) According to Nussbaum (2001: 399) emotions like empathy and compassion are especially important because they provide ‘a bridge from narrow and self-referential concerns to a broader moral world’.

\(^12\) For example, whereby we try ‘to detect a resonance or dissonance between the proposed action and one’s whole nature’ (Tallon 1997: 12).
enlarge personal or community identity or wellbeing, then they constitute part of our very notion of what is good or right.

All these are interesting developments, but the main point being made here is that the world of ethics is an unsettled and highly contested place. So much so that one might wonder whether ethics has much to contribute at all to debate on asylum, other than a smorgasbord of high-sounding arguments from which governments and their critics can select at will to both support and oppose the same policy.

*The hard world of politics*

Indeed, one might question whether ethics has any place in politics at all. For as Harries (2005) notes, there is a longstanding division between those who see politics as an amoral activity centred on considerations of power and self-interest, with ethics an unaffordable luxury, and those who see it as an activity centred on the pursuit of different visions of human relationships, in which states are subject to the same standards of behaviour as those that apply to individuals.

Both are arguably flawed positions. In the former, ethics may still guide how interests are conceived and which options are chosen to protect or advance them.\(^{13}\) In the latter, the options enjoined by ethics are almost invariably constrained by competing interests, if not competing ethical visions.\(^{14}\) Further, in practice a more common division is

---

\(^{13}\) In other words, while all states arguably act to protect and further their own interests, how they conceive these interests and how they pursue them can differ in ethically relevant ways. Even when good confronts good – or bad confronts bad – there are usually better or worse ways of working in and through such situations. For whatever the option chosen, a person usually has the chance to act more or less virtuously in carrying it out (MacIntyre 1985). Further, if one way meets the needs of both groups better than others, or frustrates them less, then it is reasonable to claim it is the more ethical way (Meynell 1976).

\(^{14}\) While collective entities like states, companies, banks, and so on can all be viewed as moral agents, we usually place more limited demands on them than we do on individuals. As Harries (2005: 13) notes, These entities exist for certain purposes, and these purposes set limits on the extent of their virtue. If compassion and generosity were to become the guiding principles of a bank, it would soon go out of business. States exist to promote and protect their own interests and that of their citizens. Their morality
probably along the lines of that described by Uhr (2005): between those who see public officials and states as obliged merely to meet minimum standards of competence, incorruptibility, lawful behaviour, accountability and so on, and those who see them as obliged to pursue ‘higher possibilities’, such as acting fairly, prudently, and responsibly, consistent with what might be expected of moral agents of good character and conscience.\textsuperscript{15}

Nevertheless, even in Uhr’s world of ‘higher possibilities’, competing visions, pressures and responsibilities are bound to exist, and the right or good thing to do is not always clear. As John F Kennedy (1965: 26) wrote, even a leader of good character and conscience

\begin{quote}
… cannot ignore the pressure groups, his constituents, his party, the comradeship of his colleagues, the needs of his family, his own pride in office, the necessity for compromise and the importance of remaining in office.\textsuperscript{16}
\end{quote}

\textsuperscript{15} This is the context in which one should view the comment in chapter three, about asylum policy makers keeping one eye on the minimum standards they must observe and the other on what they can get away with. Such attitudes may offend someone with high ethical expectations of government, but not those who focus on baseline expectations. As Uhr (1990: 8-9) notes, for a public official to ask ‘what can I get away with?’ can be just as appropriate a question as asking ‘what ought I do?’ – particularly if put as ‘what can I justify?’ In his view, ‘The advantage of approaching ethics through this rather base question of “What can I get away with?” is that it draws attention to two of the chief political elements of official ethics which are frequently ignored or overlooked. These two elements are: first, the self-interested motivation which is the distinctive feature of liberal political theory (ie its “realism”); and second, the logic of public accountability within liberal constitutionalism which is designed to modify the private use of public office. The temptation of the official to think in terms of “what can I get away with?” is checked by the requirement to defend the record in terms of whatever is publicly justifiable; so that justice enters through the side door of due process rather than the front door of ethical substance’.

\textsuperscript{16} It should nevertheless be noted that Kennedy did not endorse a crude populism. In his view (at 30), ‘The voters selected us … because they had confidence in our judgment and our ability to exercise that
Further, when we turn specifically to asylum policy, there are certain aspects of our political landscape we need somehow to accommodate, if only because they are there and they are likely to remain there. One is the current state-based system of organising human affairs, which despite pressures from above and below,\textsuperscript{17} seems destined to survive into the foreseeable future (Wang 2002). A second is the authority that states have to control entry and membership. As the High Court of Australia confirmed in 1992, a state has

\begin{quote}
\ldots the right to refuse to permit an alien to enter the State, to annex what conditions it pleases to the permission to enter, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests.\textsuperscript{18}
\end{quote}

Indeed, it is possible that some of the sensitivity associated with asylum and immigration issues worldwide may be due to these being among the few remaining areas where states do still have great power, compared, for example, to areas such as information and telecommunications, commerce and the environment. Finally, a third aspect to accommodate is the democratic orientation of many states, including Australia. As shown in chapter four, Australia’s policy makers are acutely aware that they operate in a political system that makes their ability to exercise leadership on asylum conditional on them being able to convince the electorate that they are not at the mercy of unauthorised arrivals. Further, that they are exercising their public responsibilities properly, in the sense of acting lawfully, maintaining order, meeting real need, regulating entry consistent with absorption capacity, being accountable, and being guided by reason rather than emotion.

\begin{quote}
judgment from a position where we could determine what were in their own best interests, as a part of the nation’s interests. This may mean that we must on occasion lead, inform, correct and sometimes even ignore constituent opinion, if we are to exercise fully that judgment for which we were elected’.
\end{quote}

\textsuperscript{17} Pressures from above include the compression of patterns of production, financing, culture, communications, and the way in which the world is increasingly conceived (Robertson 1992, Hannerz 1989). Pressures from below include the continued and perhaps increasing segmentation of society according to particularistic identities, values and interests (Bauman 1998, Habermas 1994).

\textsuperscript{18} Brennan, Deane & Dawson JJ, in \textit{Lim v MILGEA} (1992) 176 CLR 1 FC 92/051 at 27.
The above aspects of asylum’s political landscape, particularly the last one, invite debate on asylum issues to be set ultimately in the context of the inherent tension in our political system between the values and practice of liberalism and the values and practice of democracy (Gibney 2001). The horizons and benchmarks of these two values differ, and as political practices they can be subject to marked swings in public moods. The balances struck by leaders are rarely satisfactory, even to them, and are usually contingent because domestic and international circumstances invariably change.

The still harder world of life

The third key feature of the asylum policy landscape – the scale of inequity in global human living conditions, opportunities and treatment – is a challenge to both ethics and politics. There are, to put it bluntly, as many stories of hardship and misfortune around the world as we care to open our eyes to. Refugees may be considered a special category of needy people, in that they seek to escape not just a hard life, or discrimination, or the effects of displacement by development or natural or man-made disasters, but persecution involving a threat to their life or freedom.19 But they alone numbered an estimated 8.4 million at the start of 2006, and comprised just part of a larger group of ‘persons of concern’ to the UNHCR totalling over 20.8 million (UNHCR 2006b).20 Nor are refugees and other persons of concern to the UNHCR the only people moving across state borders without formal permission from receiving states. They are joined by large numbers of irregular migrants in search of work, family reunion, or better living conditions.

---

19 This definition of a refugee follows that adopted in Articles 1B and 31(1) of the Refugees Convention. Other definitions are possible, for example that employed by the Organization for African Unity in 1969, which includes people fleeing war, or by the UNHCR in describing ‘persons of concern’, which covers those for whom it takes responsibility at a particular time, including refugees, asylum seekers, internally displaced persons and returnees. In popular usage, the term is often employed indiscriminately, covering anyone who seeks refuge or relief. However, this habit does not do justice to the real distinctions that exist, and hinders constructive policy debate.

20 This figure does not include over four million Palestinians covered by the UN Relief and Works Agency for Palestinian Refugees in the Near East.
Many refugees want to return home once conditions permit. However, most experience exile for many years, usually in camps, with no chance either of returning home or achieving local integration. In 2003, for example, two thirds of all refugees, or 6.2 million people, had been displaced for five years or more, leading some to claim they had been ‘forgotten’ or ‘warehoused’ by the international community. According to Castles (2006), the average duration of all major refugee situations in 2003 was seventeen years, up from nine years a decade earlier.

Another feature of asylum is that it is an overwhelmingly poor world issue. The countries of origin of refugees, the main refugee-hosting countries, and countries affected by internally displaced people, are almost entirely in low or middle-income economies. For example, in 2005 seven of the top ten refugee-hosting countries fell into this category: Pakistan, Iran, Tanzania, China, Chad, Uganda and Kenya (the three high-income countries being Germany, the United Kingdom and the United States) (UNHCR 2006a, 2006b). Further, nearly half (331,900) of the 668,000 asylum applications lodged worldwide that year were submitted to governments or UNHCR offices in countries outside the top fifty industrialised countries. Yet some of these latter countries spend vast sums on their asylum systems, many times the amount spent by countries hosting larger numbers, or the annual budget of the UNHCR.21

In the face of this global dimension of asylum, most developed countries have adopted some combination of four different ‘ethics’, in the sense of specific modes of conduct:

- an ethic of proximity, whereby priority is given to refugees who reach their country’s borders;
- an ethic of association, whereby priority is given to refugees who have historical or family ties to their country;

21 The annual expenditure of Western countries on their asylum systems is estimated to be in the vicinity of US$10 to 12 billion (The Economist 2003, Casella 2002). According to Aristotle (2002: 94), in 2001 ‘the total sum of funds spent by European countries, the US, Canada and Australia on intercepting and processing asylum applications globally was more than ten times the total amount they provided to the UNHCR to protect, and find durable solutions for the 21.5 million people under its mandate. On a per capita basis that figure is in the vicinity of 500 times more’. 
• an ethic of need, whereby responses are tailored according to differences among refugees (e.g., between Convention refugees and others in humanitarian need, or between those who come directly from a country of persecution and those who come via other countries in which their basic protection needs were or could have been met, or between those whose protection needs prove short term and those whose protection needs prove long term, or between those who reach its borders and those selected from distant refugee camps); and

• an ethic of prevention, whereby responses include preventing or alleviating refugee-producing situations (e.g., through various forms of political and humanitarian intervention). Efforts to build the reception capacity of countries of first asylum and transit may also be part of this approach, whether to ease the burden on these countries, facilitate repatriation efforts, or lessen the need or incentive for secondary movement.

All four ethics have arguably helped shape asylum policy making in Australia in recent decades. However, an ethic of proximity is the default position, in the sense that while the Refugees Convention does not oblige a state to regularise the status of refugees who reach their territory, under the non-refoulement clause it does oblige them not to return or send the refugees to any place where their life or freedom would be threatened. Consequently, unless another country agrees to take them, or they are deemed unworthy of asylum, or they cease to be refugees, then grant of some form of residency by the receiving state becomes virtually a fait accompli.

22 For example, an ethic of association arguably influenced Australia’s decision to take large numbers of Indo-Chinese refugees in the 1980s; an ethic of need its introduction of a segmented protection visa system during the unauthorised boat arrivals of 1999-2001 (e.g., to help address problems associated with the secondary movement of refugees) and its recent decisions to take large numbers of African and Burmese refugees; an ethic of prevention its participation in the orderly departure program and comprehensive plan of action for Indo-Chinese in the 1970s and 1980s, and its recent development assistance to countries like Afghanistan; and an ethic of proximity its onshore protection program and ultimate acceptance of refugees from its offshore processing centres in Nauru and PNG when no other country could be found to accept them.

23 For example, for a reason listed in Article 1F of the Convention.

24 For example, under the cessation clauses in Article 1C of the Convention.
Criteria for an ethics appropriate to asylum policy

Where then, does consideration of all of the above sorts of contextual factors leave us in thinking about the ethics of asylum policy? Three conclusions seem reasonable. Firstly, Gibney (2004: 15-16) is right to say that ethics should not only ‘be informed by a convincing value or furnish a credible moral ideal’, but also ‘take account of the character and capabilities of the agents at whom it is directed, and of the probable consequences of their actions’. For example, unless the values and ideals pursued in asylum policy are tempered by the responsibilities that political leaders have to their electorates, they and their critics will often be talking at cross-purposes, and the issue of what is reasonable to expect of them will not get the attention it deserves. Further, even if the leaders personally are committed to liberal values or ideals on asylum, unless they carry their community with them a social and political backlash may occur that ‘sets back the whole attempt to implement morally defensible practices’ (Gibney 2004: 16-17).25

Secondly, Uhr (2005) is also right to say that ethics should encourage not only accountability, but also personal responsibility. For example, without accountability, political leaders may define the public interest in their own terms, and suffer no penalty if they fail to achieve performance standards and policy outcomes. But without personal responsibility, they may confuse doing what is right and good with doing only what is expected of them, and fail to recognise the importance of personal judgment and the exercise of discretion in making and administering policy. As Uhr (2005: 45) says, ‘no code or form of guidance can take the place of individual discretion and judgment about the appropriate use of public power in particular circumstances’.

Finally, taking into account both these conclusions and the diversity of values we have seen being brought to asylum issues in previous chapters, it seems right that any ethical approach to asylum policy be required to meet three basic criteria: firstly, relevance to insiders, secondly, magnanimity in the values it accommodates, and thirdly, an ability to

25 Gibney cites Germany as an example, where an influx of asylum seekers in the 1990s led to it moving from one of the most liberal asylum regimes in the EU, to one of the most restrictive.
speak to the relational and structural aspects of policy, or what we might call its ecological aspects. Each is explained in more detail below.

Relevance to insiders

Any ethics worth its salt is likely to often make us restless and discontented with the way things are: it will have us imagining alternative ways of acting or being, and expecting more of ourselves and of others. However, to sustain our attention and enthusiasm, it must also be practical, especially when we are talking about an ethics suitable for politics and public policy. That is, it must be realistic about the constraints that liberal democratic forms of government impose on leaders and communities, and appropriately modest in its demands. Further, as O’Neill (2000: 7) says,

It must address the needs of [individual or state] agents who have yet to act, who are working out what to do, not the needs of spectators who are looking for ways of assessing or appraising what has already been done.

In other words, it needs to be able to help imperfect and constrained individuals and organizations make reasonable and responsible decisions in concrete situations.

Importantly, an ethics that makes modest demands need not close the door on radical visions and actions, but it is likely to urge prudence. For example, if the consequences of a particular policy proposal are uncertain, then caution is arguably not only politically understandable, but ethically responsible. It is consistent with the precautionary principle, whereby issues of risk and uncertainty are taken seriously, and a buffer is provided against unexpected and potentially irreversible deleterious consequences. It is also consistent with a respect for mundane virtues like order and

26 The concept of ‘ecological’ aspects of policy is taken from Sachs (2000).

27 The precautionary principle underlies environmental ethics, eliciting the general refrain that ‘prudent pessimism should be favoured over hazardous optimism’ (Jacobs 1991: 100). In the case of asylum, public debate often becomes polarised between those who seem unnecessarily fearful about the risks and impact of an asylum seeker influx, and those who seem unreasonably blasé. For example, Dummett (2001), Singer and Singer (1988) and others argue for an open door policy in the face of global asylum and humanitarian needs, with limits being ethically justified only when numbers appear about to cause
stability, which as Harries (2005: 16) notes, ‘do not constitute a sufficient condition for anything’, but ‘are a necessary condition for everything whose achievement and smooth functioning require a degree of predictability and continuity’. Among these things we might include the achievement and smooth functioning of community, and perhaps also a political system of liberal democracy.

**Magnanimity**

As noted earlier, Gibney rightly claims that ethics should involve considerations of values and ideals as well as consequences and capabilities. However, as we have seen from previous chapters, asylum issues engage a wide variety of values and ideals, which we suggested could best be brought together under the broad rubric of a ‘caring for us, caring for them’ conundrum. For an ethical approach to focus only on one or two of the values within these clusters would therefore be myopic, if not unethical in its refusal to engage with all of what people actually value. Indeed, it risks alienating more people than it attracts.

A second criterion for an ethics on which we might base asylum policy is therefore magnanimity, or respect for the diversity of values associated with asylum issues. This does not entail refusing to sort the values into a preferred order when necessary, or to strike balances in which some gain at the expense of others, for unless all values align perfectly choices and compromises are inevitable. However, it does require all values to be surveyed and voiced in public debate, taken into account in policy decisions, and addressed in policy appraisals.

---

social, economic or political harm. However, as Gibney (2004) notes, crisis points are difficult to determine, especially when integrative difficulties may emerge only after some years, and the resilience or accommodative capacity of a receiving community is subject to change. Further, a state on the brink of chaos may have difficulty curbing the flow of people that has brought it to such a condition. In his view (at 223), ‘Impartialists and other ideal theorists who stress the importance of consequences often assume a knowledge of the likely effects of population flows that is simply unavailable to contemporary governments’.

28 Any idea that all values are equal in value would seem to void our whole understanding of what values are and how they work – or at least how we work with them.
Importantly, this criterion can exist independent of whether or not we believe that the value orientations of impartial and partial ethical approaches are fundamentally incompatible. Theorists on both sides tend to mark out their territory, but then bend over backwards trying to accommodate the claims of the other. For example Singer (2002), who supports an impartial approach, argues that a ‘one world’ moral standard can accommodate preferences based on nation states and kith and kin, while Walzer (1983), who supports a partial approach, accepts that a community’s moral right to regulate entry might be constrained in the case of refugees. The term ‘value orientation’ therefore means just that: a willingness in certain circumstances to give some values more weight than others, while providing for these other values to the extent possible.

That said, the criterion of magnanimity does invite a search for a conceptual framework and language that can serve as a bridge between impartial and partial value orientations, and make juggling them easier. It also invites a search for processes and practices that will make for constructive dialogue between the two, without necessarily assuming that they will ever be entirely comfortable together, or even should be.29

*Ability to speak to ecological aspects of policy and politics*

The final criterion that might be asked of an ethics for asylum policy – and implicit in the very notion of public policy – is that it addresses what Sachs (2000) calls our ecological lives, or the relationships, organizations and structures that fill the space between the individual and the universal.

---

29 One might argue that magnanimity is built into the structure of liberal-democratic political systems, and need no other vehicle of expression. For example, it might be argued that constitutions, political parties, interest groups, an independent judiciary, a free media, advocacy groups and so forth provide all the checks and balances needed to give voice to all the values involved in asylum policy, and there is no need for any bridging language or frame of reference. However, the basic insight of virtue ethicists still applies: a structure that provides for competition among values is important, but so are virtuous agents to ensure fidelity to its underlying purposes, integrity in procedures, and prudence in value adjudication. Otherwise, to extend an argument put earlier (see fn 15), a legitimate question like ‘What can I get away with?’ can take on the more sinister tone of ‘What can I hide?’
All ethics arguably has a base in relational ontology, that is, a view of human existence as populated by real and imagined relationships that provide structure, coherence and meaning. Different approaches in political ethics stress different aspects of these relationships, or have different views about their basic purposes. For example, liberal and human rights approaches tend to construe them in contractual terms, and as serving individual ends. By contrast, communitarian approaches tend to construe them in natural or organic terms, and as serving social ends. However, all agree that relationships play a central role in personal and communal wellbeing and identity. Further, that they are shaped by many factors, and feature interactions of various types, strength and durability.

In this context, it is reasonable that an ethics for asylum policy take what is good or bad for relationships as its central touchstone or point of departure. Further, since the reach of real and imagined relationships is potentially open-ended, this analysis should include not only what is good or bad for relationships within the communities that receive asylum seekers, but also what is good or bad for relationships between these receiving communities and the global population of asylum seekers. That is, their relationships with not only the asylum seekers who arrive at their borders, but also those in camps and other temporary living situations around the world.

One might, of course, argue that the nature of politics, like the nature of family, means that we are not starting with a level playing field. As Uhr (2005: 136) notes, ‘Democratic politics celebrates the open and public management of partial as distinct from impartial relationships’. From this view, what is good or bad for one’s own community and voting public is the primary touchstone in politics, and achievements in the way of social harmony and social capital are to be protected, conserved, and never taken for granted. Even a strong advocate of open borders like Dummett (2001: 18) concedes that a receiving community has a right ‘not to be submerged’:
We each need to be able to feel at home somewhere; not just in some locality, but within the institutions and among the groups of those we are bound to by common endeavours and concerns.\textsuperscript{30}

However, politics does not have to be isolating. A sense of relationship and community can extend beyond the bounds of citizenship and the nation state, and the practice of partiality can be limited to what is necessary rather than what is merely comfortable, easy or expedient. Much ultimately depends on how we assess success in politics. Winning and holding office will always be important, but when we adopt an ecological point of view, other factors also become relevant. These include how well leaders juggle a variety of values rather than a few, whether they act in ways that on most accounts are more rather than less virtuous, and how well they build or lay foundations for new relationships as well as sustain old ones.

**CARE AS A POLITICAL ETHICS**

In the previous section, after considering the ethical and political context of asylum policy, it has been argued that an ethical approach to such policy needs to be relevant to insiders, magnanimous in the values it accommodates, and ecological in orientation. In this section, we turn to explore the nature of an ethics of care, as a first step in seeing whether it can meet these requirements, and what its implications for policy might be.

The reasons for considering an ethics of care were given in chapter one, and in the introduction to this chapter. They include being a way to follow through on the ‘caring for us, caring for them’ dilemma that emerged in the preceding chapters, its related potential as a common language about asylum, and the hope that it might be as evocative as it is ordinary. That is, that it can capture and engage creatively with more of the values involved in asylum issues than is possible under other approaches, for example those centred on the law, human rights, or humanitarianism.

\textsuperscript{30} Dummett (2001: 20-21) distinguishes between the right ‘not to be submerged’ and ‘the mendacious use, in circumstances in which it is entirely inappropriate, of the emotive concept of being swamped, in order to deny the just desires of would-be immigrants and refugees’.
This is not to dismiss the validity or usefulness of these other approaches in thinking about asylum, but simply to say that they are incomplete, and often readily admit to being so. For example, the law at best affords only a skeletal structure for fair and just relationships, and begs the question of how and why good laws come about, and how they can be sustained. Further, as noted previously, there are not only areas of asylum on which the law is silent, but even when the law does have something to say, differences in interpretation can still occur, as shown by the frequency of split decisions among Australia’s Federal and High Court judges. Similarly, the language of human rights is good for communicating across legal and cultural divides, articulating the entitlements of persons-as-individuals, and setting minimum standards. However, it has little to say about the entitlements of persons-as-community, and can be unsympathetic to people with conflicting responsibilities, for whom it can sound shallow. Therefore, like law, it begs the question of where rights come from, and how they take effect and are sustained. And whatever their origins, in practice rights still take effect only when others are willing and able to recognise them. As for humanitarianism, its conceptual and analytical content is hard to pin down, having in popular use become a very loose, catch-all type term. Even when linked to a core principle like a duty to help when the cost is low (Gibney 2004), it points to a useful bottom-line, but not much else. Nor does it give much guidance on how this cost might be calculated. In sum, all three approaches are rather blunt and sometimes inappropriate tools and frames of reference when it comes to dealing with the complexity of the individual and group interactions that pervade issues of asylum.

The following discussion of an ethics of care begins by looking at its origins, then developments in how it can be understood and applied in a specifically political and public policy context.

31 It can also have some potentially unintended effects. For example, according to Gibney (2005), the growing culture of human rights in liberal-democratic states is paradoxically one of the reasons behind these states’ growing interest in extra-territorial measures to control asylum seekers, for it has brought with it too many domestic constraints on their policy freedom.

32 Another potential problem with rights-talk is identified by O’Neill (2000: 126), who argues that, ‘For the more powerful, who could do most to reduce others’ need, concentration on rights and recipience may mask recognition of their own power and of the real demands of obligations’.
Care’s origins

In ethics and politics, the concept of care has long played second fiddle to that of justice. Why this is so is largely a matter of speculation. One factor might be the sweeping social and economic changes of the past few hundred years, with impartial universal principles being seen as the best way to adjudicate issues arising in the shift from communal to cosmopolitan societies, local to global markets, and hierarchical to democratic forms of government (Tronto 1993).\textsuperscript{33} Another factor might be care’s long association with women rather than men, private rather than public life, and certain forms of public service or vocation, such as nursing or religious life, rather than politics and government. Perhaps too the concept of care has never really stirred the imagination like justice has. Or promised the same level of precision and rationality as the concept of utility, with its image of a simple calculus of costs and benefits. Or appeared to guarantee the same level of respect for individual worth and autonomy, as in a Judeo-Christian or Kantian view of the world. Instead, it has perhaps conjured only an image of worry, vulnerability and dependency, and a life of unsettling and difficult to handle emotions like love, grief, anger, fear and resentment.

