**Ideas and Society Program**

**The Asylum Seeker Crisis – Where To Now?**

5 October 2011

**Sandy Gifford:**

I want to welcome all the La Trobe students and staff and our broader La Trobe community. We have a terrific turnout and I must say I have been really looking forward to this panel discussion in this Ideas and Society Program.

We have three really key thinkers and I would also say advocates and activists and we’re here to think outside the box and to consider the question about the asylum seeker crisis – where to now? Forwards, backwards? Hopefully not backwards. Our jumping-off point today is the recent High Court decision that the Gillard government’s Malaysia Solution is unlawful. So that’s our jumping-off point. And it’s called into the question the legality of the offshore processing in general. Now the Gillard government is pushing for an amendment to the *Migration Act* to make both the Malaysia Solution and the offshore processing lawful and we’ve all been following the Abbott Opposition has rejected the amendments and so we’re headed for this political stalemate, so it’s a very opportune time to actually ask our panellists, where are we going with this? What’s happening?

Now, I am the moderator, I’m Sandy Gifford and I direct the La Trobe Refugee Research Centre here and I’d like to cut to the chase and do the introductions. And to introduce our three speakers, are three Daves. Now I have a problem. Dave Corlett, where is Dave Corlett? Great. All right, he’s being miked up. I’ll continue with our introductions, because like Dr Seuss’s Mrs McCave, she had too many Daves. She had twenty-three sons and she named them all Dave. Well, she did, and that wasn’t a very smart thing to do, because you see, when she wanted one, she just called out Yoo-Hoo. Now this made it really difficult for the McCaves, so as you can imagine with so many Daves, she re-named them – one Blinky, one Stuffy and one Stinky. But I won’t do that. So I’m going to stick to Dave, with the last names.

So let me introduce our three Daves. I want to start with David Manne, in the middle, who is the Director of the Refugee and Immigration Legal Centre and has been the leader of the recent successful High Court action and I have to say, I’ve known Dave for many years and he’s also been highly successful as a behind-the-scenes advocate in this whole area of law. Many successes, and sadly some that weren’t successful and I think it’s really important to acknowledge so much the work that actually happens not in the public eye.

Our second Dave, David Marr, is a senior journalist with the *Sydney Morning Herald*, many of you will know him in terms of his public commentary, and political commentary. He’s also the co-author of *Dark Victory*, which is a tragic and riveting read about the politics of the Howard election and the *Tampa* and if you’ve not read it, it has not passed its use-by date.

And our third Dave is Dave Corlett, which is a recent movie star on *Sending Them Back*, the SBS series which is still online I believe. If you haven’t seen it, *Go Back to Where You Came From*. Dave is also a former La Trobe student, did his PhD here and also is an author of *Following Them Home* which was really following some of the failed asylum seekers who’d been sent back, and also a more recent book called *Stormy Weather*, looking at the issues of climate change and forced migration.

So with that, I would like to welcome all three of our panellists. What we’ll do is we’ll kick off with each of them talking for about fifteen minutes and then we’ll go into about a twenty minute more debate, panel discussion and we’ll reserve fifteen to twenty minutes at the end for questions.

So, we actually have the order, Dave Corlett, to start off with you, are you still happy to do that? If so, welcome.

**Dave Corlett:**

Thanks Sandy and sorry that I’m late.

Nearly two decades ago, not long after mandatory, non-reviewable and indefinite detention of non-citizens who arrived in Australia without prior approval was made law, the then chairman of the Joint Standing Committee on Migration wrote a chapter in a book called *Protection or Punishment.*

Jim McKiernan’s chapter was titled, ‘The Political Imperative: Defend, Deter, Detain’. The title clearly suggests that there was no other political choice than to defend Australia’s borders against the threat of asylum seekers and refugees arriving by boat (a threat) by detaining and thereby deterring them.

The underlying reason for this ‘political imperative’ was, it would seem, because the Australian public demanded such a response from its elected leaders. The discomfort of many Australians with the boat arrival of asylum seekers is longstanding.

Conservative sociologist Katherine Betts, who in 2001 analysed 25 years of opinion polls, found that Australians’ antipathy towards asylum seekers arriving by boat was ‘a slow and growing trend over the last quarter of a century.’

More recently the Scanlon Foundation found Australians’ negativity towards asylum seekers arriving by boat continued.

So what underpins our attitudes towards asylum seekers arriving here by boat? How they are shaped and how might they be shifted. And does the SBS series *Go Back To Where You Came From* reveal anything about these questions of attitude? I wonder if I can get the clip played. I’ve just got a short clip to show you.

[VIDEO CLIP]

So, that was the show. Let’s go back and you get a sense of what it was about.

It is a truism of the Left, I think, that hostile attitudes towards refugees and asylum seekers are the result of ignorance and fear. Ignorance about who they are and the nature of their plight. And fear that they are somehow threatening, that the perceived difference of asylum seekers and refugees represents a threat to our lives and wellbeing.

In a sense, *Go Back* tested this hypothesis. How would people’s attitudes be affected, if they spent time walking in the shoes of those about whom they were ignorant and feared?

According to Inga Clenndinnen:

Humans have a unique talent for stories: for telling them, and learning from them. They are our most economical technique for expanding experience. Hearing them, we have the sense that we can stand, that we are indeed standing, in another person’s shoes. When the stories are true, that experience is a powerful incitement to action.

So *Go Back* sought to stand people in the shoes of others in an experiential sense and to capture the experience on camera for an audience to see.

As far as the experiment went, I thinkit tells us a variety of things. Certainly, some of the participants had their attitudes and opinions challenged.

Adam, for example, thought that asylum seekers were taking ‘our’ jobs. During *Go Back*, he accompanied Thair, one of the Iraqi men he lived with. He accompanied Thair to work. Thair’s employer said that he struggled to get workers to do the job that Thair was doing. So Adam began to question what he had assumed was self-evident.

Similarly, he and Darren (and Glenny) were deeply affected by meeting with asylum seekers at the Villawood Detention centre. They became more informed. But it was not just information. It was personal experience. For Adam, the experience was profound.

