WHAT NEXT FOR AUSTRALIA’S REFUGEE POLICY?¹

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Introduction: The Tampa and Global Approaches to Refugee Movement

After the federal government prevented the merchant vessel Tampa from landing rescued asylum seekers at Christmas Island in August last year, the rules of the refugee game in Australia were completely recast. As critics of the government continue to grapple with the immediate toll in human misery generated by the pre-existing policy of mandatory detention, it is easy to miss the bigger picture and fail to recognise the astounding breadth of what was done in the wake of the Tampa. With Labor’s support, the government passed a raft of legislation that fundamentally restricts the rights of asylum seekers, and dramatically expands the rights of those officials who intercept and deter them. The government even tinkered with our national sovereignty – the very thing it was supposedly protecting - by re-defining the concept of border, so that an asylum seeker who lands at the Australian territory of Christmas Island is no longer considered to be inside Australia for the purposes of the Migration Act.

In this sense, the government’s actions were audacious and entirely unforeseeable. The available evidence suggests that the decision to prevent the Tampa from landing its rescued passengers at Christmas Island was made on the spur of the moment. Just days before, Prime Minister John Howard had ruled out using the navy to intercept and turn away boats. He told Neil Mitchell on Melbourne radio station 3AW that he saw no alternative to the existing policy of allowing asylum seekers to land and then placing them in mainland detention centres:

‘You see the only alternative strategy I hear is really the strategy of in the sense using our armed forces to stop the people coming and turning them back. Now for a humanitarian nation that really is not an option.’³
There are suggestions that the SAS ‘had been training for such a contingency for some time’ and Norman Banks, commander of HMAS *Adelaide*, told a Senate hearing that a prime ministerial task force had discussed using the navy ‘to intercept and deter’ boats carrying ‘large numbers of potential illegal immigrants’ as early as 1999. However, when the moment came, the federal government appeared entirely unprepared to deal with the practical implications of its own actions, let alone the international fallout. As Paul Kelly noted, the ‘astounding feature’ of the Tampa affair was that John Howard ‘went in without any exit strategy’. The so-called ‘Pacific solution’ was really ‘a Nauru fix’ cobbled together at the 11th hour after Australia’s diplomatic resources had been ‘fully mobilised’ to ensure that the Prime Minister would not have to back down.

Nevertheless, even though the government’s response to the Tampa affair was a surprise, even though the so-called ‘Pacific solution’ was policy made on the run, the government’s actions were essentially consistent with its previous approach to asylum seekers and largely consistent with refugee policy as it has evolved elsewhere in the developed world.

Simply put, the broad thrust of that policy is to stop people from ever crossing your frontier in the first place, in order to prevent them from invoking the protection obligations enshrined in the 1951 Convention on the Status of Refugees. Britain’s Foreign Secretary, Jack Straw, acknowledged this in June 2000, when he was still Home Secretary and responsible for immigration. At a public forum in London he put his finger on the fundamental contradiction at the heart of the Convention: it gives people facing persecution the right to claim asylum, but it does not oblige any nation to admit those people, so that they can make that claim. The consequence of this contradiction, as Jack Straw admitted, is that some refugees will break the law to cross borders and seek safety.

The Australian government’s response to the *Tampa* laid bare the mechanisms by which asylum seekers are kept at bay. Those of us who were not busy applauding the government, were shocked to see how crude the business of border protection really is. In fact, similar processes have been operating for years, in an unobtrusive, bureaucratic way that does not discomfort us or offend our sensibilities. Australia has Immigration department officials posted at major airports in South-East Asia, such as at Bangkok or Kuala Lumpur. The job of these ALOs, or Airline Liaison Officers, is to help counter-staff
at the airport to detect people holding false passports or false visas and to prevent them from getting on a plane to Australia. In the 1999–2000 financial year a total of 353 people were intercepted by Australia’s ALOs at five airports in Southeast Asia.

Australia, like most other nations, also imposes so-called ‘carrier sanctions’ on any airline that lands an undocumented or improperly documented traveller at an Australian airport – refugee or not. The current fine is $5000 per passenger. In its annual report 2001-02, the Immigration department praises ‘the considerable contribution of the airline industry to the maintenance of Australia’s entry arrangements’, noting that the ‘industry’s adoption of technology and effective training of staff contributed to a continuing reduction in the number of improperly documented people arriving at Australian airports.’

We will never know how many refugees were amongst the hundreds of people who were prevented from boarding planes by Airline Liaison Officers or airline counter staff. We do know however, that as the network of ALOs has been extended and the carrier sanctions increased, so the number of cases of asylum seekers arriving in Australia by air has declined. As the Immigration department proudly announces in its annual report:

Notably the number of people arriving at Australian airports who prima facie engaged Australia’s protection obligations declined from 201 in 2000-01 to only 85 in 2001-02 (a fall of 57.7 per cent over one year). Key factors contributing to the fall in these numbers include Australia’s expanded Airline Liaison Officer network and the more widespread adoption of Advance Passenger Processing by airlines.