However, since the 1980s a body of literature under the broad rubric of an ethics of care has emerged to challenge the dominance of the justice paradigm. Reflecting the general flux in ethical theory noted earlier, this literature is part of – and has contributed to – a resurgence of the view that humans are interdependent rather than atomistic entities, that knowledge is emotional as well as rational, and that ethics is about reflecting on concrete particularities as well as abstract universals. It also reflects two other trends: firstly, a partial collapse in the boundaries between private and public life, with functions once considered personal or family matters becoming open to market organization, public scrutiny and state intervention (Ungerson 1997), and secondly, a growth in public institutions espousing a broad philosophy of care in fields as diverse as health, education, welfare and the environment.

\textsuperscript{33} Following Habermas, Tronto (1993: 62) argues that ‘Morality is always contextual and historicized, even when it claims to be universal’.
As already mentioned, the main focus of this thesis is the ethics of care as developed by Joan Tronto, who goes furthest in developing care as a political idea as distinct from a social, psychological or moral concept. However, before considering her work, it is helpful to set it within the context of three of her predecessors, Carol Gilligan, Nel Noddings and Sara Ruddick.

Care according to Gilligan: the care-justice typology

An ethics of care was first articulated in 1982 in a book by Gilligan called *In a Different Voice*, in which she claimed to have found evidence of two different modes of moral reasoning: an ‘ethics of justice’ and an ‘ethics of care’. According to Gilligan, the former is characterised by an emphasis on universal or Kantian type rights and rules, and the latter on relationships, responsibilities and context. On average, and for cultural and other reasons, men tend to an ethics of justice and women to an ethics of care, with the latter being what she called the ‘different voice’.

In proposing that the female voice of care is a different but parallel form of moral reasoning to the male voice of justice, Gilligan challenged two common assumptions of the time: firstly, the Freudian view that men have a better developed moral sense than women, and secondly, the Kohlbergian view that moral development travels along a single path, in which the highest stage is characterised by the internalisation of principles like justice, reciprocity and respect for human dignity (Tong 1998, 1993).

Gilligan’s (1982: 28-29) description of Amy, a participant in one of her studies, illustrates how she sees the difference between the two moral voices. Amy, she says, approaches an ethical dilemma as ‘a narrative of relationships that extends over time’, rather than ‘a math problem with humans’. Her world is ‘comprised of relationships rather than of people standing alone, and coheres through human connection rather than through systems of rules’. Later, in a broad overview (1988: xvii-xviii), she writes that,

From the perspective of someone seeking or loving justice, relationships are organised in terms of equality, symbolised by the balancing of scales. Moral concerns focus on problems of oppression, problems stemming from inequality, and the moral ideal is one of reciprocity or equal respect. From the perspective of someone seeking or valuing care, relationship connotes
responsiveness or engagement, a resiliency of connection that is symbolised by a network or web. Moral concerns focus on problems of detachment, on disconnection or abandonment or indifference, and the moral ideal is one of attention and response.

Importantly, Gilligan does not necessarily equate this latter moral ideal of attention and response with self-effacement. She distinguishes between a feminine and feminist view of care, with only the former potentially condoning self-sacrificial expectations and the limiting of women’s voices to the private sphere (in Hinman 2003, Gilligan 1995). For her, a morally mature agent is one who recognises that caring for self is as important as caring for others, even if it is difficult to juggle the two satisfactorily.

The relative merits of a care or justice moral voice can be debated (Jaggar 1995, Held 1993), but in Gilligan’s eyes they tap complementary skills and capacities, and neither is superior to the other. For example, she continues her above overview as follows:

Since all relationships can be characterised both in terms of equality and in terms of attachment or connection, all relationships – public and private – can be seen in two ways and spoken of in two sets of terms. By adopting one or another moral voice or standpoint, people can highlight problems that are associated with different kinds of vulnerability – to oppression or to abandonment – and focus attention on different types of concern (1988: xviii).

Elsewhere she compares the care and justice voices to a double fugue, in which two distinct melodies interweave to make a whole (Gilligan et al 1990). And most care ethicists since Gilligan have shared this view, seeing a dialogue between the two as befitting the richness and complexity of ordinary ethical life, and little difficulty in discussing care in terms of rights or justice as well as relationships (Tronto 2001).

34 Gilligan describes ethical thinking as an ongoing ‘conversation’ with self and others (in Hinman 2003: 321-322), so it is reasonable to think that she expects both ‘melodies’ to be heard as we go about resolving ethical dilemmas, even though we might not be able to listen to both simultaneously (Bernstein & Gilligan 1990).

35 Care and justice considerations arguably intermingle in relationships at all levels, and in ways that make it impossible to split the two without vacating our understanding of both. For example, as Kohlberg (1984: 349) notes, our caring relationships with family and friends ‘often include or presuppose general [justice-type] obligations of respect, fairness and contract’. Similarly, a passion for justice often originates in a passion to respond to suffering, and not just detached scrupulosity about observing rules.
That said, some writers see a satisfactory synthesis of the two as a task that still beckons, at least in ethical and political theory.36

In more recent times, Gilligan’s understanding of the ethics of care has evolved to centre on generic issues of difference and inclusion rather than gender, and the practice of conversation rather than theory or justification.37 She has sought to allay the impression that the care and justice approaches are necessarily gendered, and claimed (1993: 209) that she used the concept of male and female voices

... to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex.

Further, she now accepts (in Hinman 2003: 322) that ‘women – [and presumably men too] – may have different points of view and different voices’. These are important developments, for they help prevent her care-justice typology being appropriated to support gender stereotypes, and an ethics of care being dismissed as relevant to only half the population.38

and rights. Okin (1989), for example, notes how empathy and a sense of concern for others is central to Rawls’s A Theory of Justice (1999).

36 Benhabib (1992: 230), for example, suggests that a ‘synthesis of autonomous justice thinking and empathetic care’ is the main challenge for feminist theory, and Tong (1998: 302, fn 100) that a way of ‘translating’ between the two would ‘do much to reinforce’ Gilligan’s claims as to their ultimate compatibility.

37 According to Gilligan (in Hinman 2003: 320-321): ‘To have a voice is to be human. To have something to say is to be a person, but speaking also depends on listening and being heard. It is an intensely relational act. Thus voice reveals a psyche connected to both the natural and the social world … [Voice in ethics] is absolutely fundamental. Think of ethics as a conversation. Historically, this conversation has been limited by two factors: some people have been excluded entirely … and others have been unwilling or unable to articulate their inner world … We are now in the process of adding new voices, that is, adding the voices that have been missing ... specifically the voices of women, and also voices of other people who have been outside the mainstream of the ethical conversation … because of their ethnicity, culture or race. This offers the possibility then of changing the conversation and looking more deeply into this story’.

38 Certainly, the empirical evidence to sustain a gendered view of the two approaches is not particularly strong, eg see Brabeck (1989: ch 7 & 8). A more credible view is that men and women have multiple
Viewed positively, Gilligan’s work leaves us with an elegant story of two archetypal approaches to ethics,\(^3^9\) an image of them working together in creative tension, and a platform for efforts to valorise the lives and experiences of individuals and groups that might otherwise go ignored or unappreciated.

**Care according to Noddings: the relational base**

Where Gilligan builds a case for an ethics of care from psychology, Noddings builds it from philosophy in her 1984 book titled *Caring: A Feminine Approach to Ethics and Moral Education*. In her view, relationships are a fundamental characteristic of human life, and our identity evolves through them: they are ‘ontologically basic’. Further, caring relationships are a ‘superior’ form of relationship and a ‘premoral good’. Rooted in ‘receptivity, relatedness, and responsiveness’, they are more basic to ethical life than reasoning about the good or the right. In her view (1984: 83), acting caringly is to be true to a self in which our ‘fundamental and natural desire [is] to be and to remain related’:

> The impulse to act on behalf of the present other is … innate. It lies latent in each of us, awaiting gradual development in a succession of caring relations. I am suggesting that our inclination toward and interest in morality derives from caring. In caring, we accept the basic impulse to act on behalf of the present other. We are engrossed in the other. We have received him and feel his pain or happiness, but we are not compelled by this impulse. We have a choice: we may accept what we feel, or we may reject it. If we have a strong desire to be moral, we will not reject it, and this strong desire to be moral is derived, reflectively, from the more moral voices, and that tapping into these different voices is a source of richness and growth in personal and community life (Hinman 2003).

\(^3^9\) As Benhabib (1992: 158-159) notes, Gilligan helps clarify and lend impetus to two ways of conceiving self-other relations, either as a ‘generalised other’ or a ‘concrete other’, the former being typical of utilitarian, contractual and Kantian approaches, and the latter of care ethics and certain forms of communicative or discourse ethics. While relations in the former are ‘governed by the norms of formal equality and reciprocity’, those in the latter are ‘governed by the norms of equity and complementary reciprocity’; while moral categories in the former are ‘those of right, obligation and entitlement’, in the latter they are ‘those of responsibility, bonding and sharing’; and while moral feelings in the former are ‘those of respect, duty, worthiness and dignity’, in the latter they are ‘those of love, care and sympathy and solidarity’.
fundamental and natural desire to be and to remain related. To reject the feeling when it arises is
either to be in an internal state of imbalance or to contribute wilfully to the diminution of the
ethical ideal.

Since Noddings see caring relationships as constitutive of human identity and values,
she takes care rather than rights or utility as her primary ethical category. In her view, if
achievements in the way of caring relationships are threatened by a rigid adherence to
principle, then it is better to relax the principle than jeopardise the caring relationship.
For example, it is excusable for a mother who deplores racism to refuse to cut herself
off from a racist family member when there is a longstanding relationship of care
between them. Only if the relationship has been devoid of care might she be justified in
turning away.

Noddings sees care most saliently expressed in mother-child relationships. She
accepts that the quality of care in these relationships may not always be high, or come
naturally. However, in her eyes mothering exemplifies the courage, patience, sacrifice
and ability to make difficult decisions that characterises care, and points to the
importance of resources like love and empathy in shaping and sustaining it, even if
these are also sources of potential bias. Further, she sees memories of mothering and
being mothered, and of other caring relationships, as important reference points for our
future caring endeavours:

This memory of our own best moments of caring and being cared for sweeps over us as a feeling
– as an ‘I must’ – in response to the plight of the other and our conflicting desire to serve our
own interests. There is a transfer of feeling analogous to a transfer of learning … I recognise the
feeling and remember what has followed it in my own best moments. I have a picture of those
moments in which I was cared for and in which I cared, and I may reach toward this memory
and guide my conduct by it if I wish to do so (1984: 79-80).

In Noddings’s view (1984: 82), ‘natural’ caring – or where our feeling of ‘I must’ is
indistinguishable from ‘I want’, and we ‘proceed easily as one-caring’ – occurs
typically only in family and other intimate settings, where conditions conducive to care

40 While Noddings sees care as more typical of women than men, she thinks both can grow in their
capacity to care when given appropriate education and experience.
exist, such as feelings of engrossment and reciprocity. She observes that outside these settings, our caring dispositions generally become less intense. Further, that the less well we know someone, the more onerous are we likely to find their demand or need for care. As she says, most of us ‘would prefer that the stray cat not appear at the back door – or the stray teenager at the front’ (1984: 47). Outside settings of intimacy, our caring capacities and responsibilities are also limited by practical considerations. Citing the plight of starving children in Africa as an example, she argues (1984: 86) that, ‘We are not obligated to summon the “I must” if there is no possibility of completion in the other’.\footnote{She is referring to the limits to which an individual in another country can provide effective help in such a situation.} In her view, we fulfil the ethical ideal if we are caring and responsible to people within our ‘manageable’ world, and do not need to feel obligated to those beyond reach.

Noddings’s understanding of care has a refreshingly practical, if rather blunt edge. And while it may be criticised as sanctioning parochialism, it is not as ethically incestuous as it might sound. In Noddings’s view (1984: 46), we can build caring relationships with distant others through a wide variety of direct and indirect ‘circles and chains’ of connection, and she recommends that we do so.\footnote{In the preface to the second edition of her book, Noddings (2003: xv-xvi) argues that while ‘we cannot care-for everyone’, ‘there is a sense in which we can care-about a much wider population’. Further, that ‘caring-about may be thought of as the motivational foundation for justice, and we need to use justice when it is logistically impossible to exercise caring-for’.} Further, while natural caring is important to her, so too is what she calls ‘ethical’ or deliberative caring.\footnote{Where Kant sees actions done from a sense of duty as more worthy than actions done from natural inclination – and worthier still if they run counter to natural inclination – Noddings (1984: 80) sees worth also in the natural inclination: ‘An ethic built on caring strives to maintain [our natural] caring attitude and is thus dependent upon, and not superior to, natural caring’. To her (at 84), both types of caring depend ultimately on the extent to which we value relationship: ‘The source of my obligation is the value I place on the relatedness of caring’. Her use here of the term ‘obligation’ might be construed as signifying a reversion to a Kantian view of duty. However, while she does claim (at 86) that we have an ‘absolute obligation’ to care if we have an actual or genuine potential relationship with someone, she grounds this obligation (at 49) in her ontology of human relatedness and interdependence, and not an idealised notion of duty: ‘The ethical self is an active relation between my actual self and a vision of my}
matters is our willingness to engage with people, and not retreat from or be indifferent to relationships that we could have, including with people who are physically distant, or who we don’t like or don’t know. Finally, it is not family or blood relationships per se that count for Noddings, but what these relationships afford in the way of caring achievements. In other words, when thinking about whether to enter, stay or leave a relationship, or how to structure or preference it, our primary focus should not be the formal nature of the relationship, but its past, present and potential contribution to the cause of care.44

Noddings’s account of care can be criticised on other grounds as well, including that it is conceived in primarily interpersonal terms, encourages a self-sacrificial responsiveness to others’ needs,45 and fails to attend to problems associated with unequal relationships (Robinson 1999, Tong 1993, Hoagland 1990, Card 1990). However, the serious and pragmatic way she approaches an ethics of care as a moral position is impressive, as is her faith in the contribution of caring relationships to human flourishing.

Care according to Ruddick: ... and mothers

If in the popular mind Gilligan associates care with the feminine, and Noddings with the relational, Ruddick associates it with the maternal. In her 1989 book, *Maternal Thinking: Towards a Politics of Peace*, she argues that mothering gives a unique insight into the importance of care work, and a solid grounding in the skills required to handle

---

44 According to Noddings (1984: 86), we should consider ‘the existence of or potential for present relation, and the dynamic potential for growth in relation, including the potential for increased reciprocity and, perhaps, mutuality. The first establishes an absolute obligation [to care] and the second serves to put our obligations into an order of priority’. Further, even when we have no caring obligation, we ‘may still choose to do something in the direction of caring’.

45 To be fair to Noddings, she says at one point, ‘If caring is to be maintained, clearly, the one-caring must be maintained’ (1984: 100). However, given the central role she assigns care giving, and her praise of caregivers, it is easy to see why some might feel her expectations of them are too high.
situations of need, change and conflict. It also highlights the moral relevance of factors like commitment, attachment, subjectivity and context.

Significantly, while not always obvious, Ruddick does not align care with mothering alone. For example, at one point she argues (1989: 134) that ‘maternal thinkers’ have ‘no patience with the idea that a person’s identity is wholly formed by her principal work or, still more confining, by the gender identity a particular society expects’. Rather, she sees care as a practice open to anyone that identifies with its aims and is committed to meeting its demands, whether they are male or female. The basic aims of care in regard to child rearing, for example, include preserving life, aiding growth, and ensuring social acceptability. These lead in turn to demands for the practice of care, in the form of love, nurture, training, education, and so forth.

Ruddick’s contribution to the development of an ethics of care lies mainly in this strong sense of care as a practice, as well as her belief that experiences in mothering – as care giving – can have political value. That is, she believes that the skills and strategies learned in caring for children are resources that can be transformed and applied in wider social and political contexts. She attempts to illustrate this by describing a ‘politics of peace’, involving resistance to war and the pursuit of non-violent social change.

Needless to say, like Gilligan, Ruddick seeks to combat the image of care as necessarily self-effacing. In her view, care involves learning when not to care as much as when to care, in the sense of being able to recognise situations when care giving is becoming servile or oppressive. For example, she notes (1989: 72) that ‘for her own sake and her child’s a mother learns when to intervene and when to look away’. Further, following Iris Murdoch, she distinguishes (1989: 72-73) between a caregiver being humble and being passive: that is, between having ‘a profound sense of the limits of [her] actions

---

46 According to Ruddick (1989: 13-14), practices are ‘collective human activities distinguished by the aims that identify them and by the consequent demands made on practitioners committed to those aims … The aims or goals that define a practice are so central or “constitutive” that in the absence of the goal you would not have that practice. I express this intrinsic dependency when I say that to engage in a practice means to be committed to meeting its demands’.
and of the unpredictability of the consequences of [her] work’, and having a ‘habit of self-effacement, rather like having an inaudible voice’.

Ruddick’s work affirms the importance and status of motherhood, and her ideas have intuitive appeal. However, her use of mothering as the model for care, and her frequent reference to ‘maternal thinking’ (as opposed say to ‘care’ thinking), can be problematic. Like Gilligan, because of her early linking of an ethics of care with women, she leaves herself open to being criticised as an essentialist, and as reinforcing sexual and romantic stereotypes. Her approach to care can also have unfortunate connotations if identified with protective or parochial political views, or a ‘bleeding heart’ emotionalism. As Mackay (2001: 141) says of it, rightly or wrongly ‘many people, both critics and supporters, do not seem to be able to get beyond the “mother”’.

To appreciate the full potential of care as a political idea with a generic and inclusive tone, we therefore need to turn finally to the work of Joan Tronto, writing several years after Ruddick.

**Care as a political value, virtue and practice**

In her 1993 study, *Moral Boundaries: A Political Argument for an Ethic of Care*, Tronto asserts that it is time to

> … stop talking about ‘women’s morality’ and start talking instead about a care ethic that includes the values traditionally associated with women … [and] understand them in a political context (1993: 3).

In her view, unless this change occurs care will stay on the fringes of political life, perceived as a concern only of women, a secondary consideration to justice, and important in private life but not public life.

To help bring care more to the forefront, Tronto starts out by clarifying its definition. At the most general level, she describes it as
... a species activity that includes everything that we do to maintain, continue, and repair our ‘world’, so that we can live in it as well as possible. That world includes our bodies, our selves, and our environment, all of which we seek to interweave in a complex, life-sustaining web (1993: 103).

By defining care in this way, she highlights its political dimensions: it is a collective as well as personal activity; it has a goal relevant to public as well as private life, namely arranging the world so we can live in it ‘as well as possible’; and it has a strategy to achieve this goal, namely weaving people and environments together ‘in a complex life-sustaining web’.

Tronto then proceeds to break care into its process and practice components. These are explored in more detail later. Suffice to say here that she sees the process of care throwing into critical relief the whole workings of society, and the practice of care an exercise in deliberation and judgment. For her, care is ultimately a form of practical rationality:

To call care a practice implies that it involves both thought and action, that thought and action are interrelated, and that they are directed toward some end. The activity, and its end, set the boundaries as to what appears reasonable within the framework of the practice (1993: 108).

Further, she sees concerns about care permeating virtually every aspect of private and public life:

Care is found in the household, in services and goods sold in the market, and in the workings of bureaucratic organizations in contemporary life. Care is not restricted to the traditional realm of mother’s work, to welfare agencies, or to hired domestic servants but is found in all of these realms. Indeed, concerns about care permeate our daily lives, the institutions in the modern marketplace, and the corridors of government (1996: 143).

47 Tronto’s view here differs from Noddings (1984: 25), who suggests caring is ‘essentially non-rational’ or pre-rational. By this she does not mean that caring is arbitrary or capricious. Rather, that it is a ‘sort of behaviour that is conditioned not by a host of narrow and rigidly defined principles but by a broad and loosely defined ethic that moulds itself in situations and has a proper regard for human affections, weaknesses, and anxieties’. 
A closer examination of how she sees care in public life follows.

**What care isn’t**

As one way to help illustrate her understanding of care, Tronto lists some of the activities that she thinks lie typically outside it. These include leisure and creative pursuits, the provision of protective services (eg by the military and police), and the production of goods and services. However, she stresses that it is a tentative list, because each of these activities can still have a caring dimension to them. For example, dancing can have a therapeutic as well as a creative purpose or effect. Similarly, the work of the military can be caring when it helps stop or deter violence and civic disruption, but not when protective needs take on a life of their own, such as an arms race, or give rise to levels of force or destruction disproportionate to the objective of a secure and peaceful environment. Moreover, in her view (1993: 104-105), protective work generally

... involves a very different conception of the relationship between an individual or group, and others, than does care. Caring seems to involve taking the concerns and needs of the other as the basis for action. Protection presumes the bad intentions and harm that the other is likely to bring to bear against the self or group, and to require a response to that potential harm.

In other words, the pursuit of things associated with the above activities – pleasure, security, wealth and so forth – are not necessarily antithetical to care, but they can easily become so, especially when accompanied by a singularity of focus and self-preoccupation.

Whether it is right to say that care exists when there is caring activity but no caring disposition, or a caring disposition but no caring activity, is a question that Tronto leaves hanging. In her own use of the term, she generally envisages both being present, but accepts, for example, that a doctor can check a patient competently while seeing it as just another job to be done. She does not appear to consider it necessary to

---

48 ‘In general, then, I will use care in a more restrictive sense, to refer to care when both the activity and disposition of care are present’ (1993: 105).
force the issue, and perhaps understandably: to insist that a caring disposition always be present would again risk equating care merely with sentiment, and make her aim of developing a political ethics of care all the more difficult. As she explains (1993: 118),

To think of care solely in dispositional terms allows us to think of care as the possession and province of an individual. It makes any individual’s ideals of care fit into the worldview that the individual already possesses. This perspective allows care to be sentimentalised and romanticised, permitting the divisions in care previously described [male-female, private-public, etc].

What care is

At one point, Tronto (1993: 105) says that ‘what is definitive about care … [is] a perspective of taking the other’s needs as the starting point for what must be done’. At another, she says (1993: 19) that care ‘requires that we meet the other morally, adopt that person’s or group’s perspective and look at the world in those terms’. On their own, these comments suggest that she equates care with responding to need as defined by others, and the views of needy others as being the only point from which to understand and reform society.

If this were Tronto’s position, it would be open to serious challenge, on the grounds that it invites an uncritical and self-sacrificial worldview, and confuses apprehending another’s reality with accepting it (Clement 1996). It also idealizes caring relationships, which in reality usually feature at least some areas of tension and conflict. Fortunately, however, her understanding of care is not so simple. Expanding on the general definition that was given earlier, she describes it as a mixture of both process and practice. Firstly, as a process, it features four analytically separate but connected phases: caring about, taking care of, care giving, and care receiving.49

- *Caring about* – involves ‘becoming aware of and paying attention to the need for caring’. The need may be close by or far away, and have personal, social or

49 The quotes in the following summary are taken from Tronto (1996: 143). A more complete description of each phase can be found in Tronto (1993: 105-108).
structural aspects to it. What matters is that we see it, and recognise it as something deserving or requiring a response.

- **Taking care of (or caring for)** – involves ‘assuming responsibility for some caring’. In other words, we move beyond being aware of a need to deciding whether or not we can do anything to address it, and how. This phase involves difficult decisions about agency, responsibility and capacity. If we believe nothing can be done, then no ‘taking care of’ occurs.

- **Care giving** – involves ‘the actual material meeting of the caring need’. This phase covers the practical details of care’s provision and generally entails direct contact between caregivers and care receivers. Indirect forms of care giving may be included, like the provision of financial resources, but Tronto suggests that these forms of caring are sometimes best seen as part of the ‘taking care of’ phase, since by themselves they seldom meet care needs satisfactorily.

- **Care receiving** – involves ‘the response of the thing, person, group, and so forth, that received the care giving, and the assessment of this response’. This phase covers feedback from care receivers on the accuracy of perceptions of their need and the quality of care provided them. It also covers the identification of care needs either missed or inadvertently created by care’s other phases.

According to Tronto (1993: 109), when we engage in these four phases of care, we engage in ‘an integrated, well-accomplished act of care’, and meeting care needs in this integrated, holistic way ‘is the ideal of care’. However, if this all seems rather straightforward, we should be under no illusion as to the difficulties that can arise. She notes (1993: 109), for example, that ‘there is likely to be conflict within each of [the] phases, and between them’. Further, that conflict is often generated when caregivers feel that their own care needs conflict with the care that others need, or when they are responsible for multiple others who have conflicting needs. In these circumstances, caregivers are confronted with questions like ‘who gets what care, where, when, how, and why?’ (Tronto 1996: 146).