Similarly, Raquel, a self-confessed racist, for her, the experience of meeting with people and being with people who she had viewed as somehow lesser than herself led to a dramatic shift in her attitude. By knowing someone, by crossing the threshold between self and other, between ‘us’ and ‘them,’ some of the participants began to change their attitudes.

If ignorance and fear or their opposites shape our attitudes towards refugees and asylum seekers, so I think does a sense of entitlement. When we speak about good refugees and bad refugees – a dichotomy that is central to Australian political discourse, then we are implying our sense of entitlement. When we speak about the need for refugees to be grateful, or about ‘proper’ channels through which asylum seekers and refugees ought to seek protection – sentiments that most of the participants on *Go Back* expressed – then we are also implying our sense of entitlement.

We imply that we are entitled to make these judgements. In terms of Australia’s response to refugees and asylum seekers, we assume a position in relation to the nation. ‘We’ occupy a privileged place within the nation.

Now there is something to this position and to its general appeal. Nations play an important part in the lives of many people including as a sort of meaning-giving thing. So a sense of ownership with regard to the nation is not without foundation. Further, an important function of the state is to manage its territorial borders in the national interest.

But states do not have unfettered rights in this regard. ‘Our’ entitlement to ‘decide who comes and the circumstances in which they come’ is not absolute. The sense of entitlement that people like the *Go Back* participants felt with regard to the state and asylum seekers arriving by boat may also be limited by something else: a greater sense of justice.

If refugees by definition have had their fundamental human rights violated, then it makes sense that their rights need to be reinstated. If this is so, then, where do the rights claims of the likes of Raye, Adam, Darren, Raquel and Roderick to a place within the nation fit in relation to the more fundamental rights of refugees whose most basic rights to physical integrity, to safety and security have been violated?

There is also something bigger than a sense of *national* entitlement that shapes ‘our’ attitudes towards asylum seekers and refugees. The *Go Back* participants reflected a sense that somehow ‘we’ ought to determine the rules by which refugees should play. Partly, this is ignorance. And by this, I mean a lack of understanding that life is not always as ordered in other parts of the world as it is in Australia.

The participants on *Go Back* got a sense that the international refugee protection system is bigger, more clumsy, more under-resourced and, in places, more corrupt than they had imagined. Maybe this deeper understanding had a part in the attitudinal shift that some experienced. If ignorance is part of what leads us to claim forthrightly that there is a right and a wrong way to go about seeking international protection, then a lack of moral imagination and a sense of arrogance are other ingredients.

By a lack of moral imagination, I mean that ‘we’ repeatedly fail even to try to comprehend what it might be like to be dislocated, to be victims of war, survivors of torture and other serious human rights violations, to be forced to flee family, friends, community, place. And then it is arrogance on our part having failed to try to comprehend what it might be like to be a refugee, to suggest that there is a proper way in which to find protection and to cast judgement on those who do not follow this route.

The sense of entitlement – based on our place within the nation and the world – means that we are the arbiters of what is fair. Fairness is at the basis of a central claim in Australian political discourse about asylum seekers, namely that asylum seekers and refugees who get on boats take the places of other refugees who are unable to afford the services of people smugglers. Now this argument of course has strong resonance within the Australian community. The notion of a ‘fair go’ – albeit limited to those deemed part of the ‘in’ group – is embedded in the national psyche.

In its more populist manifestation, the claim to fairness is articulated as guarding against ‘queue jumpers’ who ‘steal’ the places of the more vulnerable. Now there is good reason to be critical of these metaphors, not least because the notion of an orderly queue is a misnomer and the criminalising language is nonsense.

Rather than having sinister intentions, asylum seekers coming to Australia set out in search of protection. And maybe meeting refugees who had arrived by boat, or who had attempted to or hoped to travel to Australia by boat, helped some of the participants on *Go Back* to understand that asylum seekers do not intend to ‘rip off the system.’ Rather they are seeking something entirely reasonable for themselves and their families: a life free from the fear of grave human rights violations.

Again, a challenge to ignorance and fear.

There is further reason to be sceptical about fairness claims in these matters. Claims to fairness pretend to be set against a neutral backdrop. They are claims that, while deeply politicised, are presented as being removed from politics and power. So, for example, a number of the participants on *Go Back*, suggested that it was unfair that millions of dollars was being spent on asylum seekers when other Australians are in need.

In a similar vein, Darren was recently on a current affairs program as part of a story about unaccompanied minors being taken from detention and accommodated in community-based housing. He complained that it was an issue of fairness – especially since indigenous Australians and ‘our’ homeless are not gaining access to those resources. But there are things that are implicit in the argument that need to be made explicit.

What remains hidden in many ‘fairness’ claims is the relative power and privilege of those making the claims. So, for example, Darren’s own position in the fairness equation goes unquestioned. Instead, the equation remains between, on the one side, asylum seekers, and on the other, vulnerable Australians. The vulnerable are pitted against the more vulnerable while our own privileged place exists unquestioned in the background.

Of course, this suits those of us who retain positions of privilege. In fact, rather than being somehow neutral in this competition between the vulnerable, the Australian government in our national interest decides how resources are spread between those less vulnerable. Asylum seekers do not wish to be detained at the expense of needy Australians. That is a decision of the Australian government based on the ‘political imperative’ that Jim McKiernan identified.

Of course, there *are* equity questions in all of this because there is never enough protection to meet the needs of all those who require it. How ought we respond to greater or lesser needs? Even if we accept that they all have a right to international protection, how should we balance the needs of refugees in desperate circumstances in camps and urban slums around the world against those who are able to come to Australia by boat?

Now I don’t know the answers to the questions, but we would be better placed to work them out if we didn’t attempt to demonise and play vulnerable people off against each other. We also might be able to have the discussion more ethically if we were able to recognise our privilege as a central part of the equation.

I want to conclude by returning to Inga Clendinnen. I think that she is onto something when she argues that stories are our most economical way of expanding our experience. But stories are not enough. Indeed, for some, even more literally walking in the shoes is insufficient.