Of course another potential route to protection in Australia is to apply for a visitor visa, land lawfully and then seek refugee status after clearing immigration. Even when the number of unauthorised boat arrivals peaked, the majority of asylum seekers in Australia actually came this way. Lawful arrivals are not detained and can get permission to work in Australia while their cases are assessed. But applying for a visa to visit Australia is not so straightforward, particularly if you are a refugee or displaced person or a citizen of a developing nation. All applicants from a so-called ‘refugee producing country’ are screened against certain risk criteria. If Australia’s immigration officials assess that there is a ‘risk’ that a person might seek asylum after landing in Australia, then his or her application for a visa will be
refused. This reached a level of absurdity in Indonesia when East Timorese who wanted to apply for a visa to visit Australia were forced to fill out their application forms on the footpath outside the Australian embassy in Jakarta – the fear being that if they were admitted to the embassy compound itself, then they might seek to claim asylum on the spot.

Without a visa to get past immigration controls, the only ‘legal’ route to refugee protection in Australia is the government’s offshore humanitarian resettlement program with its upper limit of 12,000 places per year. Given the limitations of that program and all the other barriers erected on the legal route to Australia, it is hardly surprising that thousands of asylum seekers were willing to sell their land and whatever else they had, to scrape together enough money to engage a people-smuggler, and risk a dangerous journey in an ill-equipped boat from Indonesia to an Australian territory in the Indian Ocean.

When the federal government prevented the Tampa from disembarking its passengers at Christmas Island, it was taking the next logical step in policy, closing off the last remaining route by which refugees might actually make it past our border controls, and so call on our obligations under the 1951 Convention.

It is true, as Robert Manne has argued, that there was a particular ‘viciousness’ to Australia’s pre-Tampa detention policy for asylum seekers who arrived without a visa, and that this set Australia apart from European countries. Robert Manne is probably right too, when he says that the so-called ‘Pacific solution’ was ‘unprecedented in its ruthlessness’. This is not so different from what happens elsewhere. The United States uses its Coast Guard to intercept ‘boat people’ from Haiti; and, in the 1990s, in what might be called the ‘Caribbean Solution’, the US asked Caribbean and Central American nations to host the displaced Haitians on its behalf. In the end political opposition prevented that plan from being realised, but Haitians have often been held for processing in other ‘offshore’ places—on navy ships or at the naval base at Guantanamo Bay in Cuba. In May 1992, no doubt alarmed at the number of people who appeared to have a legitimate claim for protection in the United States, President George Bush (senior) switched tactics. Despite protests from the UN refugee agency, the UNHCR, he ordered the Coast Guard to force intercepted boats back to Haiti, without conducting any
assessment as to whether or not the people on board might be persecuted by the country’s military regime on their return.

The peculiar politics of United States policy towards Cuba means that any Cuban who makes it to the United States soil is unlikely to be sent home. As a result, Cuban boatpeople are intercepted at sea to prevent them from ever setting foot on Florida beaches, and given a ‘rapid screening’ aboard a coast guard vessel for a presumption of refugee status. Under a deal struck with Havana, those who are screened out are returned to Cuba within 12 hours. Those with a prima facie claim to refugee status are detained at Guantanamo Bay for processing. If their claim to refugee status is confirmed, then they will be offered a resettlement place in a country other than the United States. According to former UNHCR official Dr Alexander Casella, this approach is ‘consonant with the [Refugee] Convention’ because refugees do have access to asylum procedures and protection. However they cannot ‘impose their presence on a preferred country of destination’ \(^{16}\) – or in the words of our own immigration Minister, they are prevented from achieving ‘their desired migration outcome’. (It should be pointed out that the US does have an ‘orderly departure program’ for emigrants from Cuba to the United States, which is also meant to provide a legal migration route and undercut the appeal of the sea journey.)

The Australian government’s ideal scenario was that the *Tampa* and any subsequent asylum boats would be despatched back to Indonesia, under the rubric of ‘regional cooperation’. If the boat people wished to claim refugee status, they could do so at the Jakarta office of the United Nations High Commissioner for Refugees. This is the local equivalent of European policy. For example a Tamil asylum seeker, who flies say, to Warsaw and tries to cross from Poland into Germany may be turned around at the German border, under agreements that asylum seekers must have their refugee claim assessed in the first European country in which they set foot. (The key difference is that Poland has signed the 1951 Convention and Indonesia has not.)

Critics of the federal government’s response to the *Tampa*, myself included, pointed to the damage that it did to Australia’s international reputation but this argument may have been overstated. While many countries did indeed voice concern about Australia’s actions, politicians and bureaucrats around the world were also watching attentively, to see how the Australian experiment
would pan out, and what might be gleaned from it to augment their own border defences.