If these sorts of difficult questions are generated in the course of a caring process, then it makes sense that finding answers to them is also addressed in a caring way. Tronto
accordingly suggests that the caring process feature certain ethical components. These components – attentiveness, responsibility, competence and responsiveness – make up what she calls the practice of care.  

Each corresponds to a different phase of the caring process, each can make the difference between a phase being done poorly or well, and each is something on which a caring agent can potentially be held accountable.

A brief description of the four components follows. In each case, an effort is also made to describe what achievement or failure might look like in terms of that component. In doing so, we expand on the work of Tronto, who does this only in the case of attentiveness.

- **Attentiveness (caring about)** – involves ‘recognising the needs of those around us’ (Tronto 1993: 127). In Tronto’s view, this is perhaps the most neglected, but also the most important and difficult component: ‘That “others” matter’, she says, ‘is the most difficult moral quality to establish’ (1993: 130). By this standard, awareness of others’ needs, and of the consequences for them of what we do or fail to do, is a moral achievement, and wilful or habitual ignorance a moral failing. Common impediments to attentiveness include our congenital tendency to be absorbed in our own needs, the needs of intimate others, or the needs of those we identify with, rather than those who fall outside these circles. A further impediment is our possible need to feel cared for ourselves before we can really care much for others. Tronto offers no quick fix to these problems, but suggests that improved attentiveness will depend on caring becoming a more central social and political value, and not just on improved powers of reasoning or progress in communications technology.

- **Responsibility (taking care of)** – involves assessing and conforming to responsibilities generated by context. Importantly, context does not refer merely to the circumstances of the moment, or to legal agreements, promises or statements of duty, but also individual, community or institutional practices and

---

50 These do not have to be viewed as a complete list. Walker (1995: 145), for example, suggests care entails ‘a collection of perceptive, imaginative, appreciative and expressive skills and capacities which put and keep us in unimpeded contact with the realities of ourselves and specific others’. However, the four identified by Tronto can be considered primary practice elements and, as noted later, can be interpreted broadly, in order to cover other elements.
expectations. Examples of the latter type of responsibility can include when a moral agent – a person, organization or state – knows that a need will not be met unless they meet it, or that something they did or failed to do has led to the need, or that the need provides an opportunity for them to make a statement about who they are, or who they would like to become. In this component, moral achievement lies in probing and weighing the different types of responsibility we may have, and shouldering them to the extent we can. Moral failure lies in being indifferent, or shirking or withdrawing from our responsibility.

- Competence (care giving) – involves providing a level or quality of care that meets the need for care. Here making certain that care needs are met, or met to the best of our capacity, is a moral achievement. Not meeting need, or not performing to the best of our capacity, or refusing to be guided by end results or outcomes, is a moral failing. In this regard, Tronto’s ethics of care contains a strong element of moral consequentialism: it sees an intention or promise of care

---

51 According to Tronto (1993: 132), between the ‘extremes of being responsible for everyone in every way, and thinking of responsibility as rooted in biology, there is a wide range of other possible assumptions of responsibility that are rooted in political motivations, cultural practices, and individual psychology’.

52 An example is the acceptance of responsibility by Australia for Indo-Chinese refugees after the Vietnam War, partly on account of its involvement in the war (see chapter four).

53 According to Tronto (1993: 137), ‘The moral question an ethic of care takes as central is not – What, if anything, do I (we) owe to others? but rather – How can I (we) best meet my (our) caring responsibilities? To meet one’s caring responsibilities has both universal and particular components. On the one hand, it requires a determination of what caring responsibilities are, in general. On the other hand, it requires a focus upon the particular kinds of responsibilities and burdens that we might assume because of who, and where, we are situated’.

54 In Tronto’s view, questions about failures in competence should be directed to the context within which care giving occurs as much as to the caregivers themselves. For example, in the case of instances of persons being wrongfully detained by Australian Immigration officials (further details are provided later in the chapter), it is appropriate that critical questions be directed at several levels, including the frontline officials who fail to interpret their legislative powers responsibly, the senior officials who fail to ensure that frontline staff are properly trained and supported, and the politicians who fail to insert adequate safeguards into Immigration laws.
as of little value unless care work actually occurs and a defensible end result or outcome is obtained.

- **Responsiveness (care receiving)** – involves more than caregivers trying to ‘walk in the shoes’ of care receivers. Rather, it entails care receivers being given the opportunity to interpret their own needs and assess the care they are given, and caregivers taking account of these views in developing or modifying their interventions. Here moral achievement occurs when caregivers listen to the voices of care receivers, and work to prevent or minimise the abuses and distortions that can arise in caring relationships, especially those marked by inequality or vulnerability. Moral failure occurs when caregivers are inattentive to such dangers, ignore evidence of their occurrence, and generally either fail to listen to care receivers, or pay heed to forms of expression which do not capture the full extent of care receiver responses.

**A little fine tuning**

The main difficulties that are likely to confront the use of an ethics of care of the above type in a public policy context are considered in the next section. However, it is helpful to first consider several of the ‘friendly’ criticisms that have been made of Tronto’s work; that is, criticisms by people sympathetic to the idea of an approach from care, but uneasy about some aspects of it. These include the view that it remains unclear how care can translate into practical politics, that Tronto buries things her care predecessors worked hard to revive, like the importance of the emotions, and that she goes too far in her efforts to stop care being seen as only a ‘women’s morality’.

In regard to the first, Mackay (2001), Beasley and Bacchi (2005) and others argue that Tronto, like other care ethicists, is not only vague about how care can be put into practice, but relies heavily – and by implication naively – on systems of governance being open, responsive and accountable. According to Mackay (2001: 154-155), for example, ‘ethicists of care need to start to pay attention to the levers, mechanisms and agents of change within particular political systems and to issues of access and voice’. This is a reasonable request, and how an ethics of care might translate into changes in Australian asylum policy will be discussed later in the chapter. However, it bears
reiterating that it runs against care’s grain to be overly prescriptive. From its view, the details of caring actions are generally best left for caregivers and care receivers in specific contexts to work out. While able to accommodate the notion of minimum standards, it is inclined to the view that

… every real dilemma is in literal strictness a unique situation; and the exact combination of ideals realised and ideals disappointed which each decision creates is always a universe without a precedent, and for which no adequate previous rule exists (James 1979: 158).

Further, it is wary of being held hostage to preconceived ideas about what care looks like, whereby the type and quality of care afforded by an agent is judged according to personal, cultural or ideological criteria, rather than integrity in working through its various phases, and satisfactory performance in regard to its practice components. Beasley and Bacchi (2005: 57-58), for example, criticise care on the grounds that its ‘relationship to any specific politics, let alone a beneficent or effective one, is uncertain’, and that it may ‘lend support to problematic, even conservative agendas’ as well as ‘progressive’ ones. However, the difficulty in aligning care with any one political agenda, whether progressive or conservative, should be viewed as a strong point rather than a weakness, since to straitjacket care risks distorting it. As Sevenhuijsen (1998: 15) notes, only by staying faithful to care’s four practice components can caregivers

… bring their expertise and moral considerations into public debates without this being associated with a fixed caring identity or with associated claims to moral truth or moral goodness

… [The alternative is for care to be] slotted into a concept of identity politics or a one-dimensional idea of interest promotion, or indeed a nostalgic return to harmony and consensus.55

On the second possible criticism – that Tronto neglects more elusive but equally important qualities like empathy and imagination – there is no doubt she is keen to

55 Sevenhuijsen (1998: 14) equates fidelity in the practice of care with a ‘neo-republican idea of active citizenship’, in which ‘the public sphere is seen as a meeting ground where people shape identities through action and interaction, through the exchange of narratives and opinion, through deliberation and debate, and where, in so doing, they can continually revise and transcend their images of “self” and “other”’.

352
avoid care being equated with what we might call the ‘softer’ faculties of heart and mind, rather than with ‘hard’ practice skills and competencies. In her view (1993: 118), ‘As a disposition or an emotion, care is [too] easy to sentimentalise and to privatise’.

Further, she believes that responsiveness requires less an ability to put oneself in the position of others, than an ability to ‘consider the other’s position as that other expresses it’:

Thus, one is engaged from the standpoint of the other, but not simply by presuming that the other is exactly like the self. From such a perspective, we may well imagine that questions of otherness would be more adequately addressed than they are in current moral frameworks that presume that people are interchangeable (1993: 136).

She adds later (1993: 144),

It would seem that by putting oneself in the other’s situation, this [problem of otherness] can be overcome. But the problem is that there is no way to guarantee that, in taking the place of the other, as if in a game of ‘musical moral chairs’, the moral actor will recognise all of the relevant dimensions of the other’s situation. The result is more likely to be an imposition of an incomplete understanding on the situation than a morally sensitive response.

That said, it seems possible to blend qualities like empathy and imagination into her notion of care, enriching it without damaging it. For example, empathy – of both the cognitive and emotional kind\(^{56}\) – would appear a useful resource for care practices like attentiveness and responsiveness. They share the same basic intentionality or other-directedness, and serve the same end of establishing meaningful and value-laden spaces among people.\(^{57}\) The same is true of imagination, a quality considered almost indispensable by many ethicists. For example, Murdoch (2001: 33,42) considers the ‘little peering efforts of imagination’ into the reality of others as a ‘mark of the active moral agent’, while James (1908: 242) sees it as essential to a ‘higher vision’ of the

---

\(^{56}\) Following Stephan & Finlay (1999: 730), cognitive empathy is here used to refer ‘primarily to taking the perspective of another person’, and emotional empathy to ‘emotional responses to another person that either are similar to those the other person is experiencing (parallel empathy) or are a reaction to the emotional experiences of the other person (reactive empathy)’.

\(^{57}\) In doing so, empathy arguably performs a function similar to what Nussbaum (2001: 390) says of compassion: it becomes ‘a guide to something that is at the very heart of morality’.
significance of others, and to ‘overcoming the blindness with which we are all afflicted in regard to the feelings of creatures and people different from ourselves’. Similarly, Glover (2001: 408-409), in his account of ethics in the face of twentieth century atrocities like Nazi Germany, Stalinist Russia, and the genocide in Rwanda, argues that imagination can be important in stimulating

... a breakthrough of the human responses, otherwise deadened by such things as distance, tribalism or ideology. It checks conformity and obedience, bringing to the fore what matters humanly rather than the current norm or the official policy. It makes vivid the victims and the human reality of what will be done to them.

Qualities like empathy and imagination can therefore be seen as instruments serving the cause of care. They deepen our ability to attend to others, and broaden grounds for solidarity, engagement and the assumption of responsibility. They can help stop the practice of care sliding into a ‘going through the motions’ type exercise, marked by stilted dialogue between caregivers and care receivers, narrow and defensive assessments of caring capacities and care giving options, and self-satisfied world views and values.

Indeed, in a broad reading of the ethics of care, we could potentially flesh out care’s practice components still further. For example, we could expand the notions of attentiveness and responsibility to include qualities like intelligence and reasonableness, on the grounds that they too aid insight and ethical thought (Lonergan 1970). The ideal caring agent might then be depicted as one who strives to meet the demands of caring that present themselves in their life, by being

- attentive to all relevant information, including that derived from empathetic, intelligent and imaginative exploration of the experience and views of self and others, the range of possible explanations, the suite of possible responses, and the values at stake;

- responsible in accepting the challenge to assess and marry needs and capacities, and reasonable in adjudicating among them on the basis of available evidence and value priorities;
• competent in carrying through the decisions made, and in meeting care needs; and
• responsive to the views, concerns and vulnerabilities of care receivers.

The third ‘friendly’ criticism of Tronto relates to her success in stripping care of its gender connotations in order to broaden its appeal. According to Sevenhuijsen (1998), this success comes at a price: it takes our eye off the links that in practice do exist between gender and care giving and receiving, and also off the biases in ethical and political thought that led to an ethics of care being developed in the first place.

As with the previous criticism, there is a measure of truth in this view: by having care’s practice components sweep for and value anything of relevance to the task and goal of caring, Tronto makes gender compete with other potential denominators of human experience for attention. As she notes (1993: 173), when we take ‘the ability to command and dispense care as a tool to recognise unequal amounts of power’, then more sources of inequality become visible than just gender. Further, when our basic desire is to enhance the ‘powers of the weak’ and ‘persuade those who are more powerful to surrender some of their power’ (Tronto 1993: 177), then more groups are likely to want their voice heard and acted on than just women.

However, in most respects Tronto stays true to the concerns of her care forebears. For example, her view of care as a political concept builds on Gilligan’s view that an ethics of care and an ethics of justice can be complementary. Further, her view of care as a political strategy – that is, a tool of analysis, a way to reframe political debate, and a platform for pursuing inclusive dialogue – does not exclude any desire to attend to the unique experiences, needs or capacities of women. It ensures merely that they too remain inclusive rather than exclusive in orientation.

58 Tronto here appears to suggest that the powerful will voluntarily cede power to the weak, and the weak will never need to wrest it from them. If so, she may be overly optimistic. However, she appears to recognise the problem, and identifies three ways in which an approach from care is likely to pursue a redistribution of power (1993: 177): by providing ‘a way to collect the “powers of the weak”’; by exposing ‘the ways in which the powerful have access to too many resources’; and by providing the powerful themselves ‘with a vision of what they stand to gain in a well-ordered and well-cared-for society’.
CARE’S DEMONS

The main concerns about using care as an ethics for asylum policy – and indeed as an ethical approach in general – are likely to centre on three issues: firstly, whether or not it will be too parochial; secondly, whether or not it will feed paternalistic attitudes and actions; and thirdly, whether or not it can be meaningfully assessed. Each is considered below.

Parochialism

The tendency in early works on the ethics of care to use personal or parental relationships as their model or reference point may lead to a concern that it will translate into an approach to politics that is provincial and nepotistic (Barry 1995, Poole 1991). Such concerns might multiply at the idea in particular of it being an ethics for asylum policy, where we are dealing with people not only outside our circles of intimacy, but also our usual circles of imagined relationship, for example those with fellow citizens, or ‘others like us’. The comments by Noddings about ‘natural caring’ occurring only in intimate settings, and that being a responsible and caring individual is better effected in concrete human relationships, rather than in an amorphous and insipid care for mankind, do not help. Further, an ethics of care might seem to invite prejudicial lines of political rhetoric, such as: ‘What sort of parent puts the needs of other people’s children before their own’? And ‘what sort of national leader puts the needs of non-citizens before the needs of citizens’?

Nor is it helpful that most writings on the political relevance of an ethics of care take the nation or community as their primary context, and integrate care with ideas about the nature of good citizenship and how a community should treat its members. With the

59 Tronto (1993: 126), for example, suggests that a society’s moral worth can be judged inter alia by its ability to ‘adequately provide for care of its members and its territory’, and that (at 167) ‘care as a practice can inform the practices of democratic citizenship’. Sevenhuijsen (1998) equates care with a form of deliberative citizenship, in which citizens use attentiveness to need and contextual rather than universal reasoning as their starting point when considering policy options, and demand transparent and accountable political processes.
exception of Robinson (1999), who explores care in the context of international relations theory, the question of caring for non-citizens is rarely addressed – not that this is a failing of care ethicists alone. 60 Further, Tronto (1996: 148) herself warns that care is open to the possibility of individuals, and presumably communities and states, becoming ‘self-righteous and narrow-minded in their understanding of what caring needs are most important’:

Not all of the caring work that needs to be done in the world will ever be done. As a result, all of us must always engage in a process of setting care priorities. If those who are the most wealthy and powerful are allowed simply to pay special attention to their own needs because those are the ones that they are closest to and most well acquainted with, the problems of unequal resource distribution could actually be justified, rather than overturned, by the focus on care. 61

However, the dangers of parochialism in an ethics of care can be exaggerated, for several reasons. Firstly, questions about the sort of parent or leader that puts the needs of others before their own beg the reply, ‘In what circumstances?’ Mounting a case for putting our own first is not difficult when the needs of our own and others are of a similar nature and urgency, or we share similar caring capacities to others. However, when they differ, our judgments as parents or leaders become more complex. Here care invites a different question, namely ‘what sort of parent or leader does not take into account the relative needs of others before putting those of their own first?’ Nor should we be locked into thinking that meeting the needs of our own and others is necessarily a zero-sum game, rather than one of juggling and balance.

60 To be fair, this is not a failing of care theorists alone. For example, John Rawls does not address the issue of justice between societies in his first work, A Theory of Justice (1971). He seeks to rectify this in The Law of Peoples (1999) but his focus remains more on obligations among states rather than among individuals.

61 Elsewhere (1993: 170-171) she writes, ‘Those who are enmeshed in ongoing, continuing, relationships of care are likely to see the caring relationships that they are engaged in, and which they know best, as the most important … [The danger of parochialism] is made especially virulent when care is understood, as it is by too many feminists, as growing out of the metaphorical relationship of a mother and child. A Mother who did not think that her child’s needs were more important than another child’s would somehow seem incompetent as a mother’.
Even in Noddings’s view of care, the needs of outsiders are not beyond our responsibility if there is the possibility of us entering into a caring relationship with them. It will be recalled that she refers to care in these circumstances as ‘ethical’ rather than ‘natural’. Further, that she suggests the priority we give to intimate relationships be dependent on their content rather than form; that is, on their past, present and prospective caring achievements, rather than the existence of a blood relationship, legal tie or principle. A parallel logic in asylum policy would invite at least an ethic of proximity, whereby a state would accept a special responsibility for asylum seekers who arrive at its borders, on the grounds that their nearness creates the clear potential for a caring relationship. It would also invite the view that to reject this responsibility on grounds of state sovereignty alone would be unethical. On the other hand, it would not see the asylum seekers as having an immutable right of asylum, or at least of asylum in the country to which they have come. It would invite a concern for the needs of the receiving community, and invite questions such as what asylum numbers might lead to a hostile backlash, or undermine social cohesion, or endanger hard won and fragile community habits, like the provision of welfare support to its own needy members. However paradoxical it might seem, it would allow the state to pursue alternatives to granting entry to asylum seekers, if they threaten its achievements and potential as a caring community.

Secondly, we should not confuse the content of care with the context in which it is exercised (Tronto 1996). We might associate care as a sentiment with some settings more than others, for example our relations with family, friends and fellow citizens more than with strangers and outsiders. However, when viewed as a value, process and practice rather than a sentiment, care is freed of such contextual constraints. As Tronto notes (1993: 167-168, 172),

The qualities of attentiveness, of responsibility, of competence, or responsiveness, need not be restricted to the immediate objects of our care … They direct us to a politics in which there is, at the center, a public discussion of needs, and an honest appraisal of the intersection of needs and interests. If attentiveness is presumed to be a part of public values, then the absence of attentiveness to the plight of some group in the society (or the world) becomes a public issue, worthy of public debate … [A] politics of care … requires us to … talk about the needs of all humans, not just those who are already sufficiently powerful to make their needs felt.
In other words, the very constitution of an ethics of care invites us to attend to persons and groups beyond the normal bonds of intimacy and obligation, and to accept responsibility in potential as well as existing caring relationships.

Thirdly, being candid about one’s potential failings as an ethical approach is not a bad way of reducing the risk that they will occur, if only because it is likely to prompt efforts to prevent or contain these failings. To quote Tronto again (1996: 148),

> Because caring is context specific and concrete, the problem of parochialism is so obvious that no one will think about care without wondering about its parochialism. In this regard, caring contrasts favourably I think with theories that claim to be universal but are not … The task of dislodging a theory that functions as if it were universal, as opposed to the task of pointing to the limits of a theory that begins with the assumption that it is partial, is quite different. The latter task is more easily accomplished, and as a result, partial theories that are known to be such are more likely to be attentive to the kinds of evidence that are raised pointing to their partialities.

A distinction might helpfully be drawn here between parochialism and partiality. To be parochial may be defined as protecting personal or community needs and interests, regardless of the consequences for others. By contrast, to be partial may be defined as being mindful of parochial needs and interests, and giving them due weight, but only in the course of thoroughly examining all relevant needs and interests, and providing for them to the best of our capacity. Parochialism in politics would conflict with care, but not necessarily partiality, especially if it can be kept honest, for example via integrity and transparency in government procedures, and appropriate institutional checks and balances.62

Indeed, there is no reason to think that an ethics of care would be any less interested in cultivating ‘honest partiality’ in politics and public policy than any other type of ethics. We need only point to Tronto’s (1993: 171) stress on care being ‘relentlessly

---

62 Whether democratic politics can ever be free of partiality and partisanship is a relevant question, for it would seem to come with the territory (Uhr 2005). Indeed, there are times when partiality can be considered a virtue in politics, for example when associated with tailoring government intervention to suit the care needs of particular groups, or to favour disadvantaged groups.
democratic’ and connected to a theory of justice,\textsuperscript{63} Sevenhuijsen’s (1998: 145) on creating a ‘discursive space’ for policy dialogue,\textsuperscript{64} Robinson’s (1999: 7) on tackling ‘structures and processes of exclusion’ and creating partnerships between caregivers and care receivers,\textsuperscript{65} and Mackay’s (2001: 216) on political leaders and political institutions learning to ‘speak’ care as well as justice.\textsuperscript{66} The strategies might differ, but all aim to force policy makers to openly discuss the benefits and costs of their proposals, give the less powerful or privileged a voice, and have care needs and care capacity figure prominently among the criteria on which judgment is based.

\textsuperscript{63} According to Tronto (1993: 172), care ‘requires a commitment to democratic processes, for example to listening and to including care-receivers in determining the processes of care. It requires a hard look at questions of justice, as we determine which needs to be met. And it requires, on the most profound level, that we rethink questions of autonomy and otherness, what it means to be a self-sufficient actor, and so forth’. For her (at 171), what makes care ‘democratic’ is not some conception of equality in the power or authority of participants, but ‘its focus on needs and on the balance between care-givers and care-receivers’.

\textsuperscript{64} Like Tronto, Sevenhuijsen (1998: 146) considers care consistent with existing models of liberal democracy, with the following proviso: ‘that positions of power and decision making are open to representatives of all social groups and … that there is room for different voices to be heard in the public sphere and for different forms of accountability to be developed’. She speaks of situated judgments about the quality of care lead to a ‘caring justice’, which (at 145) ‘explicitly opens discursive space for deliberating about what constitutes injustice or, in other words, for continuous reflection on which “social evils” we need to address’ (emphasis in original).

\textsuperscript{65} According to Robinson (1999: 7), care is ‘not an ethical theory but rather a kind of moral phenomenology, which explores the sociopolitical conditions, the moral and psychological dispositions, the personal and social relations, and the individual and institutional strategies which may work towards overcoming exclusion and promoting care and focused moral attention on a global scale’.

\textsuperscript{66} In Mackay’s view (2001: 216), ‘We have to be able to “speak” care if we are to do new sorts of politics’. With women politicians in mind, she says (at 201) that the introduction of care speaking in politics – or ‘a political discourse of care’ – would, among other things, ‘legitimise many women’s experiences’ and ‘link caring to citizenship and political office’. She continues, ‘the skills of care practice – attentiveness, responsibility, competence and responsiveness – could be presented as crucial political attributes in an inclusive politics which addressed needs and interests’, and care’s exposure of inequalities ‘could potentially empower marginalised groups’.
Paternalism

A second argument against care as an ethics for asylum may be that it has paternalistic – or in this case maternalistic – connotations. In contrast to an approach from human rights or human dignity, for example, which invite a vision of asylum seekers as worthy, powerful and potentially self-sufficient individuals, temporarily deprived of their autonomy by no fault of their own, an ethics of care may be said to invite an image of the powerful and privileged reaching out to the weak and vulnerable, with connotations of inequality, patronage, control and dependence, and few clear safeguards against neglectful or abusive relationships.

Certainly, the idea of some abstract human equality is not a driving force in the ethics of care, which takes as self-evident that people are not equal, at least in their need for care, capacity to give it, and ability to have care needs heard or provided for. As Tronto notes (1993: 145),

Care arises out of the fact that not all humans or others or objects in the world are equally able, at all times, to take care of themselves … Care is not an activity that occurs between equal and autonomous actors or objects, but between those who have needs and those who can provide for those needs.

Further, while she suggests we focus on how equality can emerge out of inequality, she affords no sure means of addressing what she acknowledges is a real problem: that is, ‘privileged irresponsibility’, whereby the more powerful take their own account of care needs and care efforts as definitive and complete, and either ignore or disparage any contradictory accounts.