Beyond stories, something more is needed. It’s the capacity to let the imagination go to certain places. Some, it seems, can read a narrative and let their imaginations take them into the lives of the other. Other people, such as Raye in the case of refugees, needed more literally to feel what it might be like to live like ‘the other.’ She needed to meet them, to sit with them, share their food, to laugh and to cry with them.

But we cannot all do this all the time. We need a moral imagination, a sort of openness of the heart, a preparedness to be moved.

One of the things that I think can get in the way of this is a sense of ideological certainty.

Part of what I learnt from the *Go Back* experience is that for those whose political views are somehow tied up with their sense of self, it is difficult really to walk in another’s shoes, to imagine their circumstances, including truly to contemplate their dilemmas. There is too much invested in the existing world-view to do such a thing: Too much to lose, including a sense of certainty and stability. In such cases, stories, and even personal relationships, are not enough to do the work. Indeed, stories and the imaginative capacity to allow them to impact on us are not enough. Not even for people like Raye and Adam.

As well as a moral imagination, we need to be able to do the critical thinking. To think structurally. To think about power, including our own power. And to be able to extrapolate on particular stories into the more general.

There is a role for leadership, including political leadership in assisting Australians to undertake both these tasks: to assist in the storytelling and in helping to understand the stories – both from an emotional perspective and by placing them in a political and policy context.

In the absence of good political leadership, *Go Back*, which took the refugee issue beyond the daily political point scoring and put it into the hands of real people gave us an insight into ourselves and into the experiences of refugees.

It expanded not just the participants’ experiences of the world, but those of many of the show’s viewers too.

**Sandy Gifford:**

Thank you Dave Corlett. I’ll call on David Marr now.

**David Marr:**

A bit of history. The dismantling of the White Australia Policy was one of the great achievements of Australia since Federation. It called on enormous political skill, it required Australia to re-think its sense of its own self, and it was fraught with great political peril. But both sides of politics knew that it had to be done, otherwise Australia would become a pariah state in the world. We had no choice but to face the challenge of taking apart a system which did not allow coloured immigration to this country. And the decision was taken in the late 1960s into the middle of the 1970s that neither side of politics would take domestic political advantage of the remaining large number of Australians who were profoundly opposed to this change. Until a few weeks ago I used to lament that the last time a poll was taken of people bluntly asking them what they thought of coloured immigration to this country, was 1984, and at that time 27% of Australians disapproved of anyone other than whites being allowed to come and live in this country. But the splendid Scanlon Foundation survey of a few weeks ago reproduced almost that same figure in the objections of Australians to immigration from what was loosely called the Middle East, which included both Lebanon and Iraq. So there remained in Australia and remains in Australia a large rump vote that could be taken advantage of if a party wished to take advantage of it, to cause domestic political havoc for the dismantling of the White Australia Policy. But a truce was called between the parties in order that essential work be done. But within almost months of the last of the official structures of White Australia being demolished, a boat turned up in Darwin Harbour with five Vietnamese on board. They had sailed down from Saigon, using a few pages of a school atlas and a compass, and they reached Darwin Harbour in early 1976. A narrative could have begun at that point of greeting them as heroes, they were after all, fleeing communism, and Australia’s idea of refugees had always been that they were fugitives from communism. We signed up to the Geneva Convention after the war, partly as part of the world’s apology to Jews for what was allowed to happen to them before the war, but partly also to clear Europe of people fleeing communism. And the Vietnamese, in the late 1970s coming to Australia were fleeing communism, they were part of that same narrative. They might have been greeted as heroes but they were not.

It was decided at that point by both political parties that the fears of Australians at the appearance of these unwanted, unsorted, unselected arrivals caused, that the fears would be appeased. And when we asked the question, at what point did Australia get on to the wrong track with asylum seekers who arrived by boat who I will henceforth refer to without any disrespect whatever as “boat people”, it was right at the start, because right at the start, the fears of Australians were appeased and right at the start both sides of politics pledged to stop the boats. Now this is in world terms an extraordinary pledge, then and now, to stop the boats. It is not a pledge made by Greece where hundreds of boats, perhaps even thousands of boats arrive every year. It is not a pledge made by Italy, it is not a pledge made by Spain, it is a pledge made by Australia and it was made thirty-five years ago and it was made by both sides of politics and it remains the fundamental pledge of both sides of politics. We will stop the boats. We won’t police the system, we won’t limit the system, competence as a government will be defined by stopping the boats. Now this is an extraordinary pledge to the Australian people. We’ll stop them.

Now, there is a lot of sentimentality these days about what Malcolm Fraser achieved in the late 1970s and early 1980s when the Vietnamese were pouring out of Vietnam, and it is undeniably true that he managed an almost revolutionary absorption into Australia of tens of thousands of Vietnamese, but, he did everything he could to stop the boats. He didn’t want them coming by boat. He understood as both sides of politics understood, the deeply fearful response of the Australian people to the boats. So for instance, in the Fraser years, teams from the Immigration Department went to the holding camps along the coast of Malaysia, and chopped out the hulls of boats in order to prevent them sailing. They broke their engines in order to prevent them sailing. And in the end, only a couple of thousand Vietnamese in that first wave of boats, actually reached Australia. We took in about a hundred thousand Vietnamese and less than five thousand of those actually arrived by boat. Then the boats completely disappeared. They absolutely disappeared, for all of the 1980s, until some Cambodians started to arrive by boat in the late 1980s. There is a splendid political symmetry to this story. There have been four waves of boats, two while the Coalition was in office and two while Labor was in office. So by the time the boats returned, the Hawke-Keating government was in office. It had always been the wish of the Immigration Department to formalise what had been at times an informal arrangement to place in detention anyone who arrives here without a visa. We are a visa-crazy country. It’s one of the international aspects of Australia – we’re a visa-crazy country. We’re an island state. Island states always have an exaggerated sense of their capacity to control entry into their country. We are an island state, one of the few island states in the world, and of course we’re the cultural inheritors of that other great island state, the United Kingdom, and we bring to this country many of the same instincts of ambitions at least, of absolute control of who comes into the country. Poland can’t do that, because you just wander across the border, but somewhere like the United Kingdom can. Someone like Australia wants to be able to do it. We are a visa-crazy country. And the Immigration Department had always wanted to be able to put into the clink people who arrived here without visas. They pushed the Hawke government to do this. They pushed and they pushed the Hawke government to do this. And finally, after a devastating year, in which 216 people had arrived by boat, mandatory detention was introduced to Australia, and it was introduced with the enthusiastic backing of left wing unions, left wing unions were historically extremely hostile to the arrival of coloured people in an unregulated fashion and it was put in place. This was the second terrible step that Australia took, an absolutely terrible step – mandatory detention, and the next terrible step is that the High Court ticked off on it. Here was a parallel system that was clearly punitive, intended to be punitive, the political discourse was all about the deterrent effect of placing people in detention, and yet the High Court was persuaded that this was merely an administrative arrangement, that detention would be brief and that all would be civilised and it was really no more nor less than detaining people with yellow fever, or some disease.