The British government subsequently toyed with the idea of despatching warships to intercept asylum boats in the Mediterranean. In league with Spain, Britain also attempted unsuccessfully to win European Union support for a policy of withholding aid from transit nations that fail to stem the unauthorised movement of people across their borders. Australia’s Immigration minister, Philip Ruddock, claimed some credit for ‘collaborating’ with the British government in developing its policies (a claim downplayed by the British government).

There is also talk in Europe of what might be termed an ‘Aegean solution’. Under this scenario (officially called the ‘Aegean Sea Initiative’) Italy and Greece would help to set up and fund a ‘holding centre’ in Albania. Unauthorised arrivals would be held there for processing. Those recognised as refugees would be resettled; those not recognised would be returned to their homeland.17

In Denmark, the first country to sign the 1951 Refugee Convention, a new conservative government has introduced changes similar to Australia’s temporary protection visas – delaying the right of refugees to seek permanent residency, restricting access to welfare and curtailing family reunion18.

It also appears that Australia tried to set up a kind of post-

Tampa refugee-relocation deal with the United States. Australia agreed to take Cuban and Haitian refugees who were trying to make it to the United States, while urging the United States to resettle Afghan and Iraqi ‘Pacific solution’ refugees who had tried to reach Australia. After the issue hit the front page of the Australian19, the minister’s office issued a media release asserting that talk of a refugee ‘swap’ was wrong20. But if the intention was not to do a direct exchange with the United States, then at the very least Australia was looking to create a kind of refugee merry-go-round, in which asylum seekers might join the international protection system at one point but with no way of knowing where they might exit it again as a refugee. This is the inescapable implication of the minister’s comments in London in April 2002, when he first announced that Australia would take refugees from Cuba and Haiti: ‘What we’re looking to see is that people’s migration intentions of reaching Australia, even if they are refugees, is not realised — that is, that
they will often go to places that they hadn’t anticipated they might be going to and hadn’t planned to go to’\(^{21}\). Under this scenario the minimum requirements of the 1951 Convention are met. A person at risk of persecution is given protection as a refugee, but not in a place of their own choosing. To use Mr Ruddock’s favourite turn of phrase once more, refugees are prevented from achieving their ‘desired migration outcome’. A forward-looking Mr Ruddock says this approach ‘will be a very important part of the maintenance of the international protection system’\(^{22}\).

The merry-go-round policy rests on an assumption that refugees ‘shop’ for their destination of choice. There is no doubt some refugees will try to reach a country where they have relatives or friends but the primary consideration is to seek safety and a durable solution to their plight. Anecdotal evidence suggests, for example, that many refugees end up in Australia by default, because that was the destination on offer from the smuggler they happened to encounter: if they had been offered passage to Canada or the United States or Britain, they would have gone there instead.

**What Philip Ruddock Did Next**

What all this indicates, is that the Australian government is setting the pace on changes to refugee policy worldwide. The federal government’s zeal and inflexibility set it apart from other countries and horrifies human rights organisations, refugee workers and international lawyers. But while Australia is *a step ahead* of other developed nations, it is not necessarily *out of step* with them. Attempts to ‘deter’ asylum seekers and ‘contain’ the refugee problem can be discerned around the world.\(^{23}\) The obvious question is ‘where to from here?’ Flush with the success of his skirmishes against people smugglers, SUNCs (Suspected Unlawful Non Citizens) and SIEVs (Suspected Illegal Entry Vessels) in the waters of the Indian Ocean, what did Philip Ruddock do next?

The answer to this question lies in part in a United Nations outpost on the border between Pakistan and Afghanistan.

Displaced Afghans making their way back to their homeland are being used to test out new technology that may shape future arrangements for managing the international movement of refugees. At the border crossing near Peshawar in Pakistan’s Northwest Frontier Province, returnees call at the
Voluntary Repatriation Centre run by the UN refugee agency, UNHCR, where they are entitled to collect an assistance package. Before they can do so, the UNCHR uses a piece of high-tech machinery to take a digital photograph of each refugee’s right iris. Needless to say, this is not done in order to document the gratitude shining forth from the eyes of refugees for the assistance that they are about to receive – which includes a cash allowance of US$20 per family member, a ration of wheat, some tools, two plastic sheets, sanitary cloth and soap. No, since no two irises are alike, the iris recognition technology is being used more like a kind of finger-printing, to ensure that the refugees do not double dip, and take more than their share of the world’s generous assistance. The technique was developed by Swiss based company BioID Technologies. According to chief operating officer Machiel van der Harst, the ‘iris is very rich in texture and very stable over time so it’s an ideal means of identification’\textsuperscript{24}. UNHCR staff members shine a red light into a refugee’s eye and then take a photograph with a narrow angle lens. The image is then fed into a computer which ‘measures the specific structure of nerves and muscles’ in the iris and stores the information in a data base as a complex string of numbers. If a person attempts to claim assistance twice over, the sequence of his or her iris is immediately recognised and the computer sounds an alarm. The program began in October and by mid-November some twelve and a half thousand refugee eyes had been photographed. According to a UNHCR spokesman the alarm went off a couple of times per day in the first few days after the technology was introduced\textsuperscript{25}. Since then, word has got around and attempts to double claim have stopped.