Does this, then, put care in the same camp as charity or benevolence, as something always contingent and potentially condescending? Probably yes. However, this should not be seen as an overly damaging admission, for two reasons. Firstly, it is not alone in being contingent: theories based on concepts of human rights, dignity and justice also

---

67 According to Tronto (1993: 145), ‘Although much contemporary moral theory rests upon the convenient fiction of human equality, the fact of inequality in relations of care makes this assumption problematic’.
ultimately depend on individuals and other moral agents being willing to embody these precepts in their relationships with others. Secondly, care’s overt relational ontology helps dilute its condescending connotations. Unlike approaches that start with a vision of human independence, it starts with a vision of human interdependence, and sees little intrinsic merit in people being autonomous, or even equal, other than to the extent required to foster healthy relationships. Whether an act of care – including, for example, a community’s grant of refuge or relief to an asylum seeker – is a gift or a right is therefore less important than its consequences for the giver and the receiver, and for the quality of their relationship. Nor does it have any particular moral significance, beyond the extent to which it aids or limits the capacity of both giver and receiver to enjoy life and flourish.

Also reducing care’s paternalistic connotations is its humility. It recognises that none of us are exclusively givers or receivers of care, and that in more or less acute ways, and at different times of life, we are by turn dependent and independent, vulnerable and strong.68 All humans share this experience. As Tronto notes (1996: 150), it is therefore ‘not care that produces inequality but the context in which care occurs’. In other words, in a culture that values autonomy care receivers will be perceived poorly, but in a culture that values engagement and connection they will be perceived with equanimity.

There is, however, a more insidious way in which care can become paternalistic: where instead of being patronising or controlling, caregivers over-identify with those needing care, to the point of losing their own identity or ability to critically assess care needs and care capacities. It will be recalled that Tronto (1993: 19) herself invites this interpretation when she says that

... caring requires that one start from the standpoint of the one needing care or attention. It requires that we meet the other morally, adopt that person’s, or group’s, perspective and look at the world in those terms.

Including empathy as a component of care might also encourage this interpretation, to the extent it appears to sanction taking the perspective of others.

68 As Kittay (1999: 68) observes, ‘we are all some mother’s child’.
However, as suggested earlier, there is a big difference between apprehending the reality of others and accepting it: that is, between understanding others in their own terms, and feeling with or for them, and adopting that understanding as necessarily the right, best or only way to view the world. To surrender our capacity for critical and discerning judgment in this way is to compromise the integrity of care, and particularly care practices like attentiveness, responsibility and responsiveness. The same would apply if we let others decide for us what our own needs and caring capacities are, rather than have assessments emerging from a process of ongoing dialogue.

A qualification should therefore be introduced here on the role of empathy in an ethics of care. As noted earlier, empathy is an important resource for practices like attentiveness and responsiveness. However, it needs to be approached and used with caution. Being based only on what we can see or imagine, it can be poorly informed, inaccurate and unreliable (Stephan & Finlay 1999, Nussbaum 2001). Further, the work it does for relationships is complex, and may not always lead in expected directions. For example, rather than engagement, it can encourage withdrawal, such as when it confirms a negative image or triggers a sense of vulnerability. A case in point is Hollands’s (2001) study of contact between refugees and their Dutch hosts, where the result was often better mutual understanding, but also occasionally disappointment and new prejudices. Similarly, the images presented or acquired in the course of efforts to attract empathy can be problematic. For example, Rajaram (2002) argues that the image of refugees generated by humanitarian organizations is often warped, focusing only on their helplessness and loss, and their plight as victims, rather than as people with multiple identities, and people of action rather than passivity.

While an important part of an ethics of care, empathy should therefore not pre-empt investigation of the facts of a situation, stop judgments of desert, guilt or blame, or dictate a particular response to need. It will do its best work when harnessed to the suite of care practices, rather than operating in isolation.
Assessing care

According to Tronto (1993: 141), the ‘great moral task’ of any person or organization is to ‘stand back from ongoing processes of care and ask, “What is going on here?”’ However, herein lies a third possible argument against adopting an ethics of care in approaching asylum issues: it seems to offer few clear and measurable lines of inquiry for assessing performance, especially when compared to approaching it from a position of conformity with the law, or human rights, or even justice conceived as equality or procedural fairness. The potential scope of its inquiry may alone be daunting, since it appears to want to juggle both an impartial and a partial world view: impartial in recognising that everyone has care needs, but partial in wanting to appraise these care needs, as well as the giving and receiving of care, contextually. For example, unlike an impartial approach to asylum, it can’t ignore the rich fabric of a receiving community, manifest in such goods as ‘community’ and ‘social capital’, and the harm these might suffer as a result of an open door policy. However, nor can it ignore the harm that asylum seekers will suffer as a result of a closed-door policy, as might a communitarian type approach.

Tronto (2001) accepts the difficulty of assessing care. Indeed, she identifies two of the central problems. Firstly, how can we judge what constitutes adequate or good care if care is always understood as varying according to the circumstances? Secondly, why should we expect the views of care receivers to be taken into account by caregivers when the care receivers are usually in a position of relative weakness? She does not reply to these questions, and no really satisfactory answer seems possible anyway, at least in the abstract. For it seems a truism that judgments of care’s quality will always be influenced by who we are and where we stand, and that inequalities of some kind will always characterise many caring relationships.

Nevertheless, if we sift through Tronto’s writings, we find at least two potential benchmarks of best practice in regard to an ethics of care. The first may be called ‘the

69 The former leaves care open to being dismissed as too indiscriminate (eg as advocating ‘care for everyone in every way’), and the latter as too homely and isolating (eg as advocating a ‘care for one’s own garden first’).
integrity of care test’, where we consider whether an integrated process is being employed to assess and meet care needs, featuring all of care’s various phases and practice components:

Good care requires that the four phases of the care process [caring about, caring for, care giving, care receiving] must fit together into a whole. Similarly, to act properly in accordance with an ethic of care requires that the four moral elements of care, attentiveness, responsibility, competence, and responsiveness, be integrated into an appropriate whole (Tronto 1993: 136).

The second benchmark may be called ‘the acceptability of care test’, where we consider whether enough caring options are being provided for everyone to be cared for in a way that they find acceptable, if not necessarily their option of preference:

What constitutes good care will be variable in any society. Different people have different notions of what constitutes the best care for them. The challenge of care will be to offer options for care so that everyone can be well cared for in a manner that they find acceptable (2001: 1470).

Both clearly are high benchmarks, and Tronto suggests possibly ideal ones. For example, efforts to meet the integrity test are likely to be frustrated by resource constraints, and by conflict within and between the various phases of care. Efforts to meet the acceptability test are also likely to be frustrated by resource constraints, as well as by needs being determined through interpretive processes that are subjective and unfair. Nevertheless, they are reasonable objectives to work towards, and failure to achieve them can be taken as an indication of possible problems in caring.

Importantly, the two benchmarks also provide a useful point of departure for thinking about the kinds of questions that are likely to be relevant if we adopt an ethics of care. Examples are given in Table 6.1, clustered according to the phase of care in which they seem most timely, and the form of care practice that they most call on. They seek to capture the important themes in an ethics of care, including its concern for issues relating to voice, the assessment of care needs and capacities, and the nature and strength of relationships. Cast in generic terms, they can be asked in either a particular context, or on a global scale. However, the abovementioned test of integrity would
<table>
<thead>
<tr>
<th>Care phase</th>
<th>Care practice</th>
<th>Care questions</th>
</tr>
</thead>
</table>
| Caring about | Attentiveness | How are we defining need?  
Who are we listening to in discerning and assessing need?  
Who is being left out of consideration / not heard?  
What factors might be impeding our ability to notice or assess need (eg ignorance, inattentiveness, distance, anxiety, our own neediness, competing responsibilities, organisational procedures, social and political structures, etc)?  
Which needs are the most critical and / or pressing?  
Who is caring for / taking care of whom at present?  
Who has no one caring for them?  
Who gains / loses out by the way care is currently organised? |
| Caring for (taking care of) | Responsibility | How are we conceiving our universal caring responsibilities (eg those defined by conceptions of justice, fairness, etc)?  
How are we conceiving our particular caring responsibilities (eg what needs can and should we meet because of who we are, who we’d like to be, our capacities, where and how we are situated, our part in creating the need, our potential to help meet it, etc)?  
How are we structuring these caring responsibilities (eg what principles are we employing to help structure decisions about whose care needs are more urgent or important, who should do the work to meet them, and what we can ask of care receivers, eg procedural fairness, mutual obligation, reciprocity, etc)? |
| Care giving | Competence | How are we defining ‘good’ or ‘adequate’ care giving?  
What results or outcomes do we see as consistent with good or adequate care (and what as reflecting its failure)?  
Which results or outcomes count most?  
What is the best way of achieving these results or outcomes (eg most caring / efficient / effective)?  
What do we need to do to achieve these caring ends / means? |
| Care receiving | Responsiveness | Who are we involving in evaluating the care we are giving?  
How do care receivers view the quality of care we are giving?  
How are we addressing issues of vulnerability, inequality and dependence in the provision and receipt of care?  
Are we developing / making use of the capacities of care receivers to care for themselves and others?  
Are we meeting the needs of caregivers (eg when is ‘enough’, are we looking after ourselves)?  
What needs to be changed (eg at individual, cultural, structural levels) to better meet care needs / exploit caring capacity? |
suggest that we conduct our exercises of the former type always in the shadow of the latter, to encourage our sense of perspective, and for want of a better term, our ‘ethical itch’.

A few points are appropriate in regard to the table, and to assessing care in general. The first is that care’s practice components involve a complex amalgam of skills and capacities that are not easy to measure, or to agree on standards for. However, there is a positive side to this: to the extent that we can only measure them imperfectly, and rate them provisionally, they will be a perennial issue in public debate, and achievements will not be taken for granted.

Secondly, it is likely that some standards in the practice of care will be difficult to express except by way of broad maxims or rules of thumb. These might include, for example, ‘attend to the greater need first’, ‘align care responsibilities with caring capacities’, and ‘keep care responses proportional to care needs’. The following attempt by Kittay (1999: 113) to articulate the basic principle of care falls into such a category:

To each according to his or her need for care, from each according to his or her capacity for care, and such support from social institutions as to make available resources and opportunities to those providing care, so that all will be adequately attended in relations that are sustaining.

Admittedly, the level of generality in all of the above maxims might make assessment more difficult, but all are intuitively reasonable objectives, and common enough in practice to be analytically useful.70

Thirdly, care does not necessarily exclude use of the measures and standards of other systems of ethics when evaluating performance. For example, there is no reason why the various concepts and tests of fairness and efficiency in an ethics of justice cannot be

70 Also arguably consistent with care are the so-called Kew Garden principles (Simon, Powers & Gunnenmann 1972, esp pp 22-25), whereby a moral agent is said to have a duty to assist a stranger if the following circumstances apply: the stranger is in critical need, the agent is sufficiently proximate to be aware of the need and able to act to address it, the agent is capable of assisting, and assistance from others is not forthcoming. The title refers to an incident in the Kew Gardens apartments in New York, where thirty-eight people witnessed the murder of a woman and did nothing.
borrowed to help judge whose care needs deserve priority, how needs can be met cost-effectively, and so on. However, the weight they are given will be negotiable, being subject to the process and practice of care.

Finally, if an ethics of care is to permeate asylum policy, investment will be required in nurturing its component practices among political leaders and public servants. Some may dismiss this task as being either too difficult or too nebulous, with connotations of educating for virtue. From this view, it would be better to concentrate on institutionalising care, for example in the form of transparent and democratic procedures, and extensive systems of checks and balances. However, while these are a useful safety net, they do little to inspire leaders to promote care as a value, or to support officials in developing caring habits. Indeed, rather than a politics of care, on their own they risk creating a politics of distrust (Uhr 2005), in which the prevailing mood is characterised by suspicion rather than engagement, a huge investment in the processes and structures of scrutiny, oversight and accountability, and a desire to keep ‘difficult’ people – including asylum seekers and their advocates – at a safe and manageable distance.

CARE AND ASYLUM POLICY

No matter how loudly some of us may want to scream or how morally right we may think we are, it will make very little difference if we cannot help people to understand more and to have faith that other management strategies [for asylum seekers], while remaining firm and credible, offer a greater degree of flexibility and compassion. (Paris Aristotle)

In this final section, we turn from matters of theory to matters of practice: specifically, to discussion of a number of current issues in Australian asylum policy from an ethics of care perspective. The aim is not to present a blueprint for reform, but rather to show the kinds of questions that care would bring to each issue, and the general directions in which it would have policy go. The issues considered are the refugee and humanitarian resettlement intake, mandatory detention, offshore interception and processing, and the culture of the department of immigration. Each is discussed separately.
Refugee and humanitarian resettlement

As noted earlier, if we go by the number of asylum applications in industrialised countries, global asylum needs appear to be waning, with applications in 2005 reaching their lowest level in nearly two decades. However, as was also noted, this figure is a poor indicator of the global need for refuge or relief, with refugees worldwide numbering 8.4 million at the end of 2005, and the total number of persons of concern to the UNHCR nearly 21 million, most located in poorer countries. Further, in 2004-05 over 90,000 people applied offshore for resettlement in Australia under its humanitarian program, a 15 per cent increase on the previous year (DIMIA 2005: 90).71 What we do in the face of such global need therefore remains a pressing question.

From an ethics of care perspective, it is conceivable that a society’s caring achievements may at times justify its closure, in the sense of reducing the number of refugee and humanitarian entrants to a trickle, if not altogether. While the onus will always be on those advocating closure to support their view, one example might be when the society is in such a state of social, economic or political stress, the demands placed on it by the new arrivals would render it dysfunctional as a community and provider of public goods. Another might be when caring for the new arrivals would divert attention and resources away from people with even greater needs, who will then have nobody to care for them.

Even when a community opens itself to receiving people in need of refuge or relief, resettlement is unlikely to be the only form of caring it seeks to engage in. Others, for example, might include helping people to return home in conditions of safety and hope, or to settle in countries of first asylum, or to obtain entry to other countries. In part these other caring options will be pursued because they are likely to be the preference of many refugees, and in part because resettlement opportunities are unlikely to ever be enough to cater for everyone who would benefit from them.72

71 The number of applications fell by ten per cent in 2005-06 to 81,682 (DIMIA 2006a), but had been rising for some years before then.
72 Over the past decade, only about 900,000 people have been resettled worldwide, either as refugees or through related humanitarian programs (Browne 2006).
That said, resettlement is a potentially unique vehicle for caring for people with the greatest needs and fewest options. As such, it will be an important component of any asylum policy based on an ethics of care.

Australia is one of only ten countries in the world that operate a formal resettlement program, and consistently ranks in the top three in terms of the size of its intake, behind the United States and Canada (SLCRC 2006). Whether or not it does in fact resettle ‘people with the greatest needs and fewest options’ is open to debate. Some might argue, for example, that the program is merely an adjunct to the skilled migration program, with entry granted only to the most employable or assimilable applicants, and health and other criteria often ruling out the individuals who would benefit most from resettlement. No doubt there is a measure of truth in this, but according to at least one independent commentator, in recent years the program has shifted significantly, and now better reflects ‘the international distribution of vulnerable refugees who had little prospect of repatriation or making a life in a neighbouring country’ (Browne 2006: 12).

Australia’s Humanitarian Program covers three main groups of people: firstly, refugees granted asylum under the onshore or in-country protection program; secondly, refugees granted entry from offshore; and thirdly, people with special humanitarian needs granted entry from offshore. The onshore group comprises people who have been granted asylum in accordance with Australia’s obligations under the Refugees Convention and domestic law, after entering Australia either unauthorised or on some form of temporary visa. The offshore refugee group also comprises Convention refugees, but ones usually identified and referred to Australia by the UNHCR, and selected with the UNHCR’s global priorities in mind. Their entry is fully funded and assisted by the Australian government. The offshore special humanitarian group comprises people who are not Convention refugees, but who are nevertheless subject to substantial discrimination amounting to gross violation of human rights in their home country, and are living outside that country. People in this group must be proposed for entry and sponsored by an eligible individual or organization in Australia.

73 A fourth group potentially comprises people receiving a variety of other types of humanitarian grant, for example the Safe Haven visas used in 1999 and 2000 to admit large numbers of Kosovars and East Timorese for short term periods.
As mentioned in chapter four, under an arrangement introduced in 1996 the total number of visas granted under the program is capped, with a nominal number of visas being assigned to each of the above groups. If the numbers nominally allocated to the onshore program are exceeded in any year, the number of places available to the offshore special humanitarian group is reduced by a corresponding amount to avoid the cap being breached. No trade-off occurs with the offshore refugee group. As Crock et al (2006: 18-19) point out, the difference between the onshore and the two offshore components of the program is that entry under the former ‘is reactive and based on international protection obligations’, while under the latter it is ‘founded on [Australia’s] free choice to bring in migrants’ – in this case migrants with special needs.

In the ten years from 1996-97 to 2005-06, approximately 125,000 people have been granted entry under the program, representing about 12.5 per cent of total settler arrivals of over a million people (DIMA 2006b). Since 2004-05, the annual target has been increased to 13,000, up from 12,000 since 1995-96, with the offshore refugee group being increased from 4,000 to 6,000. In 2005-06, 12,758 visas were granted to offshore applicants, the highest number since 1995-96, with about 56 per cent coming from Africa, and the rest mainly from the Middle East and south-west Asia (DIMA 2006a). They included 6,022 people on refugee visas and 6,736 on special humanitarian program visas, including many from refugee camps. A further 1,386 visas were granted to onshore applicants. The number of offshore visa grants represented only 14 per cent of the 90,678 offshore applications decided in 2005-06, but they included 995 for women in a special Woman at Risk category and 660 for unaccompanied minors.

---

74 In other words, when there is a large increase in the number of onshore asylum applicants granted refuge, as occurred in 1999-2001, there is a commensurate drop in the number of people granted resettlement under the offshore special humanitarian component of the program. The reverse occurs when the number of onshore grants falls, as has occurred since 2001. A degree of flexibility exists in the program, allowing some trade-offs between as well as within years.

75 The number would be higher if we included those granted entry on temporary Safe Haven visas, for example during the Kosovo crisis.

76 The total number of protection visas granted onshore in 2005-06 actually numbered 5,215. However, only 1,386 were counted as part of the Humanitarian Program, with the remainder being grants of further protection to holders of temporary protection and temporary humanitarian visas who had already been counted as part of the program (nearly all being converted to permanent protection visas), and grants to Australian-born children of protection visa holders.
cost of the offshore program in 2006 was $29.5 million,\textsuperscript{77} with another $62.2 million being spent on Humanitarian Program settlement services, including settlement planning and information delivery.\textsuperscript{78}

As with migrants in general, how many refugee and humanitarian entrants Australia can resettle, and from where, will always be a contested issue. However, the above intake might be compared with three possible benchmarks of caring achievement: firstly, the capacity revealed during the displaced persons scheme after World War Two; secondly, the capacity revealed again in the post-Vietnam War years; and finally, the intake of other countries.

- Benchmark 1 – in the five years from 1948 to 1952, when Australia’s population numbered only about eight million, it resettled over 180,000 refugees from Europe, twenty-eight per cent of its total migrant intake of about 633,000, and an average of 36,000 a year.\textsuperscript{79}
- Benchmark 2 – in the five years from 1980 to 1984, Australia resettled about 95,000 Indo-Chinese refugees, twenty per cent of its total migrant intake of about 471,000, and an average of 19,000 a year.\textsuperscript{80}
- Benchmark 3 – in 2005, Canada, one of the most comparable countries to Australia, granted entry to about 35,000 people under its refugee and

\textsuperscript{77} This compares with $40.6 million spent on the onshore program (not including the cost of the Refugee Review Tribunal), although this program gave rise to less than ten per cent of visa grants. A further $16.6 million was spent on offshore processing centres in Nauru and PNG, and $12.5 million on processing centres in offshore territories (Christmas Island). For financial information on the various aspects of Immigration’s operations, see Table 29b, ‘Major classes of departmental income and expenses by output groups and outputs’, in DIMA (2006a: 336-337).

\textsuperscript{78} A small portion of this $62.2 million is spent on persons granted visas under the onshore program, some of who have access to early health assessment and intervention services.

\textsuperscript{79} Some 170,700 displaced persons were resettled from Europe under Australia’s agreement with the IRO during these years, with a further 11,000 or so coming under arrangements between the IRO and non-government organizations (Price 1990a: 20).

\textsuperscript{80} These estimates are from figures compiled by York (2003).
humanitarian program, nearly three times Australia’s intake for 2005-06, and about thirteen per cent of its total migrant intake of 262,000 (Crary 2006).  

In the light of these benchmarks, it seems reasonable to think that Australia has a capacity to at least double its current annual intake under the Humanitarian Program. That said, to be sustainable, political leaders would almost certainly need to provide a positive framework within which public debate on the increase could occur, and work hard to ensure it has the necessary support. The language of care would be well suited to this task, provided it was accompanied by a carefully orchestrated program to build networks of support for not only the new arrivals, but also the residents of the suburbs and towns which they enter.

**Mandatory detention**

Australia’s mandatory detention policy – the requirement that anyone known or reasonably suspected of being an unlawful non-citizen be held in immigration detention until they are either granted a visa or removed from Australia – has attracted much criticism since its introduction in the early 1990s, but continues to be supported by the main political parties. The policy can affect a wide range of people in very different circumstances, for example people who overstay their visas or have them cancelled, foreign nationals caught fishing illegally in Australian waters, people who arrive unauthorised and claim asylum, and stowaways and ship deserters. Except when there is a surge in unauthorised boat arrivals seeking asylum, the majority of people in detention are usually visa over-stayers and illegal foreign fishers.

---

81 According to Do (2002), in 2000 Australia ranked third among the ten countries that year which accepted refugees under a formal offshore resettlement program, or fifth in per capita terms at 0.72 resettlement places per 1,000 Australians, after Norway (1.44), Sweden (1.19), Canada (0.98) and Denmark (0.82). However, if we include the number of persons granted refuge or relief through onshore protection programs, Australia ranked ninth in overall intake or eighth on a per capita basis among comparable European and North American countries, and thirty-two and thirty-nine respectively on a global basis.

82 See especially ss189 and 196 of the *Migration Act 1958*.

83 For example, at 30 June 2006, there were 749 people in immigration detention (compared to 865 at 30 June 2005), including 73 accommodated in the community under residence determination arrangements.
A duty of care to detainees has long been recognised on the part of the government and its contracted service providers, and is given effect through Immigration Detention Standards, which are developed by Immigration in liaison with the Commonwealth Ombudsman’s Office and the Human Rights and Equal Opportunity Commission. However, what this duty of care involves is contentious and still unfolding, with longstanding concerns in particular about the effects of detention on children, and on people incarcerated for long periods. In recent times criticism has also centred on instances of maladministration of the policy, including instances where Australian residents or citizens have been wrongfully detained or improperly removed from Australia. Departmental failings in the detention and compliance areas have been found to include poor leadership, insufficient checks and balances, a defensive and procedurally oriented organisational culture, and officials ill-equipped to handle their power responsibly (Palmer 2005, Comrie 2005, ANAO 2005). The result has been a major departmental shake-up and reform agenda, aimed at enhanced openness and accountability, fair and reasonable dealings with clients, and well trained and supported staff (Metcalfe 2006, DIMA 2006a).

(35 adults and 38 children) and 63 living elsewhere, eg in foster care, private apartments, correctional facilities or hospitals (DIMA 2006a). Of the 749, 17 were unauthorised boat arrivals (93 in June 2005), 40 were unauthorised air arrivals (37 in June 2005), 402 were people who had been living in the community but had overstayed or breached their visa conditions (648 in June 2005), 251 were illegal foreign fishers (54 in June 2005), and 39 were others such as stowaways and ships deserters (33 in June 2005). About 15 per cent (nearly one third in June 2005) were involved in the asylum process. Of these, only about 4 per cent (25 people) were still waiting for a primary decision on their asylum application. The rest were seeking merits or judicial review of an adverse primary decision.

84 According to the JSCM (1998: 5), ‘Immigration detention is an administrative sanction, that is, the deprivation of personal liberty other than as a result of a conviction for an offence. The Australian Government and [the detention centre managers], as service provider, have a duty-of-care to detainees and all actions relating to the detention and care of detainees must be consistent with the relevant Commonwealth and State laws and, if asylum is sought, with the relevant international conventions covering refugees’. The Immigration Detention Standards form the basis for the contract between the Commonwealth and the detention service provider, and specify the quality of life expected in detention facilities.