This was a tremendously unfortunate step in Australia. If the High Court at that point had said, we are not going to set up a parallel punishment system in this country for people who arrive lawfully at our borders requesting refugee protection, we would not be in the mess we are today. The mess we are in today is very largely because of mandatory detention.

Time’s rolled on, and time, the clock is rolling on. I want to make just a couple of more points about the basic politics of the boats, which I think we overlook. Both sides of politics were in lockstep on the boats until the rise of the One Nation Party in the late 1990s. The boats had returned again. The third wave of boats, largely made up of Iraqis and of Afghans, appeared on the horizon when Howard was in office and when One Nation was nipping at his heels. And it was One Nation that suggested the ultimately uncivilised act of pushing these boats back out to sea – a notion that Howard himself resisted and resisted, and was still resisting into the middle of 2001. There’s a famous radio interview he did, down here in Melbourne, where he said we’re a civilised country, we don’t do that kind of thing, and a few weeks later he did it, with the *Tampa*. And that was the politics, and at this point the lockstep meant that Labor was in no position to set up any kind of contrary policy, any kind of alternative and more civilised policy, and a calmer policy to deal with the arrival of this wave of boats. Labor was trapped. It was trapped because many people inside Labor absolutely supported everything that Howard was doing, it was trapped by its own record on the boats, and it was trapped because there was an election coming within months. But this was the point at which the Coalition saw the possibility of using the residual fear of the boats in the Australian community to damage the Labor Party. This was the point at which the politics of the boats entirely changed. And what we’re seeing today is another round of that changed politics, in which the Coalition extremely aggressively is beating up on the government because of the boats, and Labor is trapped. Trapped by its own wishes, trapped by its own past, trapped by its record of going along for so long with the fundamental notion that this country is about stopping the boats.

So Labor is trapped. Labor is also extraordinarily foolishly trapped because it has allowed Tony Abbott to set as a criterion of effective government, stopping every last boat. So each boat that appears, and always a marvellous photo opportunity for the press, and at least in these days we can photograph them – we couldn’t under Howard. Each boat that appears is projected by the Opposition as a failure of government. Not as the arrival of people in need of protection, but as a failure of Labor, a failure of government. And Labor has allowed itself to become trapped, right inside there.

And yet, from the very start, there has always been a strong constituency in this country for dealing decently and calmly with people who arrive here by boat. Katherine Betts’ name was mentioned earlier. She wrote, and I don’t agree with some of the political conclusions that she reached, but she wrote this marvellous paper which is available on the internet, looking at the polling of public opinion up to 2001. And you can see there, even though there is an alarming third of this nation that does not ever want anybody who arrives here by boat unsorted and unwanted, ever to be allowed to live in this country, there is nevertheless a majority, nearly all the time, a majority, for dealing decently with boat people, and calmly with boat people, accepting our responsibilities under the Geneva Convention, and letting them live here if they turn out to be refugees. But the politics of this country for nearly thirty-five years, has played to the hostile minority rather than play to the calmer and more civilised majority in this country. And we are trapped where we are now not so much because of the fears of this country, but of appalling leadership that has allowed those fears to dictate how this government behaves, how this country behaves. More of that later.

**Sandy Gifford:**

I’d like to invite David Manne to be our third speaker and I’m giving you your fifteen minutes. I think we really do want to take that and hear what you have to say.

**David Manne:**

Absolutely. Well, thank you, and look, it was just over two months ago, amidst the contemporary politics that David just described, that I was cooking for the kids on an early Saturday evening at my home in inner city Melbourne and I received a call for help. It was a distress call relayed through a young Canberra-based legal aid duty lawyer. He was probably awaiting his first call to advise someone that they had been arrested for drunk and disorderly. Instead, he told me that he’d just received a call out of the blue, from a group of men incarcerated on Christmas Island, wanting advice. These men, some of them from Afghanistan, feared being expelled to Malaysia. The matter was urgent, how urgent was unclear, but there was a sense that expulsions could happen as early as Monday. The lawyer had no experience in refugee law, but had the presence of mind to send a message out to legal networks in Australia to find out someone who may in fact know something about refugee law. And that’s how the call for help hit my kitchen bench. It was not a conspiracy to get the law in to rule on the policy. It literally happened like that. Later that evening I spoke by phone with some of the Afghan men seeking this help. They were petrified. They explained, through the aid of an interpreter, that they had recently arrived by boat in Australia seeking protection from brutality in their homelands, only to be told by Australian officials that they would not be allowed to seek protection as refugees in Australia. Instead, they were to be sent to Malaysia. They told me they feared being severely harmed in Malaysia, and that they faced deportation from there to life-threatening harm in their homelands. The group of thirty-six men sought two things. First, that they not be expelled to Malaysia, and secondly, that they be allowed to stay in Australia and seek refugee status here.

That was the brief from start to finish. As lawyers, we were asked to provide legal assistance to challenge the lawfulness of their expulsions, and secondly, to secure assessment of refugee status for them in Australia. And that is what we did. The brief was not to challenge the policy of the Malaysian Solution. That was not the brief and that was not the task. Despite the sound and the fury that David has just very neatly described, at no point did the legal team act on anything other than a request for legal assistance, and we as lawyers, responded to that request.