The UNHCR says there is no breach of privacy and no human rights concerns in the use of such technology, since no names or personal details are recorded along with the iris images. Indeed, this high-tech system is probably less invasive than other, existing mechanisms that are used to detect fraud in the system, such as inspecting the luggage of returnees, or interviewing children to determine whether the family is genuine, or has been ‘invented’ in order to claim assistance and then return to Pakistan. And as the UNHCR says, the technology is only being tested.

Nevertheless, this small trial is significant because it gives a glimpse into the future of management of refugees, asylum seekers and other displaced people around the world. It reflects the intensified focus on abuse of the international protection system by asylum seekers, rather than the abuse of fundamental
human rights by nation states. It is indicative too, of the pressure that donor
countries are putting on the UNHCR to shift its role from providing care and
protection to displaced people, to acting as the world’s policeman patrolling
their actions and restricting their movements.

No nation is more active in pursuing this agenda than Australia and
Immigration minister Philip Ruddock has turned his sights on reforming the
international system of protection and the operation of the 1951 Convention
on the Status of Refugees. In particular, he is keen to combat the phenomenon
of ‘secondary movement’, when a refugee moves on from a country of first
asylum to seek protection further afield. An example would be a displaced
Iraqi – lets call him Mohammad - who has been recognised as a refugee by
the UNHCR in Jordan, but who then gets help from a people smuggler to
travel on to Australia.

In the words of Philip Ruddock, such people seek ‘a migration outcome’ and
‘jump the queue’ of refugee protection. And this is where the UNHCR test
of iris-recognition technology comes in. In future, iris-recognition technology,
or retina scans, or other biometric identifiers may be used by the UNHCR to
document refugees granted protection in countries of first asylum. In this
way an international data base would be built up which could be used to
check the identity of any individual asylum seeker who turns up in a country
like Australia. So when Mohammad applies for asylum in Australia, his retina
is scanned and checked against the UNHCR data base. This immediately
confirms that Mohammad is already entitled to protection in Jordan, and so
he is despatched back to Amman.

Mr Ruddock believes that countering secondary movement or ‘secondary
outflows’ is an essential part of maintaining the international system of refugee
protection enshrined in the 1951 Convention. Such an approach ‘saves lives’
because ‘it removes the incentive for people to leave places of protection
and risk their lives in dangerous journeys with people smugglers.’ Secondly,
it ‘saves space’ in the resettlement system, for ‘refugees who have no
capacity to move’26.

This argument is not without substance; refugee advocates and critics like
me must confront the issue of people smuggling and where we stand in
relation to it. Are we happy for the refugee protection system to be run
largely by criminal syndicates who exploit and endanger vulnerable people
for massive profit? We must acknowledge that while unauthorised movement enables persecuted people to seek safety, it is not a ‘fair’ system for protecting refugees. In fact, as Mr Ruddock argues, it is only open to those who have the money, or can raise the money, to pay smugglers. This does not mean that those people who engage smugglers are undeserving of our compassion, as the Minister suggests, but it does mean that the system is closed to many people. As has been documented, those most likely to move through illegal smuggling networks are young men – in other words the system is biased against women and children who make up the majority of displaced people around the world.

Nevertheless, the enthusiasm of developed nations for controls on secondary movement does not spring from a desire to ensure that protection is meted out in just and equal measure to vulnerable people around the world. It is the product of a drive to contain refugee problems to the developing world and deter asylum seekers from seeking protection in the West.

The thinking behind controls on secondary movement is also suspect. For Philip Ruddock, the ideal world is one in which there are no onshore asylum seekers in Australia, just an offshore refugee and humanitarian resettlement program. ‘We have water borders,’ he says, to explain why Australia should not expect to be a country of first asylum for refugees. His view is that most refugees arriving in Australia ‘already had, or had bypassed, effective protection in a country of first asylum and had engaged a people smuggler to take them to a more desirable destination’. This is just as simplistic as the Minister’s powerful but misleading analogy of a ‘queue’ for refugee resettlement. Let’s take the case of Farwat, a Hazara man from Mazar-i-Sharif in Afghanistan, who fled to Iran at the age of sixteen. According to Human Rights Watch:

‘Farwat ….was arrested by the Iranian police as an illegal alien in 1997, when he was sixteen, for working without permission in a shoe repair shop. He spent three months in a prison in Zahedan for adult male convicts. Due to overcrowding, Farwat was forced to sleep every night in the passageways or toilets. He told Human Rights Watch how the Iranian prisoners were given preferential treatment and as an illegal immigrant he had to eat the guard’s scraps and bribe them just to take a shower. Farwat had no money and so was able to wash only once during three months, in exchange for a gold chain he had around his neck.'
For the final two months of his detention, the Iranian police moved Farwat to a desert camp with an electric fence. There were many other Hazara boys under eighteen there. Every day they received only one meal, and they were so afraid of the desert snakes and spiders they believed to be lethal that it was hard to sleep. Farwat said that the camp guards frequently beat them for no reason, sometimes with electric cords. “Also they made us stand and sit, stand and sit, again and again very fast in the yard in the sun. I myself was beaten almost every day of the two months I was there.” Farwat told Human Rights Watch that the only way to get out of this camp was to pay a bribe, but Farwat’s brother-in-law did not come to pay for his release. At the end of five months in detention, the Iranian authorities deported Farwat back to Afghanistan …