85 Between early 2005 and August 2006, some 248 cases of possible wrongful detention were referred to the Ombudsman for investigation (Jackson: 2006).
In the case of asylum seekers, criticism of mandatory detention centres less on cases of improper removal – for the refoulement of a refugee could occur whether or not such a policy exists – but on whether such people should be detained at all. The arguments used to justify the policy have altered little since its inception, and can be summarised as follows: it prevents unauthorised arrivals entering the community until their claims to refuge or relief are assessed and identity, character, security and health checks are completed; it prevents failed applicants absconding, facilitating their removal and saving the resources that would otherwise need to be devoted to finding them; and it helps keep control of and integrity in the humanitarian and migration programs. The arguments against are also much the same: people have a right to seek asylum; it is a disproportionate response to the offence of unauthorised arrival; the indeterminate and potentially indefinite nature of detention is contrary to international human rights law;\(^{86}\) the detention of children is morally wrong; the detention of people in order to deter others from arriving is also morally wrong, as well as being of doubtful efficacy;\(^{87}\) it can be psychologically damaging; it is expensive; and viable alternatives exist, for example release with community guarantors and residency and reporting obligations.\(^{88}\)

---

\(^{86}\) For example, according to this view immigration detention for lengthy periods risks breaching Article 9(1) of the ICCPR, which provides that no one shall be subjected to arbitrary detention.

\(^{87}\) According to one critic, for example (Julian Burnside, in SLCRC 2006: 166), ‘My concern in the matter, from first to last, is a moral concern, which is simply this: in my view … it is morally reprehensible to mistreat innocent people as an instrument of government policy in order to deter other people from behaving in particular ways’. Successive governments have not denied that the policy has deterrent value, but have argued this is not its primary purpose. For example, according to DIMIA (2002: 165), ‘Deterrence is not the central or dominant objective or reason for the mandatory detention provisions. However, to the extent that mandatory detention is perceived internationally to indicate Australia’s determined and effective pursuit of the above objectives [ie assessment of claims prior to entering the community, availability for removal, integrity of migration and refugee and humanitarian programs], some level of deterrence would be an understandable outcome among potential illegal entrants who lack bona fide claims to asylum, and those engaged in secondary movement for non-protection related motives’.

\(^{88}\) The arguments for and against mandatory detention of asylum seekers are canvassed in reports such as those by the Joint Standing Committee on Migration in 1994 (JSCM 1994), the Human Rights and Equal Opportunity Commission in 1998 (HREOC 1998), and the Senate Legal and Constitutional References Committee in 2006 (SLCRC 2006).
Before discussing the policy from the perspective of an ethics of care, a few preliminary points should be made, by way of context. Firstly, the policy affects only asylum seekers who arrive unauthorised. It does not cover those who enter Australia on a visitor or other form of visa, and only later apply for asylum. These persons, who typically comprise the bulk of asylum applicants, are usually allowed to live in the community on a bridging visa until their claims are assessed. Secondly, the time taken to process asylum claims by detainees is generally not unreasonable, and compares favourably with processing times in other countries. For example, in 2005-06 eighty-eight per cent of detained asylum applicants received a primary decision within three months, with more than half receiving it within six weeks (DIMIA 2006a). Times were longer from mid-1999 to mid-2002, when about 9,400 asylum applications were lodged by detained boat arrivals, and Immigration resources were severely strained. However, even during this period, some eighty per cent of applicants received a primary decision within six months, with review decisions averaging an extra two or three months. When a person is detained longer than a year, it is typically because they are engaged in a legal challenge to an adverse review decision – very few of which lead to a change in the decision – or have exhausted all avenues of legal and ministerial appeal and are

89 For example, according to DIMIA (in SLCRC 2006), its processing times are better than those in New Zealand (which in 2004-05 averaged six months) and in Canada (which in 2003-04 averaged 14.2 months).

90 According to DIMIA (2002: 167), ‘In 1999-2000, with 3,931 asylum applicants from unauthorised boat arrivals, … 80 per cent were processed in just over thirty weeks. In 2000-2001 with 3,910 asylum applicants, 80 per cent were processed in just under sixteen weeks. In 2001-2002 with 1,528 asylum applicants, 80 per cent were processed in just under twenty-five weeks, with 10 per cent straightforward applications receiving their primary decision in less than six weeks’.

91 According to information provided by the Refugee Review Tribunal (RRT) to a recent Senate committee inquiry (SLCRC 2006), an application for judicial review was filed on about 40 per cent of the 3,033 cases finalised in 2004-05 by the RRT. Of the 2,208 applications finalised that year by the courts, 245 (11 per cent) were overturned or remitted to the RRT for further consideration. In information provided by the RRT to an earlier Senate committee inquiry in 1999 (in Brennan 2003), court appeals were said to have led to a difference in its ultimate decision in only 0.2 per cent of the 26,401 cases it had determined since commencing in 1993, or 48 cases out of 1,837 Federal Court appeals. It should be noted that the courts review appeals on legal grounds, not merit.
either waiting on removal or refusing to go home. Other less common reasons can include difficulties in obtaining a security clearance from ASIO, ongoing uncertainties about identity, or unresolved issues about a person’s entitlement to enter another country where protection is available to them. Thirdly, in June 2005 changes were made to soften the detention regime in regard to asylum seekers. These include incorporation in legislation of the principle that children shall be detained as a measure only of last resort, provision for the placement of families with children in the community, either under residence determination arrangements or in supervised residential housing projects, three month time limits for primary and review decisions, expanded ministerial discretion to grant visas to persons in detention or specify alternative detention arrangements, improved individual case coordination processes, and increased oversight by the Commonwealth Ombudsman, including a requirement to report to parliament every six months on any person detained for more than two years. According to Immigration (DIMA 2006a: 132), it now operates with an explicit, government-endorsed principle that ‘detention service policies and practices are founded on the principle of duty of care’.

---

92 In some cases, a catch-22 type situation can arise, where a person refuses to leave voluntarily, and their home country refuses to accept them if returned forcibly.


94 Under these arrangements, children and their families can live at a specified address in the community, with reporting conditions, and supported by non-government organizations who are funded to source housing and provide assistance, including ensuring access to relevant services and social support networks. The families can move about the community without being accompanied or restrained by Immigration officers, but it remains a form of immigration detention and does not give any lawful status, or the rights and entitlements of the holder of a valid visa.

95 A trial residential housing centre had been operating in Port Augusta since late 2003, and two were opened in Perth and Sydney in 2006 (Vanstone 2006a). New low security Immigration Transit Accommodation Centres are also planned for Adelaide, Brisbane and Melbourne, to house short-term, low flight-risk detainees in places separate from established detention centres.

96 Immediately after these changes were announced, the Immigration Minister invited about fifty long-term detainees to apply for a form of bridging visa that allows release while efforts continue to arrange their removal. One person released under this arrangement had been detained for seven years.
Despite these latest changes, critics of mandatory detention continue to argue for its abolition, at least in regard to asylum seekers. For example, according to Crock et al (2006: 205),

> Australia’s regime of mandatory detention of asylum seekers is a grave blemish on Australia’s human rights record … Whilst important steps have been made towards addressing the problems associated with detention, the government still fails to recognise the harm that detention causes to detainees and to society as a whole, which has become accustomed to their suffering.

So what might we say about the policy under an ethics of care approach? At the outset, it is worth noting that in relation to the care needs of detainees, the changes announced in June 2005 are a significant improvement, especially the provisions relating to the detention of children and families, and the three month time limits on processing asylum claims. At the same time, the care needs of the receiving community have arguably also not been overlooked, for the policy has not been abandoned. Few would deny the importance of not only sound judgment on applicant and home country circumstances when assessing asylum claims, but also on potential dangers to the community, for example from people who are ill, or who have a criminal record, or are of security concern. Even advocacy groups usually agree that an initial period of detention for unauthorised arrivals is warranted – a period of two to three months considered not unreasonable – during which these sorts of concerns can be addressed, and to establish that people have prima facie grounds for entry for protection or other humanitarian reasons.97

---

97 In a 1994 inquiry into asylum, border control and detention arrangements, a parliamentary committee concluded that (JSCM 1994: 121-122), ‘Community and advocacy groups generally agreed that unauthorised arrivals should be detained upon arrival in Australia, in order that identity and reasons for arrival can be established, and to allow security and health checks to be conducted … [But] Many individuals and organizations felt that detention beyond an initial period of identification and checking would be unreasonable … A majority of groups advocated a maximum two month detention limit for those who are not a risk to the community or who are not likely to abscond’. A recent Senate committee inquiry (SLCRC 2006) recommended that initial periods of detention be limited to 90 days, and that continued detention be subject to a formal and independent process of review and limited to situations where an individual seemed likely to abscond, or posed a danger to the community.
That said, there are issues from a care perspective that favour still greater flexibility in the policy’s administration. They arise from a consideration of two core questions: firstly, what arrangements are likely to best meet the care needs of asylum seekers until their claims to stay in Australia are satisfactorily resolved; and secondly, are these arrangements inimical to the care needs of the receiving community, and if so, what compromise arrangements can be made that will minimise the potential harm caused to either?

In regard to the care needs of asylum seekers, the main argument against detention beyond an initial period for preliminary checks is the risk of psychological harm from incarceration and exposure to an environment with relatively high levels of despair, violence and self-destructive behaviour. People especially at risk are those suffering from previous trauma, and those detained for long periods while awaiting the outcome of appeals against adverse decisions. According to the Immigration Detention Standards, service providers are to establish and maintain ‘a secure and safe detention environment’, with satisfactory performance being where there is ‘no instance of a detainee coming to harm as a result of risks not being identified, assessed, managed and ameliorated’. However, experience has consistently shown this to be a difficult standard to meet. According to a recent Senate committee report (SLCRC 2006: 204),

There is a significant and credible body of evidence that prolonged and indeterminate immigration detention results in an unacceptable rate of psychological harm in the detainee population. Evidence also demonstrates that asylum seekers and those seeking protection on humanitarian grounds, including children, are most at risk.

---


99 The committee also argued (SLCRC 2006: 192) that the treatment of mental disorders in a detention centre is ‘inherently flawed’, especially where the cause of ill health is attributable in part or in whole to the conditions of detention. It concluded (at 210), ‘The weight of evidence before the committee demonstrates that … immigration detention, in its present form, is unable to meet the twin objectives of preserving the integrity of the migration program while ensuring the humane treatment of nonnationals in detention’. Issues relating to the mental health of asylum seekers and others in immigration detention are considered in Crock et al (2006), SSCMH (2006), Physicians for Human Rights & Bellevue/NYU Program for Survivors of Torture (2003), and Steel & Silove (2001).
Whether asylum seekers’ other basic care needs – for example food, accommodation, clothing, health and education – can be met better outside the detention setting is less clear. In a 1994 inquiry, the Joint Standing Committee on Migration (JSCM) was not convinced that this was the case. In its view (1994: 151-152),

The support which would be necessary to maintain [asylum seekers] in the community may be required over a lengthy time frame, particularly if those persons who are rejected for refugee status seek to utilise all avenues of appeal. Release into the community would require significant coordination between a range of service providers, including various Commonwealth and State Government departments and community support and welfare organizations … The confidence expressed by some community organizations about their ability to respond to the long term needs of asylum seekers does not necessarily match the reality of the situation … Within the detention environment [direct and indirect] costs are covered in their entirety by [Immigration]. It is impractical and unrealistic to expect that a similar level of support could be achieved and maintained at a lesser cost if a large number of asylum seekers were released to live individually or even as small groups in the community, and if the support was required over a longer term.

However, this is more an argument for providing a variety of care arrangements than a ‘one size fits all’ type approach. The JSCM itself envisaged a range of alternatives to detention for asylum seekers with special needs who had been detained for more than six months due to inaction or error on the part of Immigration. Among the alternatives they proposed were placement in hostels, boarding situations, private families, or their own living quarters. Further, there is no reason why the JSCM’s (1994: 155) conclusion about asylum seekers with special needs is not equally applicable to all unauthorised arrivals who seek asylum: that is, ‘The best option will depend on the circumstances of the particular person, and the extent of community support which can be generated’.

From the view of care, an appropriate objective would therefore be the development of the administrative flexibility to tailor living arrangements for asylum seekers who have entered unauthorised according to their individual needs and circumstances. After an initial period of detention to allow for basic checks to be completed and community support arrangements made, the aim would be to have a suite of options, including continued stay in closed detention, supervised residential housing arrangements, day
release from either type of centre, and full release with residential, reporting or surety conditions into the care of families or community organizations, with government subsidies where appropriate.

Further, in view of the risk of psychological harm from detention, it would seem reasonable that the onus be put on Immigration to justify instances where it thought detention was necessary beyond the initial two to three month period, and that the decision not be made by it alone.\textsuperscript{100} For as Senator Barney Cooney, a member of the JSCM in 1994, observed (JSCM 1994: 195),

\begin{quote}
It is right and proper for the Executive to have the power to release those it detains. However, an authority which holds people in custody should not have the exclusive power to decide whether they should be released or in what circumstances or under what conditions. Detention of any sort or for any length of time is a grave matter and a captor should not be the only person deciding the fate of the captive.\textsuperscript{101}
\end{quote}

Turning to the care needs of the community, drawing on the sorts of asylum values identified in previous chapters, the main argument in favour of mandatory detention would seem to run as follows. Firstly, it instils confidence in the community that immigration is being regulated – that entry cannot be achieved simply by arrival – and that such regulation is important in terms of nation building and good governance. Secondly, it instils confidence in the integrity of the Humanitarian Program, and that this too is important because it is consistent with a needs-based approach to asylum, and prevents community sympathy drying up through feeling its generosity is being abused.

\textsuperscript{100} This justification might be before a judge or a panel of government and community representatives, and grounds for continuing detention could be wide-ranging, for example the ready resolvability of the case (eg promising either early release or assured failure), failure to satisfy basic check requirements, the risk of absconding, an inability to arrange an appropriate support group, and so forth.

\textsuperscript{101} A similar view was expressed recently by a Senate committee (SLCRC 2006: 173-174), which argued that ‘while the original [mandatory detention] policy envisaged the possibility of long-term determination, the Parliament did not intend to pass a law for the indefinite detention of non-nationals … It is the role of law to provide procedural safeguard against over zealous use of executive power and reflect the community’s values of humanitarian concern and fairness; as well as to ensure effective implementation and protection of the Australian migration program’. 
From the view of care, however, the critical question is whether a more flexible approach to the detention of asylum seekers is necessarily inimicable to this confidence: that is, whether it is possible to simultaneously maintain community confidence in the Humanitarian Program and meet the care needs of asylum seekers better. In this regard, the community’s capacity to absorb two other groups with often less compelling grounds for entry and stay gives cause for hope:

- The first group comprises the people who apply for asylum after entering the community on a temporary visa, and continue to live in the community pending the resolution of their claim, many with work rights and Medicare coverage. These community applicants made up the vast majority of the 3,300 people who lodged an asylum application in 2005-06, with detainee applicants numbering probably less than a hundred (DIMA 2006a). Even when unauthorised boat arrivals peaked in 1999-00 and 2000-01, community applicants still made up the majority of applicants in the onshore program.

- The second group comprises the people who each year overstay their temporary visa and continue living in Australia with no authority to do so. In 2005-06 this group numbered up to 10,000, with total over-stayers in June 2006 estimated at around 46,400, down from 47,800 in June 2005 and 51,000 in June 2004 (DIMA 2006a). While Immigration located 10,443 people in 2005-06 who had

---

102 Published figures on the breakdown are difficult to find, but according to information provided by Immigration to the SLCRC (2006), only 88 of the 3,105 applications for asylum in 2004-05 came from people in immigration detention.

103 According to figures given by Immigration to the SLCRC (2006), community applicants in 1999-00 numbered 6,620 compared to 5,033 detainee applicants. In 2000-01 the respective numbers were 7,418 and 5,122. Between 1999-00 and 2004-05, community applications averaged 5,130 per year, but the numbers have been falling since 2000-01 and are now only about half of those of five years ago. The fall in detainee applicant numbers (about 60 in 2005-06) has been even more dramatic, reflecting the virtual absence of unauthorised boat arrivals since mid-2001. The proportion of visitor visa holders applying for asylum in 2005-06 was 0.07 per cent (2,441 applicants) compared to 0.06 per cent (2,436 applicants) in 2004-05 (DIMA 2006a).

104 This is an estimate based on the 9,550 non-citizens who became overstayers in 2004-05 (DIMIA 2005); no comparable figure is provided in Immigration’s annual report for 2005-06 (DIMA 2006a).
either overstayed their visa or were in breach of their visa conditions, the median identified period of overstay is about three years.\textsuperscript{105}

Both of the above groups involve people living in the community who have often been subject to less stringent checks prior to entry than those conducted on unauthorised arrivals in detention. Both also involve people who are less likely to be found deserving of refuge or relief than asylum seekers who arrive unauthorised. For example, some ninety per cent of asylum applicants who arrived unauthorised by boat from 1999 to 2001 were granted refuge, while grants to those who apply after arriving on a visitor visa average roughly ten per cent.\textsuperscript{106} The net effect of all this is rather ironic: people typically in need of care in the form of asylum are detained, while people who claim they need asylum but usually don’t remain free, as do many who don’t even claim they need asylum, but overstay or breach their visa conditions. Importantly, in neither of the latter two cases are there any obvious harmful consequences to the community.

It may be argued that unauthorised arrivals present a high risk of absconding. For example, according to the JSCM (1994: 153), most ‘are determined to remain in Australia’, and if they were provided easy opportunities to disappear into the community, it ‘would result in unauthorised arrival being perceived as providing ready access to long term entry’. The JSCM also notes the difficulty of locating people who abscond. For example, it says that about one third of the fifty-seven unauthorised arrivals who absconded between 1989 and 1993, including some from open migrant hostels, were still at large in 1994. This remains a concern of government, with Immigration (DIMIA 2002: 166) stating in 2002 that,

\begin{quote}
While aware of the variety of arrangements used in like-minded countries to restrict the movements of illegal entrants, in the Australian Government’s view the relative effectiveness and applicability to the Australian environment of these arrangements remains questionable. Australia does not have any kind of national identity card system and, given the diverse composition and urban concentration of its population, it is difficult to locate people who disappear into the community.
\end{quote}

\textsuperscript{105} This median is provided in Immigration’s annual report for 2004-05 (DIMIA 2005); no comparable estimate is provided in its 2005-06 annual report.

\textsuperscript{106} The proportion varies from year to year, depending among other things on the profile of applicants.
The problem of absconding cannot be lightly dismissed, especially if the numbers involved begin to seriously challenge immigration and humanitarian policy objectives. However, it seems a matter of risk toleration and containment rather than elimination, for the problem of non-citizens disappearing into the community is by no means new. As noted in chapter three, in the 1960s roughly a thousand seamen a year deserted their ships after reaching Australian ports, with relatively few being found and removed.\(^{107}\)

Further, there is also a high level of absconding among community-based asylum applicants. For example, of around 8,000 community applicants in 1993, twenty-seven per cent or 2,171 absconded after receiving either an adverse primary or review decision (JSCM 1994). And of the 81,000 or so applicants who received adverse decisions in the following decade, about 16,000 or twenty per cent remained unlawfully in Australia in 2004 (Millbank 2004).

In this context, it seems open to political leaders to further increase the flexibility of detention arrangements for asylum seekers who arrive unauthorised, and manage community concerns by measures such as maintaining robust efforts to locate and remove absconders, increasing public knowledge of asylum issues, ensuring comprehensive support arrangements for both asylum seekers and their local community hosts, and streamlining legal review arrangements. From an ethics of care perspective, the benefits would be twofold: firstly, more opportunity to tailor care according to individual circumstances, and secondly, more opportunity for the community to make informed judgments about asylum issues, including its own caring capacities.

That said, an approach from care would also suggest that the onus be on the asylum seeker, and not Immigration, to justify anything other than return to closed detention when a claim to refuge or relief has been rejected, including during any period of legal appeal. Failed asylum seekers and their advisers need to share responsibility for

---

\(^{107}\) See chapter 3, footnote 49. Recent estimates of ship deserter numbers are difficult to locate, but Immigration reports locating fifteen deserters and three stowaways in 2005-06, and twelve and twenty-five respectively in 2004-05 (DIMA 2006a, DIMIA 2005).
ensuring litigation is based on a considered assessment of error rather than unwarranted hope, and is not used as a means merely to delay the inevitable.108

**Offshore interception and processing**

In response to a sharp increase in unauthorised boat arrivals from late 1999 – many engaged in secondary movement from countries in north-west Asia – several changes were made to asylum arrangements in September 2001, which were loosely dubbed the Pacific solution. Under these changes, certain parts of northern Australia were excised from its migration zone, with the effect that people who arrive unauthorised in these areas cannot make a valid visa application for entry to Australia unless permitted by the Minister for Immigration.109 Further, these people, and others from boats intercepted in Australia’s territorial waters, can be taken to a ‘declared country’110 – to date either Nauru or PNG – where they are accommodated in centres run by the IOM and funded by Australia, while any asylum or other pressing humanitarian needs are identified. For the purposes of Australia’s *Migration Act* they are not taken to be in Immigration detention, but their freedom of movement is restricted by the geographical constraints of centre locations, if not by centre regulations.111

---

108 The principle of equity suggests this rule should also apply regardless of whether the person has entered Australia authorised or unauthorised. Exceptions could include when there are circumstances that warrant alternative arrangements, for example in the case of families with children, or people suffering from mental or emotional conditions.

109 The parts of northern Australia that fall under these provisions are specified in regulations, and include islands like Christmas Island and Ashmore Reef. A proposal to extend the excised areas to include islands across the full length of northern Australia was rejected by the Senate in December 2002, and again in June 2003.

110 Under s189A(3) of the *Migration Act*, an offshore entry person may be taken to a country that has been declared in writing by the Minister for Immigration that it: ‘(i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and (iv) meets relevant human rights standards in providing that protection’.

111 According to information provided by DIMIA to the SLCLC (2006), ‘open centre’ arrangements have operated in Nauru since mid-2004 (the only centre then operating), permitting free and unaccompanied
The expectation is that people in these offshore centres will be repatriated if no asylum or other pressing needs are identified, or resettled if they are, but not in Nauru or PNG, who are unwilling to let them stay permanently. Nor will they necessarily be resettled in Australia, whose preference is to find other countries to take them. Even when entry is granted to Australia, it will usually be in the form of a three-year humanitarian visa. At the end of this period, the visa may be extended for another three years if a protection need continues. However, access to a permanent visa will not be possible unless permitted by the minister.

Boats carrying asylum seekers that are intercepted en route to Australia can also potentially be turned back to Indonesia, where Australia funds the IOM to provide services to people who arrive there in the hope of gaining unauthorised entry to Australia. These services include accommodation, food, emergency medical assistance, counselling, and referral to the UNHCR to assess possible asylum needs. Some of the people found to be refugees have eventually been resettled in Australia, but again there is no surety of this.

The asylum needs of people taken to Nauru or PNG are assessed by Australian Immigration officials, in ways similar to those that would be used by field officials of the UNHCR. A senior Immigration official reviews any adverse decisions. However, unlike their counterparts in Australia, they do not have access to legal assistance in preparing their application, or to the Refugee Review Tribunal (RRT) to review the merits of their case, or to the Federal Court to review possible errors of law by the RRT.

movement around the island between 8am and 7pm, except for some areas like the airport. According to Crock et al (2006: 123), for practical purposes it is still a detention centre because detainees ‘are not permitted to leave the compound without permission’.
112 According to Crock et al (2006), in 2001 at least four boats were turned back after arriving in Australian waters, and in 2002 a boat that reached Melville Island carrying fourteen Turkish Kurds was also returned.
113 See, for example, DIMIA (2005) and Vanstone (2006b).
114 A small number of the first group to be taken to the centres in 2001 were assessed by the UNHCR.
115 Including unauthorised boat arrivals detained either on mainland Australia or on Christmas Island, where a new immigration detention centre is planned for completion in mid-2007.
They do, however, have access to the Australian High Court in its jurisdiction under s75 of the Constitution.\textsuperscript{116}

From the policy’s inception in September 2001 to June 2006, a total of 1,547 asylum seekers had been taken to the offshore centres (DIMA 2006a, DIMIA 2005). About two thirds (1,064) were found to be refugees or have some other special humanitarian need. Of these, more than half were granted entry to Australia, although initially on only temporary visas, and in more than fifty cases only after several years.\textsuperscript{117} The rest were resettled in New Zealand (401), Sweden (20), Canada (16), Denmark (6) and Norway (4). Those who had failed in their asylum applications had been repatriated, most having accepted a reintegration package offered by Australia, and the remainder financial assistance from the IOM. At the time of writing, no one is being held in the PNG centre, but about ninety people are being held in Nauru.\textsuperscript{118} From its inception in 2001 to June 2006, the cost of establishing and operating the two centres has totalled approximately $235 million. This does not include ancillary costs, for example those associated with increased surveillance and naval operations to give effect to the policy, or the cost of immigration detention facilities on Christmas Island.