So that evening, and the following morning, a legal team was assembled, comprising some of the finest in this field in Australia, such as Debbie Mortimer SC, Richard Niall SC and leading law firm Allens Arthur Robinson, all acting pro bono, that is, all acting for free. And I think it’s a fine thing in this country that people as vulnerable as this can access such assistance. Within 24 hours, on Sunday evening, we were before the High Court of Australia in Melbourne seeking an urgent injunction to stop the government from expelling any of our clients to Malaysia. It is here that we learnt how urgent the matter was. And that is, that sixteen of the men were to be put onto a plane at 11.30 am on Monday morning, on a plane to Malaysia, to be sent to a place with a long-standing history of serious and systematic mistreatment of refugees and a clear absence of any legal protections to ensure that they would be free from abuses that so many others have and continue to suffer in Malaysia. They were the stakes.

His Honour Justice Hayne granted an injunction that evening, effectively preventing the planned expulsions on Monday morning. And on Monday afternoon, that is, the following day, he extended the injunction pending the determination of the matter.

About four weeks later, the High Court emphatically ruled, 6-1, that the government’s proposed expulsion of these people and others, to Malaysia, was unlawful. Almost ten years to a tee, after the *Tampa* incident, how it had come to this. To understand the context of the recent High Court challenge, we need to rewind a decade to the time of the *Tampa*. The facts are notorious enough for me not to recount them in any detail. Suffice to say that contrary to past practice, 433 asylum seekers en route to Australia were refused entry and instead expelled to Nauru, for processing of claims and warehousing. The so-called Pacific Solution policy spawned the prototype that is the model of offshore processing. In action it involved two essential parts. Firstly, exclusion. Exclusion from seeking refugee protection under Australian law. And secondly, exile, that is, exile to another country in the region, Nauru or Papua New Guinea, for assessment of refugee status and warehousing.

In policy terms the rationale was driven by an imperative of essentially deterrence of people coming by boat. As David put it neatly, stopping the boats. Stopping people who are seen to have arrived by what was called secondary movement, that is otherwise referred to less fortunately in some circles and in fact in our public discourse, as queue-jumping. That is, it was seen that these people coming from Afghanistan and Iraq primarily, were seen to have forsaken protection elsewhere on the way to Australia, they’d somehow jumped a queue. The fact is, and I must again return to this much repeated, fact, and that is that there are no real queues and no real protections accessible in the region en route to Australia but that didn’t seem to get in the way of a foundation of policy during this era.

Crucially, the policy was avowedly to be fully consistent and compliant with Australia’s obligations under the Refugee Convention. Expulsion of asylum seekers must not and does not breach our treaty obligations, we heard very often from our political leaders. It is in this context the Section 198A of the *Migration Act* was enacted by parliament. This is the provision, still on our statute books I think, which empowers the Minister of the day to declare a country to be suitable to transfer asylum seekers, instead of letting them stay in Australia for processing. It is this provision that was used to declare Nauru and Papua New Guinea to be suitably safe. And it is the same provision that was used by Minister Chris Bowen on 25 July of this year to declare Malaysia to be suitably safe for expulsions. It is this provision which became the focal point of the High Court challenge. This law requires that a declared country provide three key things. Firstly, access to effective procedures for assessment of protection need. Secondly, protection. And thirdly, relevant human rights standards in relation to that protection. Now this policy of Pacific expulsion that I’ve referred constituted a key foundation of the architecture of one of the toughest and the most comprehensive anti-asylum seeker systems in the Western world, and from a human rights perspective, I think it’s fair to say it was a strong contender for Western world’s worst practice. Key features included mandatory indefinite detention, temporary protection visas, the Pacific Solution, naval repulsion of asylum seekers arriving by boat and excision of Australian territory to preclude people from seeking asylum in Australia at all. And what it did, was I think, also graphically illustrated one of the fault lines that we continue to witness in refugee policy in this country, and that is essentially a radical deviation from mainstream standards in our legal system that otherwise apply fairly universally, and they include access to the rule of law. They include habeas corpus. They include anti-discrimination or indeed equality principles and they include access to legal advice, they include access to the courts. In many ways, this policy represented a graphic illustration of this systematic deviation from the golden threads of our legal system which I think we need to return to.

Another thing which I think is important to refer to here is the fact that the policy of Pacific expulsion also caused mass and severe and lasting harm to people who were ensnared in it. Recently we’ve heard from our political leaders that somehow, somehow Nauru is humane. And I quote “humane”. Not only is that wrong, it’s grotesquely wrong. All the evidence is, is that that policy of expelling people to languish in limbo, whether in Nauru, in PNG, or possibly elsewhere, is likely to cause people the same devastating harm that it did in the past.

Now to the decision briefly. The decision recently in the High Court in what’s been known as M70. The decision itself was a classic decision about the rule of law in this country. It was not a decision about policy, it was not a decision about politics, despite all the sound and fury, the white noise about that. In fact what it was, was a decision in relation to the Minister’s declaration under Section 198A that provision, being the provision that was introduced during the time of the *Tampa* and essentially what the court found was that the expulsion of our clients, the proposed expulsion of our clients to Malaysia under that declaration would be unlawful, and here’s why. The declaration, to remind you, is a declaration made under a statute, the *Migration Act*. Parliament, about a decade ago, decided to enact a provision which required that if there was to be a transfer of anyone from Australia for processing elsewhere, that it be done under certain conditions. Those conditions are not policy, they’re law. And that law is contained in Section 198A itself. The court found that in essence that section requires something more than for the Minister making that declaration, that someone can go to another country, it requires something more than that the Minister thinks and believes that it’s acceptable to do so, but instead, for example that the access to procedures for determination of refugee status, and the protections, must be provided as a matter of legal obligation, domestic or international. Not just whether the Minister thinks or believes that it’s acceptable to expel the person, but as a matter of legal obligation that there are in fact effective procedures and that there are in fact adequate protections in place.