Following his return, he made his way home to his parents’ village near Mazar-i Sharif and pleaded to stay, but his father sent him away again to avoid forced conscription by the Taliban. Farwat spent a further three years in Iran, again living illegally, in constant fear of arrest. When he turned twenty, he chose to return to Afghanistan, unable to bear the hardship of illegality in Iran any longer. However his father remained fearful for his safety and in mid-2001 sent him abroad once more, this time with a smuggler, via Pakistan, towards Australia.

In the Minister’s neatly ordered world, refugees in a country of first asylum simply front up at the UNHCR, to have their cases assessed, after which they enjoy the ‘protection’ of the international community and the 1951 Convention. But what happens if you cannot get your case heard? At the end of 2001, Cairo was home to somewhere between 200,000 and half a million displaced people from 27 different countries. The local UNHCR office had a backlog of 14,000 applicants awaiting primary interviews. With the capacity to process just 56 new cases per week, that amounts to a waiting list five years long. In addition, there was a backlog of 4000 appeal cases.31

The Agenda for Protection

Despite its appalling lack of resources and huge problems in processing case loads in countries of first asylum, the UNHCR has given some backing to the idea of controls on secondary movement. After a protracted process
of ‘global consultations’ to mark the 50th anniversary of the Refugee Convention in 2001, the UNHCR produced a 26 page document known as the ‘Agenda for Protection’ which attempts to set the framework for refugee protection in the years ahead.\(^{32}\) The influence of developed nations, who are also the key donors to the UNHCR, is evident. The ‘Agenda for Protection’ includes references to exploring ‘the feasibility of establishing a central biometric identification system’ for refugees, strategies for the ‘reduction of irregular or secondary movements’ from countries of first asylum and the development of ‘readmission agreements’ to promote ‘the speedy return of asylum seekers found not to be in need of international protection’. No doubt as a result of Mr Ruddock’s enthusiastic support for the concept, the UNHCR is considering helping countries such as Australia to repatriate asylum-seekers whose applications have been refused. It is also looking at using the Asia-Pacific region to pilot restrictions on secondary movements which could then be implemented around the world.\(^{33}\)

The ‘Agenda for Protection’ also sets out other measures that the developed world should implement in tandem with controls on secondary movements – measures such as increased opportunities for refugee resettlement, greater financial and technical assistance to countries of first asylum, ‘appropriate alternatives to the detention of asylum seekers and refugees’ and an in principle commitment not to detain children.

**The ‘Success’ of the Pacific Solution**

Whatever we think of the federal government’s refugee policies post-Tampa, we have to admit that they have worked and they have won widespread public support. Despite its shortcomings, despite the huge financial cost, despite the diplomatic damage, despite the uncertainty and distress experienced by the asylum seekers themselves, the so-called ‘Pacific solution’ has nevertheless succeeded in its own narrow terms. There are many unanswered questions: what will happen to the refugees in Nauru or Papua New Guinea who cannot find a resettlement place? What will happen to the non-refugees, who nevertheless cannot be sent back to their homeland? — will they, like many ‘failed’ asylum seekers in Australia, simply languish indefinitely behind razor wire because they cannot be sent anywhere else? (For example among the non-refugees detained in the Pacific are 105 Iraqis.\(^{34}\)) Nevertheless, the narrow aim of the policy — preventing the arrival of asylum seekers on Australia’s shores — appears to have been met. Since
the *Tampa*, no asylum seeker arriving by boat has managed to access Australia’s refugee-determination system; since December 2001 no boats have been detected seeking to enter Australian waters. Four alleged smuggling syndicate bosses have been detained and intelligence reports suggest the number of people arriving in Indonesia en route to Australia has dropped dramatically. The SIEV X tragedy has no doubt discouraged some asylum seekers in Indonesia from risking the onward journey to Australia. The changes in Afghanistan have also helped. With the demise of the Taliban, Afghan refugees in Pakistan and Iran have begun returning home in huge numbers and fresh outflows of refugees from Afghanistan itself have been halted, at least for now. There are still plenty of refugees from Iraq or Iran, Kurds and Palestinians and others, who are seeking a durable solution to their plight, but for the time being they have been effectively deflected or diverted from Australia. Smugglers will probably offer them passage to Canada, or the United States, or a European destination, instead.

**Prospects for Change**

So where does that leave critics of the government and the small but influential minority who are appalled at what the government has done? Is there hope that a future Labor party government may undo some of the damage?