In early 2006, the government sought to extend the policy to cover all unauthorised boat arrivals, regardless of where they landed in Australia. The aim was expressed in generic terms, as providing ‘the flexibility to … move a wider group of people to offshore processing centres’, and as being ‘a disincentive to people who arrived on the mainland

\textsuperscript{116} Under s75(v) of the Constitution, the High Court has original jurisdiction with respect to decisions made under the Migration Act ‘in which a writ of mandamus or prohibition … is sought against an officer of the Commonwealth’. In August 2005, the Court affirmed its ability to also hear certain appeals from the Supreme Court of Nauru, and the right of Nauru to impose what conditions it wished on persons to whom it granted entry. The case involved an Afghan in Nauru whose asylum claim had been rejected, and who had then challenged the legality of his detention under the law of Nauru.

\textsuperscript{117} Twenty-five people were granted entry to Australia late in 2005 after concerns grew about their mental health. The longest period of stay was endured by two Iraqis found to be refugees, but who failed to pass ASIO security checks. One was granted entry for psychiatric treatment in August 2006, and the other, who had spent more than five years in Nauru, was granted entry several months later.

\textsuperscript{118} Eight are Burmese who tried to enter Australia by boat from Indonesia in late 2006, after having spent time in Malaysia (Gordon 2007). The rest are Sri Lankans who also came via Indonesia in February 2007 (Hart 2007).
unauthorised by boat to defeat the existing excision provisions’. However, the proposal appeared closely associated with protests from Indonesia about Australia’s grant of temporary protection to forty-three Papuans who arrived at Cape York in late 2005, and opposition to it was therefore based not only on criticism of the overall policy of offshore processing, but also concern that it was influenced by foreign policy considerations. The enabling legislation was withdrawn when it became clear that it would not be passed in the Senate.

Judged purely on arrival numbers, offshore interception and processing appears to have had its intended effect. The number of unauthorised boat arrivals fell from 3,649 in 2001-02 to less than 150 from then until June 2006: none in 2002-03, eighty-two in 2003-04, none in 2004-05, and sixty-three in 2005-06 (DIMA 2006a, DIMIA 2005). In October 2005, Prime Minister Howard (in Topsfield 2005) declared the policy an ‘outstanding success’:

This Government has stopped illegal immigration and our measures have included the Pacific solution. Without it and without the other measures we’d still have a problem.

See the Explanatory Memorandum to the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (in CLCLC 2006: 1).

Unlike 2001, when the government was able to defend offshore processing on the grounds of helping dissuade the secondary movement of refugees to Australia from remote countries, no such defence could be mounted this time, since it was clearly intended to cover asylum seekers from immediate neighbours like Indonesia as well.

Various arguments were advanced against the proposal, many of them echoing criticisms of the existing offshore processing arrangements. A Senate committee (SLCLC 2006: 13) looking into the matter grouped them into three broad clusters: that it represented ‘flawed domestic policy’ in a number of areas, that it breached or risked breaching international obligations (eg under the Refugees Convention and the ICCPR), and that it represented ‘deficient foreign policy, in terms of a perceived attempt to appease Indonesia’ over the situation of Papuan asylum seekers.

Elsewhere Howard (2005: 4) has said, ‘Whatever people may say about Nauru, we would never have stopped the flood of boats coming to this country if we had not amongst other things had offshore processing. Offshore processing, along with turning the boats back to the north of Australia, mandatory detention and the excision of islands from the migration zone, all of those things taken together stopped the large number of boats coming to this country and effectively provided that protection for our borders. So I continue to very strongly defend the offshore processing of unauthorised arrivals to Australia’.
More specifically, Australia argues that its new approach allows it to simultaneously fulfil its Convention obligations, disrupt people smuggling, and deter refugees from secondary movement. In its view, it promotes integrity in the international protection system, and allows it to maintain the offshore resettlement component of its humanitarian program, which would otherwise be ‘crowded out’ by large numbers of onshore asylum grants:

In the Australian Government’s view, while refugees have a right to protection, they do not have the right to choose the country that provides the protection or a right to local integration in that country … The right to ‘seek and enjoy asylum’ in the UDHR is purely permissive. Nor do refugees have the right to abandon protection in one country to seek it in another. In the context of millions of refugees worldwide and the need for hard choices as to who and how many Australia can help, secondary flows disadvantage the resettlement prospects of other refugees who may be in equal or greater relative need of assistance, including those in refugee camps and

---

123 There are numerous challenges to the claim that Australia is meeting its Convention obligations in adopting offshore interception and processing; see, for example SLCLC (2006), Magner (2004), Bostock (2002), Fonteyne (2002). However, according to DIMIA (2002: 151), ‘Having entered Australia’s territory, unauthorised arrivals who are taken to a declared country are not being prosecuted or punished for their illegal entry or use of false documentation and therefore are not being penalised in contravention of Article 31, and they are being protected from refoulement. They are also being provided access to a refugee status determination procedure, where any asylum claims that they may make can be assessed’. Similarly, according to Piotrowicz and Blay (2001: 18), ‘The refugees on the Tampa [the first boat intercepted] may well have been in a dire situation. Anyone in need of emergency help must receive it. But in addressing the immediate problem we should not be deflected from the wider issue: if the refugees’ only aim was to escape persecution in Afghanistan, then they could have requested permission to remain in Indonesia or other countries they transited. Instead, they wished to enter Australia. But international law has never allowed forum shopping. Refugees are not entitled to pick and choose where they will go’.

124 According to DIMIA (2002: 152), ‘The key outcomes of the [offshore processing and interception arrangements] has been to limit the capacity of smugglers and those using their services to assume that unlawful arrivals will obtain a migration outcome in the country of their choice. The arrangements are designed to ensure that refugees will be identified and protected, but take away a major incentive for dangerous travel in circumstances where, in terms of refugee protection, it is unnecessary’. More than 350 asylum seekers are known to have died in at least one tragedy in October 2001, involving a boat called the ‘SIEV X’.

125 The argument being that when there is a limit on the overall number of refugees Australia can absorb, its Convention obligations oblige it to give priority to refugees who reach its shores.
those who do not have the financial resources to pay people smugglers. Prospects for family reunification of refugees already resettled in Australia are also jeopardised (DIMIA 2002: 149).

The policy also appears a success in terms of public approval, with a majority of Australians expressing support for the general idea of ‘turning boats away’ (Dodson 2005, Shanahan 2002, Betts 2001).

Nevertheless, the policy has attracted strong and sustained criticism, especially from refugee advocates and human rights organizations. Many, including the UNHCR, consider it contrary to the spirit of the Convention, conducive to breaches of international human rights instruments, discriminatory in not providing asylum applicants in offshore centres the same rights and services provided to onshore applicants, and a poor example to set for other countries. Manne (in Gordon: 2007) describes it as an ‘out of sight, out of mind, out of rights’ policy, Brennan (2003: 12) as a ‘sledge hammer tactic’, and Gibney (2004: 192-193) as ‘a new type of government-led, offensive politics of asylum’ that reflects ‘an insouciance towards asylum seekers worthy of condemnation’. The proposal in 2006 to extend the policy to cover all unauthorised arrivals, regardless of where they landed in Australia, was a step too far even for some members of the Howard government. Abstaining from the vote on the bill in the House of Representatives, National Party whip John Forrest described it simply as ‘wrong for our country’. In his view (in Maiden 2006),

[Boat people] are decent people and my Australia is egalitarian and based on a fair go for everybody. I just don’t think sticking them overseas, offshore somewhere, is a fair go. This legislation is something I believe is wrong for our country: morally, spiritually, and ethically.

So how does the policy fare in the light of an ethics of care? There are potentially many aspects to this question, and not all of them can be addressed here. However, as will be argued below, the moral argument against it is not as strong or as clear-cut as one might expect.

To begin, it is worth noting that at the end of his own critique of the policy, Gibney (2004: 192) suggests that critics often ignore ‘difficult questions’ that might introduce a
measure of nuance in moral judgment of it.\textsuperscript{126} Loosely paraphrased, they include the following. Firstly, is it uncaring to put in place strategies to stop people heading to Australia on dangerously unseaworthy craft? Secondly, if circumstances favourable to asylum seekers can be arranged, is it uncaring for a rich country like Australia to pay a poor country like Nauru to temporarily host them? And finally, if Australia based the offshore resettlement component of humanitarian program purely on need, or greatly increased its overall intake under the program, would it be uncaring for it to continue to make a trade-off between onshore and offshore grants?

On the first question – whether it is uncaring for Australia to stop people engaging in hazardous voyages – the response might reasonably be a mix of yes and no. Yes if people are left stranded in dire circumstances, with no alternative measures being developed to still deliver the refuge or relief that might be needed. But no if such opportunities are afforded, and the most pressing reasons for embarking on a hazardous voyage – for example, it being a matter of life or death – are removed. On this count, Australia might defend its actions as not uncaring, for example on the grounds that it has undertaken humanitarian and military interventions in countries like Afghanistan and Iraq to relieve the need for flight, and that it funds the IOM to care for asylum seekers in transit in Indonesia. Further, that when it intercepts boats en route to Australia, it takes the occupants to offshore centres where they can live in safety while any asylum claims are assessed, and anyone needing refuge will eventually receive it, although not necessarily in Australia.

On the second question – whether it is uncaring for Australia to pay another country to temporarily host asylum seekers – the response again might reasonably be yes and no. Yes if it means Australia subsequently washes its hands of the asylum seekers, and fails to attend to their long-term care needs. But no if it makes arrangements that, if not favourable, at least do not unduly disadvantage either the asylum seekers or the host country. On this count, Australia might again defend its actions as not uncaring, since

\textsuperscript{126} As will be noted in chapter seven, elsewhere in his book Gibney (2004: 251-254) proposes several criteria as determinative of whether or not a particular initiative is morally justified, including whether it inflicts ‘existential damage’ on people, whether it benefits the cause of ‘asylum overall’, and whether sacrifice of a right ‘is really necessary’. 
in addition to assuring the asylum seekers of a claims assessment and eventual resettlement somewhere if needed, it has provided Nauru and PNG with generous financial and other benefits.127

On the third question – whether it would be uncaring for Australia to maintain its trade-off between onshore and offshore visa grants if the latter were based on need, or the overall intake was greatly increased – again the response is plausibly yes and no. Yes if it means onshore applicants are subject to less demanding criteria; that is, if all they have to do to secure entry is trigger Australia’s protection obligations, while offshore applicants have to meet a more wide-ranging test of relative need. But no if it means that onshore applicants must also meet relative need criteria, and they are still found either more deserving than their offshore counterparts, or at least no less deserving. On this count too Australia might defend offshore processing as not uncaring, on the grounds that it gives it more freedom to make resettlement decisions based on relative need rather than legal obligation.

Of course, we can dismiss all the above as side issues, especially if we think our relations with asylum seekers should be governed by an ethic of proximity. As noted earlier, this is the legally defined default position in asylum policy anyway, not because the Convention obliges states to regularise the status of refugees who reach their territory, but because it obliges them not to return such refugees to any place where they will have a well-founded fear of persecution. Accordingly, unless someone else offers to take the refugees, the receiving state has little choice but to accept them, at least until it is safe for them to go home.

There is no doubt that an ethic of proximity is attractive, not least because it has intuitive appeal and a simple logic. For example, according to Manne (2004: 82-83), a parallel can be drawn between unauthorised boat arrivals and the Christian parable of the Good Samaritan. In his view,

127 For example, according to Crock et al (2006: 123), Australia’s initial pledge to Nauru of $30 million in aid for having a processing centre located there ‘was greater than all of the AusAID funds provided to Nauru between 1993 and 2001’. She says that Nauru was subsequently granted aid of $41.5 million for 2001-03 and $22.5 million for 2003-05.
Once we become aware of an appeal for help from an individual whose suffering we know is real and whom we have the capacity to assist, a human relationship is established. It is within our power to act generously or ungenerously … There is little we can do for the overwhelming majority of the … [millions of refugees in the world. But] there is a great deal we [can do] for the twelve thousand who, simply through their arrival in Australia or even their thwarted attempts to get here, established a relationship with Australia and who now fall, through their proximity, within a field of ethical obligation which we cannot avoid.

The ethic also arguably works to draw a line under the harshness with which we should treat unauthorised arrivals – the ‘enough is enough’ type argument.

Nevertheless, to base asylum policy purely on an ethic of proximity would fail to address the issue of relative need. We cannot ignore the fact that differences exist in the urgency and severity of protection and humanitarian need among the worldwide population of Convention refugees, and that these differences multiply among the worldwide population of asylum seekers. The relative plight of refugee women and unaccompanied children compared to refugee men is a case in point, the trauma of their flight being often compounded by their vulnerability to abuse and maltreatment in refugee camps. The ethic also ignores the fact that concepts of proximity and distance have become malleable in the light of globalisation. A lack of physical proximity is no longer the barrier or excuse to knowing about, having a relationship with, or responding to refugees in great need in distant places, in the way it once was.

These failings give arguments from proximity a whiff of convenience, if not laziness of thought and imagination. And while convenience and local clamour might be reasonable political grounds for giving priority to asylum seekers who arrive at one’s door – some might say who ‘put themselves in one’s face’ – it is difficult to argue that these factors carry much moral weight. Further, other views are possible as to the nature of the ethical obligation that arises with proximity. For example, according to Etzioni (2006: 9),

Asylum seekers are entitled – by international law and elementary justice – to a safe haven, to protection when their life is endangered or when they are truly escaping the threat of torture other serious physical injury. However, this right does not entail a right to a particular shelter, in a particular nation. When a woman knocks on one’s door seeking shelter from an abusive
husband, one ought to take her either into one’s own home or to a shelter for abused women. That is, the right to protection does not include the right to a specific, let alone five-star, shelter. Genuine asylum seekers need to be protected – someplace. (I am speaking on moral grounds. Some argue that international treaties require that a nation allow asylum seekers who knock on its doors to stay in that particular country. If this is the case, these treaties ought to be renegotiated). Hence it is legitimate to transport asylum seekers to safe havens in developing nations as long as they are safe in these nations and these nations serve as willing hosts.

An issue of power is also involved. Many of the countries of destination of forced and irregular migrants have fewer policy options than Australia, either because of the permeability of their borders, the legal or political arrangements they have with their neighbours, or the sheer number of the arrivals they have to cope with. In their circumstances, an ethic of proximity is perhaps appropriate. However, Australia’s circumstances are different. As an island nation with a demonstrated ability to control entry, it has choice in the matter, and it would be irresponsible if it failed to go about this task with due care.\textsuperscript{128} A statement like, ‘well they’re still all refugees’, misses the point. For the ethical issue is not, as Manne suggests, simply a matter of asking what we can do for the twelve thousand refugees on our doorstep, compared to the nine million refugees somewhere else.\textsuperscript{129} Rather, it is what we can or should do for the twelve thousand refugees on our doorstep compared to the twelve thousand somewhere else who could potentially take their place, when differences exist within and between both groups in their level and type of need, and when there is a capacity to help either group but not both, at least in the same way.

\textsuperscript{128} This is a point that Brennan (2003: 203) does not take into account in the ‘thought experiment’ he designs as an argument against offshore processing: ‘Imagine that every country signed the Convention on Refugees and then adopted the Australian policy. No refugee would be able to flee from their country of persecution without first joining the mythical queue to apply for a protection visa. If anyone dared to flee persecution, they would immediately be held in detention (probably for a year or so) awaiting a determination of their claim. All refugees in the world would be condemned to remain subject to persecution or to proceed straight to open-ended, judicially unreviewable detention. The purpose of the Convention on Refugees would be completely thwarted’.

\textsuperscript{129} The figure of nine million is used here merely to make a point. As noted earlier, resettlement is not the only or even preferred option for every refugee.
Nor is this ethical issue obviated by the fact that we have an obligation under domestic and international law to assist refugees on our doorstep, compared, as Crock et al (2006: 19) put it, to a ‘free choice to bring in migrants’ in the form of refugees elsewhere in the world. Both groups – those up close and those far away – are arguably within a ‘field of ethical obligation which we cannot avoid’. We need to be careful that the former do not block our view of the latter, or trump their claims, just because they are ‘here’ rather than ‘there’. Further, just because Australia has no legal obligation to take relative need into account in asylum decisions, does not mean it is ethical not to do so, especially when we conceive of potential relationships with offshore refugees as equally inviting of our attention and responsibility as current relationships with onshore refugees.

It may be argued that if any ethical dilemma exists, it is self-imposed: that is, Australia introduced the offset arrangement between the onshore and offshore components of its Humanitarian Program, and could just as easily remove it. It could, for example, hold the number of people resettled from offshore to an agreed target, regardless of the number of unauthorised arrivals granted asylum. Or it could retain the offset arrangement, but double or quadruple its overall annual quota of program entrants. However, while we can change the number of players on the field, we can’t change the playing field, the parameters of which are set by the scale of asylum problems worldwide, and the limits to the absorption capacity of individual states. We can postpone facing the issue of relative need, but at some point it always reappears.

In this context, to the extent that it permits Australia’s Humanitarian Program to be based on factors other than purely Convention refugee status, including relative need, the policy of offshore interception and processing is arguably consistent with an approach from care. Indeed, it is also arguably consistent with an approach from justice, to the extent that this entails imagining what might be perceived as fair from the position of the least well off asylum seekers globally. The alternative, whether we like it or not, is a system weighted heavily in favour of those able physically to reach Australia, who benefit from the Convention’s focus on in-country refugees, and from the access they gain to well-developed legal, welfare and advocacy systems.
To the extent the policy also engenders public confidence in the government’s control of asylum seekers, it may paradoxically enhance public acceptance of people granted entry under the Humanitarian Program. It will be recalled from chapter four that policy makers believe support for both the migration and humanitarian programs depends on their ability to control arrival numbers and conditions, and to maintain the distinction between the migration and humanitarian streams. From this view, a high migration program is received best when it is perceived as part of nation building, and a function of economic and labour market needs and family unity. By contrast, a high humanitarian intake is received best when it is perceived as a contribution to meeting global human needs, and a function of community compassion and generosity. As Kelly (2006) observes,

The paradox of [Prime Minister] John Howard, once an immigration sceptic, is that he has expanded the [immigration] program. There are more skilled workers and more Asians coming to Australia than before and there is remarkably little open political hostility to the intake … The Howard period has reinforced the political compact that sustains Australian immigration. That is, immigration wins public acceptance or at least acquiescence when it is geared to the labour market, when new immigrants are expected to integrate into the community and when the program upholds border protection because it is based on government selection of migrants and not self-selection of Australia by illegal arrivals. The Tampa policies created the political climate that underwrote Howard’s conversion to an expansive immigration stance.

That said, whether the current policy of offshore interception and processing would survive application of the kind of values, processes and practices associated with an ethics of care is another matter. These would seem likely to point to a number of conditions being imposed on such a policy, some of which would not be met under current arrangements. Without wishing to be too prescriptive, they could well include the following:\textsuperscript{130}

\begin{itemize}
  \item The offshore processing centres are established with the support of the host countries, under conditions that enhance their own care giving capacities.
\end{itemize}

\textsuperscript{130} This list could usefully be supplemented with some of the recommendations of the Senate committee (SLCLC 2006) that reviewed the \textit{Migration Amendment (Designated Unauthorised Arrivals) Bill} in June 2006.
• Boat interception and transfer practices are designed to minimise the risk of any harm to passengers.

• Care standards in offshore centres are set in consultation with the UNHCR, host community, service professionals and the asylum seekers.

• The principle of non-refoulement is respected. In practice this means everyone intercepted has an opportunity to voice any claim to refuge or relief, and to have these claims determined through a fair administrative process. In view of Australia’s resource capacity, it is reasonable to expect this to include access to impartial advisers when preparing applications, access to a merits review and ministerial discretion procedure similar to that afforded asylum applicants in Australia, and similar time limits on processing (ie three months each for primary and review decisions).

• Those found in need of refuge or relief are able to compete with others for a place in an Australian humanitarian program that genuinely targets the most needy worldwide, and is of a scale commensurate with Australia’s capacity.

• Other care options are pursued, including entry to other countries as refugees or migrants, and voluntary repatriation with reintegration assistance.

• If a person found in need of refuge or relief is not selected for resettlement in Australia or elsewhere within a reasonable period after the determination (eg six to twelve months), or if a person who has no such need cannot be repatriated through no fault of their own, they are brought to Australia. If not

---

131 In principle there seems no reason why reviews cannot be carried using personnel from the Refugee Review Tribunal.

132 Under Article 31(2) of the Convention, in the event that a state is unwilling to grant formal entry to their own country to refugees who arrive unauthorised, it is obliged to allow them ‘a reasonable period and all the necessary facilities to obtain admission into another country’.

133 Australia retains a responsibility of care for such people, but by reason of engagement rather than law. For as noted by DIMIA (2002: 153), ‘The Convention is silent on what happens to a refugee who is neither regularised in the country of refuge nor able to secure admission to another country within a “reasonable” period’. According to Robinson (1953: 156), on such occasions “the state concerned is authorised to apply such restrictions as are necessary in the specific case”. Goodwin-Gill (1996: 153) basically agrees: ‘Given that the principle of non-refoulement remains applicable, the freedom of the State to finally refuse regularisation of status can well be circumscribed in practise. As a matter of law,
immediately, access to permanent residence is provided for all within a maximum of three years.

- Centre conditions and processes are monitored by independent authorities in line with transparency, accountability and responsibility objectives, but consistent with asylum seeker privacy and safety considerations.

Further, an ethics of care would require political leaders to avoid peddling the kind of simplistic and pejorative caricatures of asylum seekers that they often have in the past, notably those that portray people seeking unauthorised entry as ‘bad’, and people selected for resettlement as ‘good’. Instead, the onus would be on them to provide detailed and accurate information about all asylum seekers, local and global, and to establish the language of care as an appropriate framework and medium for public debate on the community response to them. Among their aims would be empathy for asylum seekers, wherever they are located, and support for a generous, needs-based and multi-faceted Humanitarian Program.

**Departmental culture**

If we accept Max Weber’s analysis, the modern world is characterised by an unfortunate paradox, whereby the price of progress is a bureaucracy that stifles individual creativity and autonomy. A counter analysis might point to a bureaucracy that is also often remarkably successful in harnessing the resources of individuals to better effect many shared purposes. However, Weber is just one of many writers to dwell on the potentially dark side of efforts to create a regular, orderly world. Others include Habermas, Foucault and Bauman. Each in their own way highlight the risks involved when principles take priority over particulars, and an instrumental or procedural rationality subsumes value rationality. Or in other words, when more thought is given to how to do a task well than to the propriety of the task itself, when following rules takes priority over adapting or interpreting them according to circumstances, and when no one really takes responsibility because everyone is just ‘doing their job’.

however, the State may continue to keep the unsettled refugee under a regime of restricted movement, either in prison or a refugee camp’.
A case in point, it may be argued, has been Immigration’s implementation of compliance and detention policy. For example, after investigating the wrongful detention of an Australian resident of German background, Palmer (2005: x) claims that Immigration had become ‘process rich and outcomes poor’. Further, in his view (at xi), there were ‘serious problems with the handling of immigration detention cases,’ which stemmed ‘from deep-seated cultural and attitudinal problems’ and ‘a failure of executive leadership’:

The combination of pressure [from ‘heavy workloads’, ‘policy, procedures and structures being developed on the run’, etc] … and the framework within which [Immigration] has been required to operate has given rise to a culture that is overly self-protective and defensive, a culture largely unwilling to challenge organisational norms or to engage in genuine self-criticism or analysis (2005: ix).

In reflecting on Immigration’s failings, it would be wrong to not acknowledge the contextual factors that Palmer identifies as contributing to them. These include the pressure and pace of change in the department, and the complex and permissive legal, policy and political framework within which it operates. Efforts by government to ensure the lawful and orderly entry and stay of non-citizens have had the support of the Australian parliament, courts and community for almost as long as they have been in existence. If these efforts have become more determined of late, it is due in no small part to changing international migratory patterns on the one hand, and decisions by Immigration’s political masters on the other. Of migratory patterns, for example, the UN High Commissioner for Refugees (in Rennie 2005) notes the challenge posed by the growth in forced and irregular movements, in which

... illegal migrants and refugees ... [travel] side by side, many times with the interference of smugglers or traffickers, who are of course interested in mixing everything.