The relevant obligations that the court looked at and said were required, is that the country must provide, and in this case, Malaysia was the country in question, must provide people who have refugee status have rights for example, which are enshrined under the Refugee Convention, which include education, religion, employment, housing and access to the courts. The court went on to say that a country provides access to effective procedures for assessing protection if its domestic law provides for such procedures, or it is bound by international obligation to allow the UNHCR to undertake procedures, or is bound by international obligation to do so itself. In none of those situations is Malaysia so bound. It went on to say that there must be, I beg your pardon, it went on to say that in relation to Malaysia, that Malaysia failed the test under law in this country because, firstly, it does not recognise the status of refugees in its domestic law and does not undertake any activities such as registration, documentation, or refugee assessment. Secondly Malaysia is not a party to the Refugee Convention. And thirdly, the arrangement with Australia to provide rights is not binding, it’s a statement of political intention. That is, ultimately, the essence of the ruling, and that is that if a Minister of the day is to declare under this provision that someone can go to another country, that that country is suitably safe, if you like, that there have to be certain objective facts in place. It’s not just a matter of the Minister thinking or believing that it’s safe enough to do so. And in a sense, the court was really talking about ensuring that anyone who is expelled to another country, that that country has reflex rights, that is, that it ensures by a matter of legal obligations, that there are reflex rights in that country under the Refugee Convention.

I want to briefly now turn to a couple of other matters. And firstly, did, as has been asserted, did the court change the law. The court did nothing of that sort. The court did something very normal and common in this country and in fact it discharged its function in that way and that is, certain people, that is 42 asylum seekers asked the court something very normal and reasonable in this country, and that is, does the government have the power under law to do that which it is proposing to do, in this case expel them to Malaysia. And the court looked at the law, looked at the facts, applied the law to the facts and found that it was in fact unlawful. It was in many respects that simple. The second point – did the court as has been alleged by certain political leaders, miss an opportunity and I paraphrase, to break the people smugglers business model. Well, in fact the court didn’t miss an opportunity to do so because that was not in fact the function of the court. The court doesn’t seize upon and is not called to seize upon under the separation of powers, to pursue policy objectives of a government. The court is of course, its key function is to apply the law to the facts properly and to interpret the law in light of those facts and that’s in fact what it did.

I want to very briefly, in closing, conscious of the time, just put out something by way of, I guess, a proposal or a discussion that might prompt some questions, and that is, where do we head to from here, in terms of the sort of situation we’re mired in? There are a couple of false debates I think. One is, and we need to move beyond these debates … one is, what is more humane? Is it more humane to send someone to languish in limbo and crush them in Nauru or in PNG or in Malaysia? It’s a non debate. It’s not a true debate because in all cases, the proposal is brutal and beyond the pale, because in all cases what we’re talking about is unnecessarily and quite potentially unlawfully harming innocent people. In fact, a lot of the debate in this country at the moment has descended to depths where really the political jousting is about how harshly, how harshly we can treat vulnerable people. Instead of a bigger question, and that is, how do we properly and humanely, and fairly manage a deeply complex situation in our region? And it’s on that score that I think we need to move beyond a simplistic and distorted debate about whether it’s onshore processing or offshore processing. I want to clarify that and say that I’m not for a second suggesting that we shouldn’t process people who come to Australia in relation to their refugee status, but what we need to do is in fact seize an opportunity here, a different type of opportunity to the one that I just referred to before, and that is the opportunity that the High Court has thrown up, not deliberately, but inadvertently, in its decision, and that opportunity is to develop a policy in our region, which is genuinely focused on providing stabilised and secure conditions throughout the region, or far better protection structures throughout the region for the so many people, the so many people, moving through our region, in search of safety from danger, and it’s in that way that the benchmarks, the legal benchmarks set out by the High Court about what it is that is required to ensure that anyone were to be expelled elsewhere to a situation of safety, what those benchmarks are, is part of I think, the solution for the future. But really what we’re talking about is creating in the future, working patiently and cooperatively in the region to develop better structures, regional structures for protection based on three key things. One is, ensuring that wherever someone goes they receive fair processing. Secondly, that they are humanely treated. And thirdly, that if they’re found to be in genuine need of refugee protection, that there is the availability of resettlement within a timely fashion. That is the type of situation, that is the type of structure, which could move us beyond the debate that we have at the moment, which is not really focused on the protection of people, but rather the protection of borders. Thank you.

**Sandy Gifford:**

Well, thank you very much. I’m going to speak from the chair instead of from the podium. Thank you very much for three really insightful and I think, very timely reflections on where we’re at.

Before we open up for questions though, I’d like to take five to eight minutes to take off from David Manne, where you ended, and ask the panel, where to now? We’re in this gridlock, where to now? Politically, socially, humanely and legally, and open this up to the panel for some discussion. And I’m not fussed who wants to start. That’s the big question. Where to now? How are we going to break this deadlock?

**David Manne:**

Well it’s very difficult to see at the moment how we break it, because I think one of the real difficulties at the moment, and I think this shows you what a deep problem we’re in, is that the response in relation to the High Court decision which was a classic rule-of-law decision, was in fact to propose amendments to the law which oust the law, which literally seeks to strip bare basic protections for people who come here and instead give almost unfettered power to the Minister of the day to send an asylum seeker anywhere without even needing to consider what would happen to them. So I think we’re in a very dangerous situation at the moment where there are even proposals to depart, or deviate radically from ordinary standards that we have about ensuring that the law governs these matters to somewhere else. And I think we’re in very dangerous territory.

**Dave Corlett:**

But that’s not new though, is it – the response of the Executive consistently to court rulings on these matters has been to re-write the law. For the last twenty years or so.

**David Manne:**

Not always. I mean I think sometimes, but I think the way it’s been done this time shows you the depths to which we’ve got to. I think that for example, last year, the decision of the High Court to ensure that people who come by boat had the law applied to their cases, rather than not, there has not been an attempt there to change the law – there are circumstances where there hasn’t been, but I think that it’s really the nature of the attempt too, the radical nature of these laws which I think is deeply troubling, and shows that really what we need is a different form of political leadership.

**David Marr:**

The first proposal of the government after the High Court’s decision came down to fix up its little problem, was to strip entirely all protections from the law – entirely, everything. Gone. And the Opposition had to point out to them that at least they might like to keep protection of non-refoulement, which is an ancient, fundamental rule of civilised nations that you don’t send people away to countries where they might face death and persecution. I mean, it’s a fundamental notion of civilised behaviour had to be pointed out by the Liberal Party. [laughter] I mean, that was a moment for me to understand the brutality of the politics of the boats and I don’t know the way forward from here but I think it’s going to have to come from within the political parties themselves. It’s clear, the last decade has shown that it’s clear that on this subject, if the Coalition parties are going to be aggressively pursuing what are racial politics and are indisputably to my mind, racial politics in the domestic framework of this country, Labor will follow. And the decency of the conduct of the politics in this area, in this country, seems to me alas to depend – I withdraw alas – it depends on the health of the Liberal Party. And all of those decent people inside the Liberal Party, those decent people who vote for the Liberal Party, the decent people who have clearly shown up in polling, who have profound worries about what’s going on in this area, need to assert themselves inside their own party. Ditto people inside the Labor Party. Those party structures are going to have to work to begin to make profound policy changes, because without them, I can’t see how we break a cycle of these kind of cage fights in Canberra over this small, manageable issue of refugees.

**Sandy Gifford:**

Can I just ask Dave Corlett, just following on, does it really matter what the public thinks?

**Dave Corlett:**

Do you know, it’s one of the things that struck me about the *Go Back* experience was that the political system just didn’t engage with it. So there was a real sense from the participants and also from viewers, and viewers, at the peak we had 600,000 viewers and MasterChef had one and a half million, so you know, we’re talking about a small segment of the community. But actually I think the rating numbers don’t reflect the extent to which the show impacted on debate within the community. I think lots of students have watched the show as part of their school and so the impact continues, but I was struck by the fact that the political class simply, or the politicians at least, didn’t engage with it. And so there was a sense I think on the part of the participants or some of the participants at least, that change was possible and also I think if you look at the SBS website, and people who have seen the show and responded to the website, the way they talk about it changing their attitudes, there is a sense that it’s possible for people to get an insight into the realities of what it’s like for refugees and asylum seekers. And to also think about what that might mean for Australia’s response to refugees and asylum seekers. But I think as far as I know Joe Hockey just called it a stunt. And that was the extent to which he would engage in it.

**David Manne:**

I think it’s a very complex dynamic, the one between the public and political leaders on this issue, but I think one of the tragedies in recent times – around three years ago with a new government, regime change if you like, there was something very unusual in history actually that happened, and that was the government embarked upon a systematic program of restoration of rights, and it was restoration of rights to refugees in this country. And it’s been easily forgotten, but it was actually very important, and potentially was a real circuit breaker and a different way forward, if I can say that – a way ahead. It abolished the Pacific Solution and with it, the notion of offshore processing. It abolished temporary protection visas. It at least promised the end to mandatory indefinite detention – it hasn’t been delivered, but it promised that on paper. And it did other things too. It restored work rights to many asylum seekers in the community. There are a whole range of things. It’s very unusual for that to happen. But one thing that didn’t happen with it was really any serious attempt by the government of the day to bring people with it, on this. There was no narrative with it, there was no story. And I think that that is a very unfortunate thing, because it would have required political leadership, it would have required a change of story in this country, why are we doing this, why are we restoring rights to people and allowing them to stay and be processed here. And then all of a sudden, boats, more boats. Without a narrative.

**David Marr:**

Which were blamed on the reforms. By the Opposition.

**Dave Corlett:**

And there was no alternative narrative to fall back on. That’s the point.

**David Manne:**

That’s the point. And I think that’s a tragic thing in this country.

**Dave Corlett:**

And I think the government at the time had the political capital to go and make that narrative, and it was one of the few issues that it had the opportunity and let it slip.

**David Marr:**

In the dying days of Rudd’s rule, he began to make an attempt to persuade the public about some fundamental facts in this. And one of the extraordinary things about this issue is how impervious it is to fact. I’m about to bring out a book on panic in Australia and the way in which panic governs so much of the politics of this country. But it does strike me that one of the things about panic is that when you’re in a lather, when you’re in a complete lather, you don’t absorb facts, and the facts of this issue are so simple, really. And the other day, the Scanlon Foundation that I mentioned, once again confirmed what many pollsters have shown, is that Australians have no idea how many boat people come to this country, none. Something like 10% of the survey the other day had a rough idea that boat people make up one or two per cent of permanent arrivals in this country every year. Ten per cent of the nation. But they’ve been told that for years.

**David Manne:**

But what do governments do when they want people to know the facts?

**David Marr:**

They could have an advertising campaign.

**David Manne:**

Have they?

**David Marr:**

No.

**David Manne:**

Have they actually bothered to tell people – which political leader in the last decade has stood up and said, this is why people come here, and this is why, when they come by boat, almost all of those people are granted, under rigorous examination, are granted refugee status in this country?

**David Marr:**

None. And indeed, no political leader since that first boatload of Vietnamese arrived in1976, no political leader in this country of any of the big political parties, has ever done anything but demonise them. So it’s no wonder we are in the situation we are in.

**Sandy Gifford:**

It’s probably a really good time now to throw it open to the floor. We have ten minutes left. Now the challenge to the audience is a good question with a question mark, not a statement with a period. Yeah? So if we could take some very short, sharp really good questions from the floor. We have a hand over here. Possibly a web cam and then you’re second. And then third.

**Question:**

I’m a Masters of Global Communications student here. I’m just wondering – you say that politicians are not good at delivering the facts. What about the media? What’s the role of the media in separating out the fear and the facts in this debate?

**David Marr:**

I can only admit to just about complete failure. I’ve been writing again and again and again for ten years what David said – there’s no such thing as a queue. A recent poll found that 62% of Australians are convinced that boat people are queue jumpers. I’ve been writing again and again and again as have many of my colleagues that it breaks no law to come to this country by boat to seek refugee protection. 61% of Australians believe that laws are broken, that they are illegal. Now I know that there are sections of the press which are using this issue to undermine the Labor government and there are sections of the press that are just trying to report what’s going on. There’s nothing unusual about that – that’s the way it goes. But certainly the press can’t claim to have had any great success in illuminating the Australian people on the pros and cons of this issue.

**David Manne:**

They’ve had great success I think in some ways though in feeding I think fears, feeding misinformation, peddling or perpetuating the peddling of myths. You know, it’s on a fairly … one of them that I think is potentially more insidious is the old stereotype which comes back in re-cast form often, recently it’s been that if an asylum seeker in detention has an iPod or wears a tee shirt that doesn’t have holes in it, or takes multi-vitamins or even smokes, that somehow they can’t be a genuine refugee. And I know it sounds ridiculous but those sorts of myths end up sometimes on the front page of papers. And they’re deeply damaging because as we know, what they do is distort a simple truth about refugee status and that is that it is essentially egalitarian, that refugees come from all corners of the globe, and from all walks of life and are people, people like us. And I think it’s those sorts of … those facts and the distortion of them that sort of lays the foundation for I think very deeply disturbing campaign often of misinformation.

**David Marr:**

Well, that great front page of the *Herald-Sun* the day after the High Court decision. Do you remember it? A picture of a boat and a huge headline “Here They Come”. So feeding the very fundamental notion of invasion, feeding the fundamental fear. Now the boats will come. That’s true. That’s absolutely true. But that was the first response. Ba-boom. Here they come.

**Sandy Gifford:**

We had another question I think, was it over here?

**Question:**

I wish La Trobe had been able to find a speaker to canvas some of the other side of the story. I am happy for refugees to come from everywhere. I wonder specifically whether TPVs would not satisfy a lot of people in terms of, we deal with the fear and distress of people, but they don’t access to permanent residency or citizenship, which is normally dealt with by people applying and coming here through normal channels. Can I also acknowledge that I’m a very prejudiced person. I would let the refugees out of detention and put lawyers in it.

**Sandy Gifford:**

Now, who wants to take that one on?

**David Marr:**

Well, there’s no doubt that the polling shows that temporary protection visas are very popular with the Australian people. You have many, many people on your side. There are problems with those visas which perhaps other people here would follow through with, but have no doubt whatever that you speak for a very large proportion of the Australian people, that says, protect them, but only for a bit, only for a bit.

**Dave Corlett:**

What I wanted to say is that while TPVs might be popular, I think there’s no evidence that TPVs had any impact on preventing people getting on boats, in fact the TPV regime was part of the reason why more women and children were coming on boats to Australia, and when we saw the SIEV X go down, David, you know what the percentages of women and children on that boat were more than I would. But larger numbers of women and children coming as a result of the temporary protection visa policy and also I think that the impact of temporary protection on refugees who are trying to rebuild their lives, who have had their lives shattered by that refugee experience, and then to be living in ongoing temporariness, and the impact of that on their ability to rebuild a life after that experience – I think the human cost is just unacceptable. That’s my response to the TPVs.

**David Manne:**

One of the problems of TPVs – there are a few – one of them is that they violate our obligations that we signed up to. So once again we’re not playing by the rules. If we want to play by the rules, we don’t have TPVs. Number two – I was heartened to hear the premise of what you said, but it points to a problem too, and that is to deal with the distress of people. Well, what they do is in fact they exacerbate it and we for many years helped TPV holders seeking permanency, and what it did in many cases was deepen the harm to them, so it harmed people who were fleeing from harm. It also caused a pull factor as Dave said – it re-traumatised people but also what it did just in terms of broad social policy, putting aside human rights for a moment, and the law, just in terms of social policy, it also did something I think, quite perverse and that is, for thousands and thousands of people, in fact over nine thousand people in our community, it condemned them to a twilight world for a significant period, and almost all of those people have become permanent residents and citizens in Australia, but after, really, a third wave of suffering – fleeing from persecution, then being locked up for often prolonged periods in Australia, and then suffering the further uncertainty and indignity of temporary protection before becoming what? Australian citizens. And it’s that’s harm upon harm upon harm that I think just in terms of public policy we ought to try and avoid.

**Sandy Gifford:**

We probably have time unfortunately for one last question and it’s the web cast. So I have a pointer for a web cam question.

**Question:**

Yeah, the question is, what is the difference in the political conditions of now compared with those that allowed the White Australia Policy to be abolished?

**David Marr:**

Well, the abolition of the White Australia Policy was an imperative. Australia had no choice. And it had to be done in a way that caused the least domestic political disruption. And it was done in a way that many people thought was improper. It was done with actually not much political debate, and people weren’t given a hell of a lot of choice about whether it happened or not. It happened, and it’s been a great success for this country. The thing about the boats is that it provides a dramatic fresh opportunity every time any boat arrives, to ventilate the fears and prejudices that such people cause in this country. Have no doubt about who it is that is most worried about the boats. There are many commentators who claim it is grossly unfair to point out that this is an argument about race. It is an argument about race. The people in those boats are not white. And Murray Goot, a tremendously skilled commentator and analyst and pollster from Macquarie University in Sydney, has pointed out there are two groups of people – they interlap a bit of course – two groups of people who are most worried about the boats. One the one hand, they are the people who do not like coloured immigration and they do not like immigration particularly from the Middle East, nor do they like what they call aboriginal advantage. They think aborigines are getting too much. And the other group is a law and order group that responds very strongly to the notion of queue jumping and illegality. That group has a curious side effect as well. They’re the keenest group in Australia for the return of capital punishment. Now they’re the people who are most worried about the boats. They’re the people who are driving the politics of the boats. And it is about race. And it is about two respectable political parties, the Coalition and the Labor Party, willing to trade in race for domestic political advantage. That is what Australia is doing here, and we will continue to do it until we have the courage to name it for what it is. This is race.

**Sandy Gifford:**

What we need to do unfortunately – I think this room is booked from 12.30 on and we are like, two minutes after 12.30. We could actually go for another couple of hours and so I apologise for those who would like to have more of a debate and more questions. But can you please join me in thanking our panellists for a very incisive presentation. So, thank you very much. We all have challenges ahead of us I think, no matter what side we’re on.