Labor’s long awaited policy on refugees and asylum seekers reflects the tensions within the rank and file of the party over this contentious issue. In an effort not to frighten voters in marginal seats, the policy is couched very much in the same language of ‘border protection’ that has proved so politically effective for the Coalition. In this sense, Carmen Lawrence is right when she says that Labor is ‘playing on John Howard’s turf’ and allowing him ‘to define the territory and the argument’. The new policy fails to undo the far-reaching post-Tampa legislation that was rushed through parliament with Labor support in the dying days of the last parliament. Overall Labor offers no fundamental challenge to the existing arrangements for dealing with onshore asylum seekers. Nevertheless, shadow minister Julia Gillard has been listening to a wide range of advice from critics within and outside the party and the detail of the policy reveals that she has come up with some creative and innovative proposals.
Deter and Deny

If elected, Labor would continue the boat ‘deter and deny’ policy of the current government. As Robert Manne has argued, the post-Tampa legislative changes essentially shifted from a policy of deterrence based on the cruel treatment of on-shore asylum seekers (mandatory detention and temporary protection visas) to a policy of ‘naval deterrence at the border’37. If elected, Labor would continue this policy, although a new coastguard would take over the role of the navy in intercepting boats and turning them around and Labor would end the detention of asylum seekers in Pacific Island countries. Christmas Island would be used as the main detention and processing centre instead and would remain excised from Australia’s migration zone so that asylum seekers held there have no right to apply for refugee status under Australian law or to appeal negative decisions to the Refugee Review Tribunal. In short, the ‘Pacific solution’ becomes an ‘Indian Ocean solution’ and Labor perpetuates the Coalition’s contrived and dubious approach to international law by fiddling with the demarcation of Australia’s borders. One significant difference is that Labor promises that those found to be refugees would be settled in Australia immediately, rather than detained indefinitely while the federal government searches fruitlessly for another country that is willing to take them off its hands.

Detention

While Labor remains wedded to the principle of mandatory detention, it has suggested a range of measures that would make the system more humane and transparent. Labor has promised to return management of detention to the public sector, to ensure that health services in detention are provided by ‘independent medical professionals who will be free to speak out on issues’ and to grant media access to detention centres ‘subject to agreed protocols’. Labor will also appoint an Inspector-General of Detention, ‘an independent statutory office holder, who will hear and resolve complaints from detainees about detention conditions’.

Labor has promised to remove children from ‘behind the razor wire’. Unaccompanied minors would no longer be wards of the Immigration Minister but put under the care of Labor’s proposed Children’s Commissioner. Labor would allow asylum seekers to move into new low-security hostel-style detention centres once they have passed health and background checks.
Asylum seekers would be free to leave these ‘supervised hostels’ to work during the day but must return at night. The new centres would be located ‘in regional Australia in communities that volunteered to host one’. This raises the potential for this proposal to be stymied by the NIMBY (not in my back yard) syndrome although Labor would seek to identify sites where there would be support for an influx of workers (‘areas with labour shortages, particularly shortages of agricultural labour and the like’).

Labor has promised to speed up processing so that 90% of claims will be determined within 90 days. If a person is detained for more than 90 days, including on Christmas Island, their case will be reviewed by an Asylum Seeker Claims Processing Review Committee. The case will be reviewed again after each subsequent month of continued detention. This appears similar to a detention review system used in Canada (although in Canada the reviews kick in much earlier) and could focus attention on cases of indefinite detention. However the Minister is not compelled to accept the Review Committee’s recommendations. This raises the question of whether the Review Committee will have any more impact than the Human Rights and Equal Opportunity Commission, the Ombudsman or the Senate, which successive governments have largely chosen to ignore.

Labor promises to ‘fund appropriate non-government agencies to provide case workers to work with asylum seekers to explain the process being undertaken and to manage expectations’. This proposal is based on a Swedish system that helps asylum seekers to understand their rights and responsibilities within the system and prepares them for the potential of failure and return to their homeland. Under the case-worker Sweden has achieved a high-rate of voluntary return of non-refugees — that is ‘failed’ asylum seekers — in dignified and humane conditions.

Labor’s proposed changes to the detention system are welcome, but it is a bit like shutting the stable door after the horse has bolted. Labor may reform detention arrangements but if there are no boats arriving, then the only asylum seekers subject to mandatory detention on the mainland will be the few score who manage to reach Australia unlawfully by air. Labor does not address the more pressing issues arising under consequences of the current system. What will it do with the growing number ‘non-refugees’ now detained in Australia, Papua New Guinea and Nauru, many of whom cannot be deported?
Refugee Processing

‘Labor will abolish the Refugee Review Tribunal and give Australians a say in the determination of refugee claims by having a three person Refugee Status Determination Tribunal with one legally qualified member and two members drawn from the community.’ This proposal raises many questions. A three member panel to replace the current single member Refugee Review Tribunal sounds like a good basis for better decision making. However Labor’s talk of appointing ‘community members’ to the new Refugee Status Determination Tribunal (RSDT) to give ‘ordinary Australians a say in Australia’s refugee program’ rings alarm bells. This sounds like a recipe for a “peoples’ court”. Why not give ‘ordinary Australians’ a say in criminal sentencing as well? The ‘legally qualified member’ of the RSDT would be given a permanent appointment, which should help ensure independence, but Labor says nothing about the selection process or length of appointment of the ‘community’ members, or what skills they would be expected to possess.

The RSDT is not an appeal body like the current Refugee Review Tribunal, but makes decisions in the first instance. It could grant a protection visa without a hearing on the recommendation of the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA). However if a hearing is held, then DIMIA officials appear along with the applicant. This suggests that the introduction of an adversarial system more akin to an Australian court, rather than the European-style inquisitorial model, on which the current system is supposedly based. The idea behind the inquisitorial model (though often not realised in practice) is to elicit as much information as possible from the applicant in a non-threatening manner.

Labor opens up the prospect of ‘one appeal’ from a Tribunal decision on points of law, which could be made to the Federal Magistrates Service. This is a limited re-introduction of some judicial oversight of the refugee determination process, which is the only way to ensure high-quality decisions that are just and lawful. However, this is highly conditional: firstly the appeal is ‘by leave’ – in other words the Magistrate must agree to hear the case. Secondly, ‘the appeal will only be granted if, in the opinion of the Court, the asylum seeker has done everything reasonably in his/her power to prepare for removal if the appeal is unsuccessful’. This seems unreasonable and impractical. It is based on assumption that appeals are frivolous or vexatious,
rather than a fundamental right under a system of law. It is also not clear how broad the grounds of appeal would be: unless the privative clause put in place by the current government (with Labor support) is revoked, or ruled out by the High Court, then any appeal right is meaningless.

Labor promises to reform the system under which the Minister can intervene to grant a visa on compassionate grounds (under s417 of the Migration Act). This is the only safety net in Australia’s refugee determination system to prevent the removal from Australia of people who are not refugees under the narrow definition of the 1951 Convention, but who are nevertheless at risk in their homeland or have other compelling reasons to stay in Australia. Labor promises to ‘make the process transparent and ensure independent expert advice is obtained’. This is an improvement but does not go far enough. What is needed is an alternative ‘humanitarian’ visa category that could be offered by Immigration department officials or Tribunal members as an alternative to a protection visa based on the narrow Convention definition of a refugee

**Temporary Protection Visas (TPVs)**

Labor will keep TPVs but reform them. Labor will allow TPV holders to access settlement services including English language training and the Job Network. After the expiration of the ‘short term’ TPV, Labor would grant permanent residence to refugees who still faced persecution in their homeland. This is an improvement on the current system, which can condemn refugees to live indefinitely in Australia on a series of rolling ‘temporary’ visas, with no right to family reunion. However Labor’s failure to define ‘short term’ is a significant omission. The TPV system should have been scrapped altogether.

**Global Approaches**

Labor says it will ‘consider increasing Australia’s humanitarian program’ but makes no firm commitment to lifting the annual refugee intake. In fact it makes clear that any increase will be achieved ‘within current immigration intake numbers’. In other words, if Australia is to take more refugees, then it will take fewer skilled migrants or fewer family re-union migrants. An increased humanitarian intake is also made contingent on ‘the extent that communities in regional Australia volunteer to have refugees resettled in
their community’ (although it does to provide extra resources to ‘assist them to resettle refugees’). Bob Carr’s influence is apparent in the pledge that ‘any increased intake of refugees will be part of Labor’s population dispersal policy designed to boost regional areas while taking the pressure off overcrowded places like the Sydney basin’.

**Conclusion**

The changes that Labor is offering show that the voices of disquiet within and outside the party about Australia’s treatment of asylum seekers and refugees are having some effect. The huge level of community activism on this issue has produced significant results – notably the belated commitment by Immigration Minister Philip Ruddock to make sure that unaccompanied minors are removed from detention and placed in foster care. The Minister’s promise to extend the alternative detention arrangements for women and children first trialled at Woomera is another concession, even though those arrangements more closely resemble ‘house arrest’ than any form of ‘community release’. The detention of families and children has always been the weak-point in the government’s ‘democratic’ armour of majority support for the mandatory detention.

The danger for Labor is that its approach will satisfy no one. It will not win back disenchanted voters from the Greens and supporters of a tough approach will stick with the Coalition. Labor can countenance Green defections in safe seats. The party believes it cannot risk the loss of blue-collar votes to the Coalition in marginal electorates, which is what it fears would have happened if it offered a more fundamental policy change. Labor is probably right in that calculation – at least in terms of the next election – but the perception that the party has lost its idealism and its commitment to principle may do it more damage in the long term. There are many good initiatives in Labor’s policy, but Labor could have, and should have, gone further. In any case, Labor remains in opposition.

In the short term then, I see little chance that Australia’s elaborate post-Tampa refugee regime will be undone, and I find myself, somewhat despairingly, in agreement with Robert Manne, who wrote in June:

> Given the present balance of opinion in Australia, hopes for a relatively speedy defeat of current border control policy seem to me utopian in the extreme. 38
Robert Manne appealed for a kind of minimum program of reform arguing that with the success of ‘naval deterrence at the border’ the ‘previous policy of deterrence has lost its purpose’. He called for the government to show some compassion to the victims of that deterrence policy. Firstly he called on the government to ‘release from detention all asylum seekers who have passed health and security checks, whose claims are still in process or whose claims have failed but who cannot be repatriated to their tyrannical homelands.’ As he noted the numbers involved are small. Secondly, he called for the government to grant permanent residence to 7000 or so refugees given temporary protection visas. The logic of Robert Manne’s argument is compelling – with the Pacific solution and naval interception in place, the other brutal elements of Australia’s system of deterrence are no longer necessary. But I am not holding my breath while I wait for Philip Ruddock to see the light.

Endnotes

1 If his is an amended version of a paper presented at three conferences: ‘Refugees and the Lucky Country’ Trades Hall, Melbourne 29 November 2002; ‘The Refugee Rights Symposium’ Deakin University, Burwood, 5 December 2002 and ‘Fear of Strangers’, Art Gallery of South Australia, Adelaide, 7 December 2002. I am grateful for the comments that I received from other conference participants. Material from this paper has been published in different versions in two separate articles: ‘Plugging the holes in fortress Australia’ Australian Financial Review (Review Section p.4 22.12.02) and ‘Protecting Australia the Labor Way’ Australian Financial Review (Review Section p.6 3.1.03)

2 Peter Mares is a journalist with ABC Radio National and Radio Australia and a visiting fellow at the Institute for Social Research at Swinburne University. He is the author of Borderline: Australia’s response to refugees and asylum seekers in the wake of the Tampa (UNSW Press 2002)

3 John Howard, interview with Neil Mitchell, 3AW, 17.8.2001. Available online at: http://www.pm.gov.au/news/interviews/2001/interview1177.htm I am indebted to Robert Manne for pointing me in the direction of this transcript and for other critical comments on the original draft of this article


5 Senate Select Committee into a Certain Maritime Incident 26 March 2002 (SENATE—Select CMI 195) Commander Banks witnessed these discussions
when he was working as a staff officer, Maritime Operations, at Australian Defence Force Strategic Command in Canberra

Paul Kelly ‘No way out for a pale imitation’ *Weekend Australian* 1-2/9/01

See Alan Travis ‘Straw wants to re-write Geneva refugee convention’ *Guardian Weekly*, 15-21.6.00


Ibid pp 38 & 99

Department of Immigration and Multicultural and Indigenous Affairs *Annual Report 2001-02* p55

Ibid. p.55


See Louise Williams ‘Bias claims on Australian embassy’ *The Age*, 14.7.98 and Gervase Greene, ‘Embassy off-limits for East Timorese’ *The Age*, 15.7.98

Public comments at the conference ‘Refugees and the Lucky Country’ Trades Hall, Melbourne 29.11.02

Ibid


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Greg Sheridan ‘New Trade with US: Refugees’ *Weekend Australian* 18.5.02

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AAP ‘Australia to take refugees from Haiti and Cuba’ *Canberra Times* 23.4.02

Ibid


Reuters (London) ‘UN Finds Novel Way to Keep an Eye on Afghans’ 8.11.02

‘UNHCR uses iris recognition machines to screen Afghan refugees’ *Asia Pacific*, *ABC Radio National, Radio Australia* 21.11.02 (transcript at www.abc.net.au/ra/asiapac)

Philip Ruddock. Address to UNHCR Executive Committee Meeting, Geneva, 30 September 2002

See Adrienne Millbank ‘Australia and the Refugee Convention’ *People and Place* vol 9, no. 2, 2001

Peter Mares, *Borderline: Australia’s response to refugees and asylum seekers in the wake of the Tampa* (UNSW Press 2002) p 118

Department of Immigration and Multicultural and Indigenous Affairs ‘Refugee and Humanitarian Issues: Australia’s Response’ October 2002
Mares: What Next for Australia's Refugee Policy?

32 ‘Agenda for Protection’ UN General Assembly Document A/AC.96/965/Add.1 26 June 2002
33 Megan Saunders ‘UN may help to return refugees’ Australian 30.9.02 and ‘UN to “fix” refugee system’ Mercury 6.9.02
34 Philip Ruddock, Ministerial Statement, 3.12.02 Hansard p 9400
35 ‘Protecting Australia and Protecting the Australian Way’ December 2002
36 Carmen Lawrence ‘Why I resigned’ Australian 6.12.02
37 Robert Manne, ‘For pity’s sake, set them free’ 10.6.02 Age
38 Robert Manne, ‘For pity’s sake, set them free’ 10.6.02 Age.