Similarly, of political masters, Kelly (2005) argues that,

The idea that [Immigration’s] culture evolved in a political vacuum unbeknown to the Howard Government is a joke. It was fashioned and reinforced in response to the demands of the Government as part of the most ruthless, effective and high-profile crackdown in Australia’s history, with Howard using the Tampa, the Pacific solution and the detention system against
unauthorised and unlawful arrivals to send a message to the world. And the policy worked. The boats have stopped.134

Or as the Minister for Citizenship, John Cobb, stated in 2005,

This department, since 2001, have [sic] done the job that the government asked them to do – dealing with illegal immigration in the order of what was looking like 12,000 to 13,000 boat people every year. Members opposite do not like this, because the people of Australia backed that policy up to a ninety per cent degree. They may not like that option but it is a fact, and that is what the department did. When you have a job to do that is not always pleasant, it can be damned tough to do – and they did that job. We now have virtually no boat people coming to Australia at all because the department did that job under instructions. They did it well, and Australia agreed with that.135

That said, there is no excuse for one of the main departmental failings identified by Palmer: that many officials either misunderstood or refused to exercise their discretionary responsibilities in regard to their power to detain people. According to Palmer (2005: 24-25),

Many of the DIMIA officers who were interviewed and who use the detention powers under s189(1) of the Migration Act 1958 had little understanding of what, in legal terms, constitutes ‘reasonable suspicion’ when applying it to a factual situation … There did not appear to be – even at senior management level – an understanding of the distinction between the discretionary nature of the exercise of the ‘reasonable suspicion’ and the mandatory nature of the detention that must follow the forming of a ‘reasonable suspicion’.

Nor, in Palmer’s view (2005: viii), did Immigration have a system of review sufficient to provide confidence that the power to detain was ‘being exercised lawfully, justifiably and with integrity’.

The government defends itself by saying that while it asks for fast decisions from Immigration, it never asks for unlawful ones, or ones that result from a failure to follow

134 According to Barker (2005), ‘The ministers set the tone, the parameters and the mindset. The officials, senior and otherwise, were merely mechanics trying to read and to respond to what ministers wanted. Nothing would have changed if the Rau and Alvarez cases had not been exposed’.

prescribed procedures. It should also be said that the problems identified by recent inquiries into Immigration (Palmer 2005, Comrie 2005) relate mainly to the compliance and detention areas of the department, rather than the refugee and humanitarian areas. As Palmer (2005: 213) notes, the problems ‘might not be endemic to DIMIA as a whole’. Nevertheless, it is reasonable to assume that the pressure to make fast and politically responsive decisions is pervasive in the department, and inquiries specifically into the performance of the refugee and humanitarian areas have usually elicited their own list of complaints.

Again, the question of interest here is what might be the implications if we approach the issue of departmental culture from the perspective of an ethics of care. It is a question that seems particularly timely, in view of the nature of the reforms that Immigration embarked on following the 2005 Palmer inquiry. As mentioned earlier, they centre on achieving an open and accountable culture, fair and reasonable dealings with clients, and well trained and supported staff, all of which is meant to be captured in a new departmental logo, ‘people our business’. One is reminded of the words of the Immigration Minister in 1958, Alexander Downer, when introducing to Parliament the bill that forms the basis of today’s Migration Act:

136 According to former Immigration Minister Phillip Ruddock (in The Age 2005), ‘The culture that I believe operated within the department, and encouraged very vigorously, is that people should make lawful decisions, and I think if you look at the outcome of the investigations the people involved did not follow the procedures … To suggest that there was some culture that people were encouraged to cover up mistakes or to act unlawfully would be quite false … Of course people would be encouraged to make decisions lawfully and to follow them through as quickly as possible. That doesn’t justify people ignoring the procedures’.

137 For example, some witnesses before a Senate inquiry in 2000 into refugee and humanitarian determination processes alleged an ethos of speed over care, and inadequate skills and training on the part of decision makers (SLCRC 2000). A number saw a basic conflict of interest between Immigration’s asylum and migration control functions, which they considered could only be avoided only by having the former relocated to Attorney-General’s. Concerns about processing standards were also aired in a more recent Senate inquiry (SLCRC 2006). However, the National Audit Office (ANAO 2004) has expressed a more confident view, concluding after an investigation of the system than it was being managed well, and that adequate formal and informal quality assurance mechanisms were in place to monitor and enhance the quality of decision making.
Great authority is vested in [the Minister for Immigration], and his is the solemn responsibility to wield it in a manner which, whilst preserving the security of the country, is at the same time humane and just to the individuals concerned. We must never forget that this department, perhaps above all others, is one that first and last is dealing with human beings, and their future welfare.138

The reforms will unfold over a period of time, and are meant to be ongoing. The department’s new secretary, Andrew Metcalfe, got off to a promising start when he encouraged his officers to engage with all major stakeholders – including ‘clients’ – and to ‘talk’, ‘listen’, ‘think’ and ‘question our assumptions’ (Metcalfe 2006). Further, both the Commonwealth Ombudsman (2006) and the Human Rights and Equal Opportunity Commission (HREOC 2007) have already noted substantial improvements in the way of staff attitudes, processes and facilities in the administration of the department’s compliance and detention activities.

Nevertheless, from an ethics of care perspective, unless care itself is embraced as a departmental value, the risk remains that value rationality will again be increasingly squeezed by instrumental and procedural rationality, and individual and departmental performance will continue to be assessed on a narrow range of criteria and outcomes.

In an approach from care, a number of measures to complement Immigration’s current reforms would therefore seem desirable. At the broadest level, a first step would be for political and departmental leaders to adopt the language of care, discussing performance in the Humanitarian Program in terms of needs and capacities, the nature and quality of human relationships, and environments conducive to hearing voices in not only the receiving community, but also of those of asylum seekers and others in need of humanitarian assistance. The alternative is a language of control, indifference or anxiety, where valid concerns about relative need, social harmony and program integrity are lost in a prejudicial debate about sovereignty, abuse of generosity, and the risk of being ‘flooded’.

138 CPD (Reps), 1 May 1958, vol 19, p 1397. Among other things, the bill contained provisions to limit the minister’s powers to arrest, detain and deport non-citizens, and to increase the latter’s opportunities for legal appeal.
A second step would be to inscribe care as a value and practice in overarching departmental objectives. For example, Immigration’s two main objectives are firstly, to contribute ‘to Australia’s society and its economic advancement through the lawful and orderly entry and stay of people’, and secondly, to contribute to ‘a society which values Australian citizenship, appreciates cultural diversity, and enables migrants to participate equitably’ (DIMA 2006a). Worthwhile as these may be, in the absence of any overt reference to care, the phrases ‘lawful and orderly entry and stay’ and ‘a society which values Australian citizenship’ set a particular tone for our relations with outsiders. The first implies that people who arrive unauthorised or disorderly undermine the country’s social and economic progress. The second that we are free to form our own views about the value of non-citizens, and the quality of care they should be afforded. A similar point was made recently to a Senate committee inquiring into the administration of migration legislation in general. According to the witness (Kneebone, in SLCRC 2006: 168),

The ‘citizen-alien dichotomy’ has led to a belief that different standards can be applied to someone who cannot establish that they are a citizen. Consequently, the Migration Act is framed entirely in terms of the control of aliens and reflects an ingrained sense of a lack of State responsibility for the treatment of ‘non-citizens’.

To imbue Immigration’s objectives with a more positive tone, opportunities should therefore be sought to insert references to the concept of care in its business plan. One option, for example, would be to amend the first objective to read: ‘to contribute to Australia’s society and its economic advancement through the lawful and orderly entry and stay of people and care in the design and delivery of related policies and programs’. Another would be to amend the second objective to read: to contribute to ‘a society which values Australian citizenship, appreciates cultural diversity, enables migrants to participate equitably, and engages caringly with non-citizens’.

In regard specifically to the Humanitarian Program, the department promises to meet Australia’s protection obligations and deliver the program ‘to a high level of integrity’. However, what integrity means is not spelt out. There is no mention, for example, as might be expected in an approach from care, of the program being structured according to relative need, of promoting an informed public debate on refugee and humanitarian
issues, of engaging with asylum seekers and refugees in reviewing program performance, or of setting intake targets commensurate with community capacity.

A third step would be to include the practice of care in the expectations of individual officers. For example, as part of its current reform agenda, Immigration’s new ‘core values’ have been identified as teamwork, service excellence, respect, openness, and commitment (DIMA 2006a, Metcalfe 2006). It may be argued that the practice components of care as defined earlier – attentiveness, responsibility, competence and responsiveness – are all aspects of these values, and that their presence can be taken for granted. And indeed, the descriptions of the new values include reference to such things as ‘being responsive and accessible’, ‘delivering services to prescribed and publicly available standards’, and ‘listen[ing] to make sure we understand each individual’s needs’ (DIMA 2006a: 26). However, an approach from care would suggest that the above four practice components of care be specifically identified as an integral part of Immigration’s new values. Otherwise, the risk remains that they will still be equated more with diligence in following instructions, or competence in performing technical, logistical or procedural tasks, than with exercising discretion and judgment in situations where these qualities are not only permitted, but necessary.

In this context, it is interesting to note that Metcalfe (2006: 12) recently advised officers to use several tests when considering what constitutes ‘fair and reasonable’ dealings with their clients, among whom he presumably counts asylum seekers:

Being fair and reasonable doesn’t mean that the client will always achieve their desired outcome, but [as a first test] they should feel they were treated fairly, as should a reasonable member of the public if the circumstances were explained … [A second] test … is to consider whether a decision maker would be comfortable defending the action publicly … [A third is] how would you feel if you, or a member of your family, was receiving the service?

These tests seem consistent with an ethics of care approach, with a few qualifications. Firstly, ideas about being fair and reasonable should also be informed by the sorts of strategic questions in table 6.1 above. Secondly, individual officers should consider their capacity to make sound judgments on these sorts of matters in need of constant formation, and dialogue with people with a diverse range of views and experiences an
important part of the process. Thirdly, the tests should be supplemented by the two integrity and acceptability of care tests described in the earlier section on assessing care, particularly when judgments are being made about overall policy directions. Finally, a high degree of self- as well as other-awareness is needed for these sorts of tests to work, together with an ability to distinguish and move easily between different frames or modes of thinking, including legal, organizational, political, ethical and personal. These sorts of individual and corporate skills should accordingly be developed among officers, in addition to investments in standard forms of scrutiny, oversight and accountability.

**CONCLUDING COMMENTS**

For most of us, experience, if not common sense, suggests that it is impossible to care for everyone. Outside our intimate or imagined circles of family, friends, tribe or country, care weakens. Beyond these familiar circles, even our ethical obligations are a matter of dispute. As O’Neill (2000: 119) notes,

> The deepest disagreement about transnational justice is between those who think that there is at least something to be said about duties beyond borders and those who think that ethical concern cannot or should not cross borders.\(^{139}\)

In this chapter, a conception of an ethics of care has been explored that does not seek to downplay the importance of familiar circles, but rather to make them porous and fluid. It does this by conceiving of care as a value, process and practice, rather than a sentiment or disposition. In a public policy context, it involves bringing the value of care more to the centre of public debate, and having policy design, administration and evaluation informed by the processes and practices of caring about (attentiveness), caring for (responsibility), care giving (competence) and care receiving (responsiveness).

\(^{139}\) She continues, ‘Liberal and socialist thinkers have traditionally viewed justice as having unrestricted scope, and hence cosmopolitan implications. In fact liberal and socialist practice has usually subordinated justice to the demands of nation and state; but this may have been a practical and temporary rather than a fundamental concession. By contrast, various forms of relativism, historicism and “realist” views of international relations deny that the category of justice has implications or even makes sense beyond the boundaries of nation or community’.
The aim of adopting an ethics of care in the area of asylum can be pitched at various levels, ranging from the modest to the more grandiose. For example, at an instrumental level, it can centre on helping policy makers negotiate their way responsibly through the ‘caring for us, caring for them’ conundrum that we have seen pervades their views on asylum. Or, at a more normative level, it can centre on having care feature more strongly among the values that shape policy, which we have seen include nation building, good governance and community building. Or yet again, at a more philosophical level, it can centre on having care as the framework within which we set these other values. To quote Tronto (1993: 154-155),

By focusing on care, we focus on the process by which life is sustained, we focus on human actors acting. When people engage in care we see how the notions of human capabilities and functioning are translated into human practices. And by starting from the premise that these practices are central, we are able to place them at the centre of our moral and political universe.

The point here is that support for an ethics of care can be garnered on any of these grounds, and can be defended without necessarily acceding to the latter world-view (although it makes it easier).

Some may be wary of an ethics of care, on the grounds that it appears biased in favour of receiving community considerations, uncritical of sovereign powers over entry conditions, and able to be co-opted to support a ‘fortress Australia’ policy. An approach based on impartial principles may seem more straightforward, incisive, and uncompromising as a source of policy critique. Some may even think it more moral. For example, according to Brett (in The Australian 2006: 15),

One aspect of globalisation is the development of human rights as a universal language which creates a universal human moral community coextensive with the cosmopolitan’s potential field of knowledge. Locals still live inside much smaller moral communities.

However, an ethics of care meets the criteria that were identified early in this chapter as required of a public policy ethic, namely relevance, magnanimity, and ability to speak to the ecological aspects of politics:
relevant because it promotes qualities that help policy insiders do their job better, and because it has a practical edge, being concerned more with basic issues like need and capacity than ideals and principles, and with acts and outcomes than promises and intentions;

- magnanimous because it seeks to hear and accommodate the needs of both the receivers and givers of care, rather than plump exclusively for either; and

- ecological because it asks us to move beyond legal or moral minimums in care standards, to foster real or imaginary relationships between the receivers and givers of care, and to change whatever hinders these relationships being as mutually rewarding as they can be (including personal, organizational and structural factors).

There is, of course, no guarantee that adopting the language of care will ensure that care is practised. Nor can we be sure that an approach from care will be free of problems like parochialism and paternalism. However, compared say to an approach from human rights, it has the advantage of being modest in its assumptions. For example, it takes more effort to accept that all people are equal, than that all people need care, and that most people have a capacity to practice it. Further, care’s potential failings are well known, and are therefore in principle more easily countered or contained. This is less the case with human rights, which as Kennedy (2001: 2) notes tends to be ‘an object of devotion rather than calculation’, and which according to O’Neill (2005) also has a ‘dark side’, for example the potential to inspire a guarded and recriminatory outlook on life, leading to withdrawal rather than engagement.140

140 According to O’Neill, this risk stems from the potential for obligation-bearers to become wary, weary, sceptical or resentful of the level and cost of controls needed to set, police or comply with systems of rights, and for rights-holders to take on the role of victim or complainant, becoming preoccupied with blame, redress and compensation. In her view (2005: 439), ‘I do not think we should accept at face value the view that [human rights] is all about respect for persons and treating others as agents. Much of it is indeed about protecting the weak and vulnerable. But it is also about extending the power of states over non-state actors and human individuals, about establishing systems of control and discipline that extend into the remotest corners of life, about running people’s lives for them while leaving them with the consoling pleasures of blame. As Bernard Williams puts it, blame is “the characteristic reaction of the morality system” in which obligations and rights have become the sole ethical currency’.
Another concern about an approach from care may be that it will lead to a fear of or reluctance to engage in conflict over asylum issues. However, where an approach from justice will tend to frame conflict in terms of competing rights or obligations, care will tend to frame it in terms of competing responsibilities. In doing so, it does not shy from a fray, but nor does it enter it arrogantly. Rather, it respects the complex nature of our moral architecture as private individuals and political actors, as exemplified in the kinds of value clusters and dilemmas that were identified among the three leadership groups analysed in earlier chapters. Further, it contains seeds of conflict even within itself. For as Tronto (1996: 143) points out,

> Given the complexity of [care’s] different phases … care processes can become fragmented [and] parts of a care process may come into conflict with each other. By allowing that care is a complex process with many components we do not romanticise the care process; care is more likely to be filled with inner contradictions, conflict and frustration than it is to resemble the idealised interactions of mother and child or teacher and student.

In the face of these potential tensions, an approach from impartial principles may again appear attractive, whereby we step back to ‘see the big picture’ and ‘take the broader view’. An ethics of care too asks that we do not become so caught up in the vicissitudes and partiality of daily life that we cannot inquire critically, ‘what’s going on here’? The only thing is, it also asks that we do not step so far back that all we see are big picture generalities, and we lose sight of the little particulars that layer much of life’s value and meaning, and fail to provide for them. The result may well be a multitude of divided responsibilities and loyalties, but in a liberal democratic system of government it is the lot of political leaders to embrace and work with these tensions, rather than to gloss over them.

141 The image of a moral system as architecture is borrowed from Frost (2003).
142 According to Tronto (1993: 110), while the ‘ideal’ of integration can serve us analytically, and is a ‘way to begin to judge the adequacy of care’, it will ‘rarely be met’ in view of ‘the likelihood of conflict [eg differences in the interpretation of need between caregivers or between caregivers and receivers, and tensions between the needs of care-receivers and the needs of the caregivers], of limited resources, and of divisions within the caring process’.
As will be evident from the discussion of the implications of an ethics of care for specific aspects of current Australian asylum policy, being prescriptive is not its forte. Nevertheless, it provides concrete markers – a value, a process and a practice – for us to touch and structure ourselves around when considering what to do, how to do it, and how well it is being done. Further, as a tool for critical analysis, its cutting edge comes from things that prevent it being appropriated by any one political agenda or ideology. These include its concern for consequences rather than intentions, for needs rather than rights or rules, and for cultivating and exploiting caring capacities rather than conforming to defined standards. Finally, it is ideally suited to grand narratives about human relationships, in which the stories of asylum seekers and receiving communities can be interwoven, and the caring achievements in the relationship can be counted as more important than the failings.\footnote{For example, of Australia as a refugee-receiving country, a narrative might enlist stories of past successes in absorbing refugees and migrants, current achievements in embodying professional, civic or national virtues, and potential future achievements in helping address global problems. In this narrative, elements like fear, indifference or racism can be presented as painful, damaging and potentially obstructive seams of thought and experience, but as by no means comprising the whole story, which is complex and ever changing. Similarly, of those who seek asylum, a narrative might enlist stories of compelling past care needs, current achievements in adapting to the host society, and potential future achievements as citizens and contributors to their adopted community. In this narrative, instances of undeserving claims, ingratitude, or inability to adapt can be presented as disappointing and annoying, and something to inform caring processes and practices, but to not detract from the larger picture of relationship.}

That said, pervading care is a quiet but disconcerting note of tragedy. It sounds, for example, in its acceptance that there are always more care needs than can be met, and its recognition that, like human rights, it too has a potential dark side, whether in the form of a destructive selflessness, dependency, or patronage. It also sounds in its recognition that life involves conflicting ethical demands, whereby doing right by one can often involve doing wrong by another. Asylum is merely a case in point: actions that can be justified in the context of a particular community often conflict with actions that can be justified in the context of a global community. To quote Frost (2003: 490-491),
All of us who consider ourselves to be rights holders in GCS [global civil society] simultaneously consider ourselves to be bearers of citizenship rights within the society of democratic and democratising states. As such we expect others to respect the rights of the sovereign states within which we are constituted as citizens … However, as citizens of sovereign states we are often called upon to put impediments in the way of rights holders who are not members of our own state. We are called upon to do this in order to secure advantages for our own state and our own fellow citizens. In pursuit of national self-interest we are asked to agree to policies which hinder the free movement of migrants across our borders, to policies which tax goods produced abroad, and to many other kinds of regulations which discriminate against outsiders with a view to benefiting our own people. In every case in which we are confronted with a choice that asks us to choose either in favour of our state or in favour of individual human rights, we are confronted with what is at base a tragic choice. We find ourselves in the classic ‘lose-lose’ dilemma. If we choose to support our fellow citizens, we undermine the ethical commitments we have as members of GCS, whereas, if we choose to uphold the individual rights which civilians have as members of GCS, then we may rightly be criticised for ignoring the best interests of our fellow citizens.

Nevertheless, when an ethics of care works well, it is unlikely to condone a response to tragedy that is limited to feelings of anger and frustration, a stoic shrug, or a spirit of benign beneficence. Instead, it will encourage commitment to contain or change the factors that contribute to tragedy. Further, while it may emphasise the importance of careful and inclusive deliberation when deciding what is to be done, the qualities it celebrates – attentiveness, responsibility, competence and responsiveness – are qualities that impel action as much as contemplation.
CHAPTER SEVEN: CONCLUSIONS

Responding to crises – handling what lands on your plate – is an important responsibility of any prime minister. But so too is setting the agenda: knowing why you want the job, knowing what to do with it. Above all, it is imagining something better and fashioning the policies to get there. (Paul Keating)

But happy are your eyes because they see, your ears because they hear! (Matthew 13:16)

As noted at the start of this thesis, while their numbers may ebb and flow, asylum seekers are unlikely to disappear any time soon from the world scene. For this to occur, either the causes of forced and irregular migration must be eliminated, or the free movement of people across state and community boundaries must be legally sanctioned and publicly accepted as a better way of organising human affairs than the current way. Both may be worthy ideals, and even legitimate public policy objectives, but their achievement is a long way off. Until then people will continue to knock on the doors of countries other than their own, claiming a need of refuge or relief, and these countries will need to make choices on how to respond to them.

In the preceding chapters, we have explored the values that have shaped the choices made by Australian political leaders over the past half-century towards asylum seekers, and the potential contribution of an ethics of care to asylum policy design, delivery and evaluation. The primary goals have been a better understanding of the issues involved in such policy, and the articulation of an ethical approach potentially as engaging of policy insiders – those charged with actually working out what to do, and implementing and enforcing it – as of policy ‘spectators’, to use O’Neill’s term (2000: 7). Each chapter has ended with concluding comments, however this final chapter summarizes the main findings, suggests possible areas for future research, and makes some final reflections.

The values shaping asylum policy

Without question, Australia is one of the most successful – some might say ruthlessly efficient – countries in the world in regulating the number of people to whom it grants
entry and the conditions on which they come or stay, with asylum seekers being no exception. Geography, a well-resourced and competent public service, and a supportive – some might say loose and toothless – legal framework play a role in this success: Australia controls entry because it can, whereas many others have great difficulty doing so, whether because of proximity to the countries from which forced and irregular migrants come, porous borders, scale of influx, or legal, political and bureaucratic environment. However, a capacity to control entry can be used to pursue certain outcomes rather than others, can become an end in itself rather than just a means to an end, and can be exercised more or less fairly and compassionately. Further, for critics of Australia’s asylum policy, a number of basic questions keep rising, including why control seems so important to its policy makers, and why the country isn’t as open and welcoming of people in need of refuge and relief as it is of tourists, business people and skilled migrants.

As noted in chapter one and elsewhere, various explanations are tendered for Australia’s quest for control over its refugee and humanitarian intake. They range from a deep-seated insecurity, racism or xenophobia, to an amoral political pragmatism in which political leaders shamelessly exploit the concerns of fringe groups or bow to majority public opinion in their hunt for votes and power. Or, more generously, from the lack of a sufficiently powerful countervailing commitment, tradition or mythology, to the tentative journey of self-discovery of a young nation, to differences in the balance struck between liberal and democratic principles, and between the values of human rights and community.

As was suggested, there is probably a measure of truth in all of these explanations, with some appearing more pertinent on occasion than others. However, the close reading of archived government files and conversations with policy makers undertaken for this study, covering some sixty years of asylum policy in Australia, undermine any simple or singularly focused account, and illuminate factors that most writers either miss or avoid.

The findings confirm the view that a culture of control permeates asylum policy making, as it does immigration policy more generally (Lopez 2003, Cox & Van...
Amelsvoort 1994, Cronin 1993). Chapter two, for example, showed how Australia acceded to the 1951 Refugees Convention and 1967 Protocol only when confident that the grant and terms of asylum remained largely a state prerogative. Similarly, chapter four noted how in more recent decades successive governments have changed domestic legislation and exploited the minimum standards approach of the Convention to preserve an asylum regime in which they maintain the upper hand in asylum decisions, and not the judiciary, let alone asylum seekers themselves.

The findings also support Neumann’s (2004) view that this quest for control stems from perceptions of the national interest as articulated in immigration and foreign policy. For example, chapter three described how foreign and territory policy considerations governed Australia’s handling of Papuan asylum seekers in PNG when it was under Australian administration, delayed accession to the 1967 Protocol till 1973, and for decades had Foreign Affairs controlling asylum decisions. And while carriage on asylum decisions has shifted to Immigration since the 1970s, foreign policy considerations are still evident in the handling of asylum seekers from countries with whom Australia has important and sensitive relationships, for example Indonesia. The lesson is that asylum policy has always been developed taking into account whole-of-government considerations, and not merely what Garfield Barwick in Parliament once referred to as ‘a very high humanitarian point of view’.1

Pushing deeper, the findings show further that policy maker perceptions of the national interest are shaped by two primary values: those of nation building and good governance. As shown in chapter four, policy makers might argue about how or in what direction to take the nation, and what standards good governance entails, but not about the propriety of these being the two dominant contours in the value maps they bring to asylum issues, or indeed the criteria they use to assess how well they and others follow their lines. As summarised in Figure 7.1, nation building, for example, is identified with building Australia’s economy, culture and international standing in the way governments see fit, and for which they have received electoral endorsement. Similarly, good governance is identified with preserving the freedom to govern, making ‘proper’ public policy decisions, providing leadership, shaping public perceptions, and caring for

1 15 Aug 1962, CPD (Reps), vol 36, p 349.
asylum seekers. Among these criteria, or what we might call adjunctive or second tier values, ends and means intermingle and sometimes coalesce, and interpretations and priorities begin to differ. However, for policy makers they are clearly the main topics on which debates about asylum need to be centred to be meaningful.

Figure 7.1: The value clusters of Australian asylum policy makers

This is not to say that other values are not also considered important, including ones that typically preoccupy asylum policy critics, for example human rights, compassion, national character, international legal obligations and international reputation. Indeed,
some appear as second tier values. Further, most interviewees spoke of a range of personal experiences, passions and principles that help them structure their thinking about asylum. However, when it comes to their public responsibilities, the relevant values are perceived to multiply, and are harnessed in their primary roles as good engineers and responsible governors of a nation. The moral and political projects of critical spectators may be no less grand, but they are unlikely to be as diffuse or pluralistic in value content, as fraught by conflict, or as accepting of the need for compromise.

The strength of the themes of nation building and good governance should probably not be surprising. Australia has no mythology to parallel that of England’s as a safe haven for political agitators in Europe, or America’s as a ‘golden door’ for the world’s ‘wretched refuse’ and ‘tempest-tossed’. However, it does have a long tradition of democratic government and, as Jupp (2002a, 2002b, 2001) notes, social engineering through immigration. Marked at one time by assisted passages, preference for British immigrants and racial exclusion, this engineering tradition now features a global and non-discriminatory targeting of skilled workers, a refugee and humanitarian program that averages around ten percent of overall annual immigration – indeed ten per cent seems to have become a tacit rule of thumb as to what is an appropriate proportion – and extensive settlement, citizenship and multicultural or social harmony strategies. What remains constant, however, is the firm hand of government on the tiller, endlessly shaping and refining these programs to achieve desired outcomes, and never moving ahead of what the political leaders of the day consider most Australians willing or able to accept, and themselves willing to defend.

Importantly, the value maps of Australian policy makers are probably also not particularly unique. For example, as Steiner (2001) shows in his study of European

---

2 These images form part of the words of Emma Lazarus inscribed on the Statue of Liberty.
3 According to Jupp, this social engineering, involving the careful orchestration of immigration and asylum programs in accordance with social and economic goals, has helped Australia achieve economic prosperity and a diverse population living in relative harmony. However, in his view (2002a: 19), while a policy dominated ‘by selection and exclusion [is] rational and utilitarian … it often weighs most heavily on those who have most reason to come to Australia – refugees, the poor, and their relatives’.
parliamentary debates on asylum, concerns about social harmony and managerial
efficacy are as dominant as concerns about liberal identity. Further, as shown in this
study’s own examination in chapter five of the values guiding EU states and European
Commission leaders in developing a common EU asylum policy, EU members appear
as intent as Australia, within the constraints of their own circumstances, to control
asylum seeker numbers and preserve sovereign powers over immigration. And while
Commission leaders express a desire to maintain Europe’s reputation for hospitality and
human rights, they too appear focused on community building, except in their case the
boundaries of the European Community substitute for the boundaries of individual
states. If sovereignty really is the basic problem in asylum, as some suggest –
remember Foucault’s comment about ‘the need to cut off the King’s head’ – it would
seem a hydra that is multi-headed and multi-layered.

The potential contribution of an ethics of care

The above account provides insight into the minds of the people responsible for
developing asylum policy in Australia. It also lays out topics to be addressed or bases
to be covered when engaging in any comprehensive and considered evaluation or
critique of asylum policy, or at least one likely to sustain the attention of policy
makers. However, while it might explain why Australian asylum policy takes the form
it does, whether it justifies all aspects of current policy is another matter. For a number
of niggling questions remain, including: are the values identified properly prioritised?
Are they really the only things that matter? Is such a mindset adequately informed by

4 If policy critics wish to avoid being labelled simplistic or self-indulgent, they must be prepared to
explain how their values intersect with those of the policy makers, or if already there but on the periphery
of concerns, how and why they should be brought more to the centre. As Harvey (1999: 116) argues,
following Habermas, only ‘once pluralism is brought to the heart of decision-making and accepted, [do]
the real problems of adjudicating between different experiences and perspectives begin’. That said, if a
monist or idealist view results in a point of view being considered that would otherwise be ignored, it
might still have important democratic and strategic value. For example, it can be argued that it is not the
role of asylum advocates to decide what tradeoffs should be struck when values compete, but rather that
of ministers around the cabinet table.
the harm or suffering it occasions? And is Australia doing what it really ought to do – ‘the good and the right’, so to speak?

At this point a reader might have expected either an attack or defence of current policy settings and values on ideological grounds, of either the ethical or political variety. However, as Gibney (2004) notes in his impressive work, *The Ethics and Politics of Asylum*, neither of the contrasting ideals presented to governments by impartial and partial ethical and political theories are particularly satisfactory. In broad terms, the former hold that governments should consider in equal measure the rights and interests of every individual in the human community, the latter that they can put the rights and interests of their own citizens first. The problem is that both capture important moral claims, and as Gibney shows, there are genuine structural, political and ethical limits to the welcome that can be extended to asylum seekers by liberal democratic states.

More importantly, as explained in chapter one, one of the aims of this thesis has been to lift discussion of asylum ‘out of the trenches’ and point it in a direction that invites reflection on who we are and what we can do as moral and political agents, but within the ambit of the constraints and interests of policy makers. As noted, the way of proceeding has accordingly been to ‘start with where policy makers are at’, ‘look for what binds’, and ‘build on the good’. Further, to be less concerned about policy prescription than how policy insiders – whether political leaders or public servants – might go about their work in an ethically serious manner. For as Gaita (2004: 341) says,

> Aristotle advised those who wanted to know what justice is to look to the just man. But of course, one [has] to have eyes to see … [And to] ‘have eyes to see’, one must live and think in conceptual space in which examples of what others say and do can speak authoritatively to us, can deepen our sense of the virtues, of good and evil and, more generally, of what it means to live a human life.

In chapter six we went about this task in three steps. The first involved reflecting on what might reasonably be asked of ethics in a public policy context, where ethical theory and conviction typically counts less as a source of authority or legitimacy than the sanction of parliament, the courts and voters. Three criteria were put forward: that
the ethics be relevant to policy insiders, magnanimous in the values it accommodates, and ecological rather than atomistic in orientation. The second step involved exploring the nature and evolution of the ethics of care since first being articulated by Carol Gilligan in 1982. When conceived as a value, process and practice rather than a sentiment or theory, and refined to explicitly provide for the work of empathy and imagination, the approach was judged well-suited to the work of asylum policy making, not just because it meets the above criteria and taps into a familiar and rich form of discourse, but because it speaks directly to the ‘caring for us, caring for them’ dilemma that permeates the concerns of policy makers. The third step involved considering what questions an ethics of care might bring to various aspects of Australian asylum policy, and what directions it might have policy go. With its emphasis on inquiry and dialogue, and judgments based on appraisals of consequences, needs and capacities, it was suggested that likely changes would include an increase in the refugee and humanitarian intake, the introduction of still further flexibility in the mandatory detention regime, the imposition of strict – and at present unmet – conditions on offshore interception and processing, and the promotion of a caring culture among Immigration officials.

A comparison may usefully be made here between the approach taken in this thesis and that by Gibney, for the two are different but ultimately complementary. For one thing, in his quest (2004: 230) to develop ‘a convincing statement of the ethical responsibilities of states’ in regard to asylum seekers, Gibney takes ethical theory as his starting point, whereas this thesis takes the values of the makers of asylum policy. Further, the two reach different end points. For example, noting the merits of both impartial and partial theories, and the real world constraints on the ability of states to practise an open door policy, Gibney (2004: 231) suggests an acceptable compromise expectation is that they at least observe the humanitarian principle, that is, the ‘obligation to assist refugees when the costs of doing so are low’. In his view (2004: 21, 230), this principle is ‘the best available common standard for states’, is a ‘modest, sober and painstakingly realistic criterion’, and is ‘both ethically informed and politically relevant’. By contrast, noting the presence among policy makers of a value of caring for asylum seekers, and their general ‘caring for us, caring for them’ dilemma, this thesis suggests an appropriate expectation is that they bring care as a value and language more to the centre of policy discourse, and the associated phases and qualities
of caring about (attentiveness), caring for (responsibility), care giving (competence) and care receiving (responsiveness) more to the centre of assessments of individual, agency and community performance.

The two approaches also afford different standards for judging the moral status of policy initiatives, although overlapping and again potentially complementary. Where Gibney is concerned with when asylum seeker rights may reasonably be pruned, an ethics of care is concerned with when assessments of asylum seeker needs, and the needs, capabilities and quality of care afforded by the receiving community, may reasonably be defended. For example, according to Gibney (2004: 251-254) any initiative that curtails the putative rights of asylum seekers – such as the right to choose the country of asylum, or enjoy freedom of movement pending the outcome of their asylum claim, or obtain permanent rather than temporary residence if the claim is successful – is justified only if it meets three criteria: it doesn’t inflict ‘existential damage’ on people, it benefits the cause of ‘asylum overall’, and sacrifice of the right ‘is really necessary’. By contrast, in an ethics of care approach, an initiative is defensible when the product of decisions that demonstrably feature care’s various process and practice components, is something that recipients can reasonably be expected to accept, and is consistent with broad rules of thumb like priority being given to those in greatest need, caring responsibility being matched with caring capacity, and caring responses being proportional to care needs.

The two approaches come closest when they consider the practical implications of being adopted by policy makers. For example, Gibney lists respect for the principle of non-refoulement, the resettlement of more refugees in wealthy Western states, tighter limits on the mandatory or unsupervised detention of asylum seekers, the promotion of positive public attitudes to refugees, and greater international cooperation in areas like resettlement and tackling the causes of forced migration. These all seem consistent with an ethics of care approach, examples of the potential implications for Australia of which were mentioned above.

Neither approach, it should be said, presents a particularly radical account of the duties of states and policy makers in regard to asylum seekers. Both allow for a continuation
of the nation state system, and recognise that crafting policy in a democracy is subject to competing values, with compromises being necessary. However, where one speaks the language of rights, principles and minimum obligations, the other speaks the language of engagement and open-ended ethical and political possibilities. And where one serves as a useful bottom line when relationships are tense, which is not an unusual state of affairs between asylum seekers and receiving communities, the other helps prevent a rupture, and keeps judgments about the content, direction and potential of relationships well informed and responsible.

Significantly, an ethics of care can accommodate Gibney’s humanitarian principle, but can’t be limited to it. As was exemplified in the study of the JRS leaders in chapter five, with their focus on companionship as well as justice, a relationship-based approach to asylum seekers is more free-flowing and less satisfied with moral minimums than an approach based on abstract principles.

A few final general comments may be made on the ethics of care as an approach to asylum issues. Firstly, compared say to a human rights approach, it reflects a ‘thick’ rather than ‘thin’ conception of human existence. In other words, it sees people as embedded and interdependent bearers of local habits, identities, loyalties and responsibilities rather than as atomistic and independent bearers of universal rights. Rights-talk has its merits. For example, it inspires people to treat each other civilly, even when empathy is lacking, and in theory cuts across inequalities in power, authority and status. However, if our aim is open, stable and cohesive communities, the cultivation of affective and resilient relationships among their members, and between members and outsiders, is vital (Hesse & Post 1999). And here an ethics of care comes to the fore. In asking that asylum seekers be viewed as potential receivers of a community’s care – people with whom a community is in either actual or potential relationship – it puts the onus on policy makers to ensure their assessments of the caring capabilities of the community are responsible, and its interventions on behalf of the asylum seekers are competent and responsive. At the same time, by sanctioning their taking into account the limits and needs of the receiving community in shaping their responses, it is slow to condemn any measures they might take to protect the community’s current and future caring achievements.
Secondly, reframing asylum policy debate in terms of a ‘caring for us, caring for them’ dilemma may be criticised for retaining the language of ‘us’ and ‘them’, and so appearing to capture and reinforce a sense of difference and distance. However, such a typology is commonplace, and seems malleable only over very long periods, or in short bursts under extenuating circumstances. It seems therefore practical to concentrate on making the most of the fact that care exists on both sides of the typology, however much weighted to the former. It affords a positive starting point for ethical and political imagery, and steers discussion to core issues, such as what might reasonably be expected of us as actual or potential caregivers, and what might be our true caring capacity if given the right support.

Finally, an ethics of care may appear to focus on process over outcomes, which is generally considered something of an anathema in politics. As Robert Hill, a former senior minister in the Howard government recently put it (in Walker 2006),

> Politicians focus on outcomes, because unless you can deliver the outcomes you can’t get the votes. Nobody votes for you because of process – or not for long anyway.

However, the phases and qualities of care are not merely about process. As Tronto (1993: 109, 103) says, they ‘describe an integrated, well-accomplished act of care’, and these acts are steps towards a world in which all of us are living ‘as well as possible’. Moreover, outcomes don’t just happen. They are typically a product of processes that Hill perhaps takes for granted, such as consultation with interested parties, the setting of priorities, and the efficient organization of human, financial and material resources. Indeed, the very choice of what constitutes a desirable outcome, and judgments about its delivery or attainment, are likely to be informed by a variety of deliberative processes. And whether at individual, agency or community level, these processes and judgments can be more or less reflective, more or less inclusive of the parties they take into account, more or less sensible to the needs, experiences and vulnerabilities of these parties, and more or less willing to explore and exploit all capacities and possibilities in responding to them. In proposing an ethics of care as a framework for these processes and judgments, the aim, put simply, is to find an ethics that will incline asylum policy...
insiders to the ‘more’ rather than the ‘less’, and to borrow Gaita’s imagery, give them ‘eyes that see’.

**Possible areas for future research**

Even if we accept that the ethics of care is an appropriate ethical and political approach in matters of asylum, the question arises as to how it might develop traction in public and political circles.

In a discussion of how compassion might be developed in public life, Nussbaum (2001) notes the relevance of at least three factors: family upbringing, the design of political institutions, and the nature of public education. In her view, questions to ask of each include how they separate or bring people together, what conceptions of the good, responsibility and appropriate concern they teach or engender, and what emotions they promote or discourage. These are useful questions in regard to cultivating an ethics of care as well. For example, research might be directed to understanding better the information, frames of view and emotions generated about asylum by politicians, schools, the media and asylum advocates. Or about the differential effects on care of having some asylum seekers located in the community, others in detention centres, others in Nauru, and still others in countries even further from public sight and sound. Or indeed about the effects of face-to-face encounters with asylum seekers, and of the debates that surround them. For example, most of the leaders interviewed for this study mentioned a variety of experiences affecting their views on asylum, ranging from childhood memories of racial and sectarian animosity, to visits to overseas refugee camps. We can’t force experience, or guarantee that it will produce the results we want. However, in considering how we might enhance our capacity and disposition for care,

---

6 According to Nussbaum, much of the work needed to promote compassion will and should be done privately, within families, and outside the reach of the state. However, there are ways in which the state can and should support this work.

7 It is worth noting that Nussbaum believes emotions like shame and disgust offer little of value in public deliberation, on the grounds that their cognitive content is often false or distorted, and that they encourage unhelpful conceptual divisions (e.g. of people as moral or immoral, victims or villains, ‘just like us’ or ‘different to us’). She may be right, although we should be uneasy about dismissing the potential value of any emotion too quickly, since all can be useful indicators of value and motives for action.
direct engagement seems, if nothing else, a rich source of reflection.\(^8\) Future research might therefore be directed, among other things, at the effect of forums in which people have the opportunity to meet and hear asylum seekers, and the relative merits of commercialised refugee and asylum seeker reception and support arrangements as opposed to volunteer-based ‘good neighbour’ arrangements.

On a more general level, research could be organised into three broad lines of inquiry. One into how communities develop their disposition and capacity for care, whether in regard to asylum seekers or any other needy individuals, with possible links to research on the formation of social capital and values or virtue education. Another into how political leaders can best discern and develop these caring capabilities and dispositions, and contain or transform whatever prevents them reaching their potential, with possible links to research on political psychology and emotionally intelligent leadership. And yet another into how communities and leaders have juggled their caring responsibilities in the past, a question that invites trawling for and telling stories and legends of individual and community experience, with an eye more for achievements than failings.

Indeed, anything that seems likely to create a personal and public space for emotional literacy,\(^9\) a sense of identity based on attending to human need, and an imagination able to see the human meaning of tragedy, would seem ripe for investigation. For each seems a bulwark against the isolation and disengagement that flows from physical distance, concern about ‘getting involved’, and identity being based exclusively on family, tribal or community ties, bureaucratic or professional position, or ideology.

Research of this kind may be viewed as harbouring an ambition for moral engineering, and criticised for politicising values and emotions. However, as this study indicates,

\(^8\) Relevant experience can take various forms. For example, when introducing a bill to parliament in 1958 that, among other things, provided for non-criminal deportees to be held in immigration detention centres rather than normal prisons, and increased their avenues for legal appeal, the then immigration minister, Alexander Downer, said he felt a particular sympathy for such people, having been a prisoner of the Japanese during World War Two: ‘Gaols’, he said, ‘are depressing places, especially when you are not in any true sense an offender’; CPD (Reps), 1 May 1958, vol 19, p 1397.

\(^9\) Or as Little (1999: 4) says, ‘becoming better at recognising what’s happening emotionally both to us personally and in the public world around us’.
values already shape policy, and emotions alert us to what values we think important, and whether policy is succeeding or failing in promoting or defending them. In other words, they are aspects of private and public life that are already saturated with moral and political implications, and to not consider how they might be crafted to better effect reflects a narrow conception of ethics and politics, and arguably an irresponsible one (Solomon 2003).

A final reflection

This thesis continues a long tradition in social and political inquiry, in which the focus is on bringing instrumental and procedural rationality into closer alignment with value rationality. A guiding desire has been to develop a values-based language and framework for approaching asylum issues that is relevant to political leaders and public servants, and that accommodates the interests of asylum seekers and receiving communities alike. It has been argued that the ethics of care provides such a language and framework.

However, just as one might ask why be fair when we know life is so often not, so too may we ask why care, when we know we can so often get away with not caring with no obvious harm to ourselves, and sometimes benefit. Indeed, the latter question may well be the more important, for unless we care we are unlikely to be fussed by unfairness, or bother to have our views on what’s fair exposed to voices different to our own. After all, why would John Rawls have bothered labouring on *A Theory of Justice* if he had not cared enough about the misfortunes caused by the vagaries of luck and circumstance to want to have their effects reduced?

It is tempting here to slip into a rationale that relies either on a form of self-interested altruism – that an ethics of care that does good for others is ultimately also good for us – or an ideologically or religiously-inspired view of the world, like that of the JRS leaders and their belief in the inherent dignity of human beings and the loving ways of God. We can include among the latter the quasi-mystical views of Emmanuel Levinas, who sought to explain our responsibilities to others in terms of a pre-existing debt to them as the source of our own being and identity. Or as Manderson (2001: 3) explains,
A needy man begs for food. A child seeks shelter – or, indeed, asylum. We do not ‘give’ them charity (or rights) from the depth of our autonomy. We already owe them a debt, for their otherness is the very condition of our existence. We live not just among them but because of them. Charity or kindness is not a torchlight that we hold and decide to shine on someone else. No, it is the sunlight without which we could not see anything at all.

From this perspective, as Manderson continues,

Responsibility is first and foremost a response-ability, a demand placed on us regardless of our will. The choice is not whether we have a responsibility, but whether we choose to heed it.

However, without wishing to question the influence and value of these types of argument in public discourse on asylum – including the Levinasian argument, which fits nicely with the relational ontology of an ethics of care – they are likely to be more convincing for fellow travellers than for sceptics, unbelievers, or ordinary voters. As O’Neill (2000: 21) says, arguments which are hostage to an individual’s or organization’s preferences or beliefs, objectives or commitments,

... lack authority for those who do not begin by accepting the pertinent norms, who dispute the accepted categories, or who abhor others’ basic projects.

Are, then, we left floundering, understanding better what an ethics of care involves, but with no universally persuasive reason why we should accept its challenge?

The question is perhaps ultimately a matter of individual and public conscience, but we can end with three points as to why such an ethics is appropriate for people and agencies engaged in public policy. Firstly, it meets O’Neill’s (2000: 24-25) modest criteria for what can be considered ‘reasoned’ conduct even outside an instrumental or metaphysical framework, namely that it is a ‘way of organising thought and action’ which others can in principle follow, and that it is capable of providing guidance ‘for oneself, for shared activities and for others’. In other words, it is ‘intelligible’ in thought and ‘followable’ in deed.

Secondly, there is something about the ethics of care that is both humble and complete: humble in the sense of conceiving ethics as an ongoing, searching conversation among
people of different views, experiences and circumstances, and complete in the sense of providing for the work of the heart – Little’s (1999: 8) ‘muffled but surprisingly exact language of human beings everywhere’ – as well as the head. These may seem unusual bases on which to recommend or adopt a particular approach to policy, but in a pluralistic world and contested ethical and political environment they are a precondition of reflective and informed policy development and constructive policy critique.

Finally, politics, like ethics, is centred on relationships. And while it might be too much to expect people acting in a private capacity to pay great attention to relationships that extend beyond family and friends, it is not too much to expect it of political leaders. Their job, after all, is to discern and serve not just the national but the public interest (Mulgan 2006, Uhr 2005), a term open to all sorts of use and abuse, but covering what has earlier been called the ecological dimension of human life: the connections and spaces between people living in community – local, national and global – as distinct from people living as individuals. People have different values and views about how we should live and relate, and some have voices louder than others. Politics is therefore not just about advancing a particular leader’s or group’s vision of something better, but brokering differences of view, and listening for quiet or missing voices. To ask political leaders to undertake each of these activities with care and in the interests of care as conceived in this thesis, is therefore really just asking them to do their job properly.
BIBLIOGRAPHY


ACFOA (Australian Council for Overseas Aid), 1966, opening address by the Minister for Immigration (Hubert Opperman) at the Refugee and Migrant Service Commission Conference, 21-23 Feb, Canberra.


ANAO (Australian National Audit Office) 2005, Management of the detention centre contracts – Part B: Department of Immigration and Multicultural and Indigenous Affairs, Audit Report No 1, ANAO, Canberra.


Betts, A. 2004, ‘The international relations of the “new” extra-territorial approaches to refugee protection: explaining the policy initiatives of the UK government and UNHCR’, paper to 2nd annual student conference on forced migration, Centre for Research in Ethnic Relations, Warwick University, 15 March.


Brennan, F. 2003, Tampering with Asylum: a Universal Humanitarian Problem, University of Queensland Press, St Lucia.


Byers, S. 2003, Speech on asylum and immigration to the Social Market Foundation, 30 Jul, available: [http://politics.guardian.co.uk/immigration/story/0,,1422344,00.html](http://politics.guardian.co.uk/immigration/story/0,,1422344,00.html) [accessed 19 Aug 2003].


Cox, D. & Van Amelsvoort, A. 1994, ‘The wellbeing of asylum seekers in Australia: a study of policies and practice with identification and discussion of the key issues’, Centre for Regional Social Development, Graduate School of Social Work, La Trobe University, Australia.


Hage, G. 2006, ‘Values to have and to have not’, *The Australian*, 27 Sep, p 34.


Metcalfe, A. 2006, ‘An overview of organisational change within the Department of Immigration and Multicultural Affairs (DIMA) and its implications for other agencies’, speech by the DIMA Secretary to Australian Public Service Commission SES Breakfast Series, 2 May, Canberra.


Rennie, D. 2005, ‘Traffickers, not refugees, are the problem’, *The Daily Telegraph* (London), 30 Dec, available:


SLCRC (Senate Legal and Constitutional References Committee) 2006, Administration and operation of the Migration Act 1958, Mar, Commonwealth of Australia, Canberra.


UNHCR 2001, ‘Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum’, Preliminary Observations, Jan, Geneva.


Vanstone, A. 2006a, ‘Vanstone builds on commitment to alternative detention arrangements’, media release of 2 Feb, available:


