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## POLICY PERSPECTIVES

The Art of Crisis Management:

The Howard Government Experience, 1996–2007

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**PAPER NO. 3** *Refugee crisis or playing the populist card?*

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The Howard Library was established by UNSW Canberra in 2018. It works to improve public leadership and policy in Australia by:

- preserving and making accessible the papers of and the papers of Howard Government ministers;

- advancing research in, and informing debate about, public leadership and policy;

- curating exhibitions that introduce Australians to leadership and policy challenges in a balanced and non-partisan way through the experiences of the Howard Government (1996–2007); and

- contributing to the civic education of all Australians.

The Howard Library curates a permanent Exhibition at Old Parliament House in Canberra, and has a Reading Room at the Australian Defence Force Academy (ADFA) Library.

## POLICY PERSPECTIVES

*Policy Perspectives* is a series of occasional papers published by the Howard Library which aims to reflect critically on policy decisions of the Howard Government in order to provide context and perspective for contemporary policy debates, and facilitate discussion among the policy community and the broader Australian public.

## DISCLAIMER

## EXECUTIVE EDITOR

The Howard Government faced several crises in its eleven years in office, from the beginning of the 'war on terror', through the (almost simultaneous) collapse of Australia's second airline, Ansett, to the scandal of the Australian Wheat Board's dealings with Iraq's leader, Saddam Hussein and the waterfront struggles of Australia's stevedoring companies against union control.

How did the Howard Government respond to the crises it encountered; how did it 'frame' these crises for public understanding and support; what role did the media play in explaining particular crises and critiquing Government's responses; how were the Government's responses evaluated – by it and its critics – after each crisis had passed; was there a pattern from which we can learn to better inform contemporary government responses to crises such as the COVID-19 pandemic, and those that lie in wait?

These questions were the focus of the presentations and discussion at the John Howard Prime Ministerial Library's 2022 annual conference.

Speakers included former Howard Government ministers, academics, media commentators and crisis management experts.

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She has held academic roles at the University of Melbourne, the Australian National University, Michigan Law School and Griffith University, where she also served a four-year term as Dean and Head of Griffith Law School. She served for two years as legal and policy advisor to the Australian Capital Territory's Human Rights Commission, leading the work on an audit of the territory's remand centres, among other matters. In 2008, the ACT government awarded her an International Women's Day Award for outstanding contributions to human rights and social justice. She has also worked on shorter contracts with the Jesuit Refugee Service, and as a consultant to the Australian Human Rights Commission and for the Office of the United Nations High Commissioner for Refugees.

# REFUGEE CRISIS OR PLAYING THE POPULIST CARD?

## Penelope Mathew

Life is mostly froth and bubble,
Two things stand like stone,
Kindness in another's trouble,
Courage in your own,

*Ye Wearie Wayfarer*, Adam Lindsay Gordon, Scottish-Australian poet (1833–1870)

WHEN INVITED TO SPEAK at the Howard Library conference on the topic of 'Refugee Crisis or Playing the Populist Card?', I accepted with alacrity. The invitation offered an intriguing opportunity in the presence of the former Prime Minister, to speak about the legacy of the Howard government's handling of the *Tampa*. My paper invites readers to consider whether the handling of the *Tampa* was a crisis of our own making and whether a more considered approach that utilises the normal processes of migration management is yet a possibility.

## Whose crisis?

As I write, we are in the middle of several ongoing refugee crises. Some are recent, like the Ukrainian war refugee exodus, and some are protracted, as is the case for Palestinian and Afghan refugee populations. Some refugees meet the international definition of a refugee set out in the 1951 Convention relating to the Status of Refugees,[1] while others, such as war or conflict refugees, may or may not meet the Refugee Convention definition.[2]

When we watch the scenes unfolding in Ukraine – as we can in the modern era – we feel the pain of those leaving their homeland, pushed out by an unprovoked armed attack. They are in crisis. But if they arrive here without a visa and ask for our protection, does that mean we have a crisis on our hands also?[3]

The etymology of the word 'crisis' is Greek. Intriguingly, the term 'Krisis' means decision.[4] Back in August 2001 as the Norwegian freighter, MV *Tampa*, headed for Australia with 433 asylum seekers rescued from a vessel in distress, the Australian government decided not to allow them to set foot on Australian soil. Rather, they were transferred via Australian naval ship (HMAS *Manoora*) to Nauru. Shortly afterwards, the so-called 'Pacific Solution' was developed to ensure that any person seeking asylum, travelling by boat and without a visa could be intercepted and sent to Nauru or Manus Island in Papua New Guinea. There, they were held in indefinite detention. During the Australian election that followed, then Prime Minister Howard famously declared, 'we decide who comes to this country and the circumstances in which they come'.[5]

But do we decide the circumstances in which people come; are we ignoring the circumstances in which they leave, along with the rules we have agreed on to govern this situation? It is evident that 'we' in Australia (or any other country of refuge) do not decide when Vladimir Putin invades or when other actors violate human rights or persecute people based on characteristics like race or religion that they cannot or should not have to change. Along with most of the international community, Australia has agreed to cooperate with other countries by following a set of rules in the 1951 Convention and other human rights treaties to ensure that refugees are given protection. While it is perfectly correct to say that in general, immigration is a process controlled by each sovereign State, these rules require that we do not just assume someone is not a refugee,[6] we do not penalise asylum seekers simply for arriving without a visa,[7] we recognise that refugees are human beings,[8] and we provide protection where necessary because refugees have lost the protection of their home country.[9] What, then, do Mr Howard's words 'we decide' signify?

## 'We decide' as a populist call to arms

Viewed in context, the phrase, 'we decide' is a populist call to the people of the country – the 'we' or 'us' – to say that we are still in control and if we decide to, we will ignore criticisms from outsiders and depart from our

own long-standing practice. To begin with, the phrase 'we decide' conveniently disregards Australia's prior and voluntary acceptance of rules to govern the arrival and treatment of asylum seekers. A second relevant factor is the populist political discourse stoked by Pauline Hanson's One Nation Party at the relevant time.[10] Finally, Mr Howard's own conception of Australians' views strongly suggests a populist connotation to the phrase 'we decide'.

In light of Mr Howard's previous speeches, such as the 'Headland' speech of 1995,[11] it is apparent that 'we' are 'mainstream Australia.'[12] Mainstream Australia, according to the 'Headland' speech, was frustrated by 'government decisions increasingly driven by the noisy, self-interested clamour of powerful vested interests with scant regard for the national interest.'[13] This is a populist argument – that government is dominated, corrupted even, by powerful interests that stand against the values of 'the people'.[14]

Who, then, is included in that phrase 'we decide'? Obviously not asylum seekers and refugees. They are outsiders and 'we' will decide whether they are fit to become one of us. 'We' may not be the same as 'we the peoples' of the United Nations, under whose auspices the 1951 Convention was adopted, unless the Australian interpretation of the Convention is accepted.[15] Asylum seeker advocates are also not included – they are just part of the noise getting in the way of governing in the national interest and who ignore the purportedly unwelcome nature of asylum seekers arriving without prior authorisation.

As the *Tampa* episode unfolded, asylum seekers arriving by boat were portrayed as undesirable outsiders who were not fit to join our community, and indeed, a threat to the community: a crisis to be averted. Boat arrivals were wrongly associated with terrorism, which became a heightened concern for government following the terrorist attacks on New York and Washington on September 11, 2001. For example, when asked by radio presenter, Derryn Hinch (later a senator for Victoria), whether the boat arrivals might include 'Bin Laden appointees', Defence Minister Peter Reith replied, that 'you've got to be able to manage people coming into your country', and then went on to say 'otherwise it can be a pipeline for terrorists to come in and use your country as a staging post for terrorist activities.'[16] The idea that a person intent on committing a terrorist act in Australia would attempt to arrive on a people smuggler's boat was unlikely, to say the least. Readers will also recall the 'Children Overboard Affair', in which asylum seekers were portrayed as people who throw their children overboard, even though this had

not occurred in that instance.[17]

Irregular migration was also associated with national security more broadly. For example, in his campaign speech, Prime Minister Howard said that 'national security is … about a proper response to terrorism', 'a far sighted, strong, well thought out defence policy' and 'an uncompromising view about the fundamental right of this country to protect its borders.'[18] The securitisation of borders is a trend that has swept the Western world since the end of the Cold War.[19] It has transformed immigration from something viewed as economically valuable or humanitarian or compassionate in nature and dealt with as a routine administrative matter, into a potential threat to the nation. This could be a physical threat (as with the unjustified link to terrorism) or a threat to the values and cohesion of the nation. This threat is dealt with by extraordinary measures. In the case of the *Tampa*, the Special Air Service was called in, and a militarised programme of maritime interception is now accepted as the norm in Australia. The response to the *Tampa* and its aftermath is an example of the populist's 'performance of crisis'.[20]

## The Australian (re)interpretation of the rules

Alongside the populist narrative of threat and crisis, a legal justification of Australia's actions against boat arrivals during the Howard government was vigorously prosecuted by the Minister for Immigration, Philip Ruddock. According to the Australian interpretation of the Refugee Convention, in particular Articles 31 and 33, very few unauthorised boat arrivals needed protection in Australia as they had supposedly foregone some form of protection elsewhere and could, indeed should be treated less favourably than those arriving with a visa.

Article 31 of the Refugee Convention is almost as important as the prohibition on returning refugees to a place of danger, known by the French term as the obligation of *non-refoulement* and set out in Article 33. Article 31 prohibits the imposition of penalties on refugees who are in, or who enter a country in contravention of domestic immigration law. Those responsible for writing the Convention acknowledged that refugees would often have little choice but to breach immigration laws given their flight and the difficulty of securing valid documentation.[21]

Article 31 does contain some limiting language. To avoid penalties, an asylum seeker must, among other things, have 'come directly' and 'show good cause'. However, an amendment to the draft Convention which would have

limited the protection of Article 31 to a refugee 'unable to find asylum even temporarily in a country other than one in which his life or freedom would be threatened' was ultimately discarded.[22] The Department of Immigration and Multicultural and Indigenous Affairs acknowledged this in a paper prepared for the Global Consultations held during the 50th anniversary of the Refugee Convention in 2001.[23] Nevertheless, the Department stated that:

> In view of Australia's position as an island far from most current refugee source countries, few asylum seekers – especially those arriving unauthorized since 1999 – arrive in direct flight from their country of origin. Most have engaged in secondary movement, often aided by well-organised people smuggling networks operating for financial gain.[24]

In any event, according to the Department, none of the measures Australia had adopted over the years, such as mandatory detention, temporary protection, offshore 'processing' or interception, amounted to a penalty.[25]

The Department also noted, rather optimistically, that the obligation of *non-refoulement* in Article 33 does not require entry, as opposed to non-return, and that 'through negotiating entry with other countries, it may be met anywhere in the world by those States who honour the non-refoulement obligation.'[26] While the latter statement is true, securing return of refugees to countries they had transited *en route* to Australia was never going to work. Not only were these countries under no obligation to readmit non-nationals, but they were often not party to the Convention and/or did not have national equivalents of protection. Indeed, the insecurity for refugees and asylum seekers in such countries, was documented at the time[27] and provided an obvious reason for their departure. This of course is why Australia had to offer additional aid to Nauru, which was not a party to the Refugee Convention back in 2001,[28] to secure its participation in the Pacific Solution. Similarly, Australia's extant aid programme explained why Papua New Guinea was prepared to be involved.[29]

While the Australian government may have hoped those asylum seekers sent offshore and determined to be refugees would be resettled in another country, the majority of those found to be refugees, 705, were resettled in Australia, with New Zealand taking 401, and very few other countries taking any.[30] Thus, the majority of those determined to be refugees came to Australia and in 2008 the Rudd government brought the first iteration of the Pacific Solution to an end.[31] That end was short-lived.

With the arrival of around 20,000 boats in 2012 and relentless sloganeering around 'stopping the boats' by the Tony Abbott-led opposition, the offshore detention arrangements were reinstated in August 2012 by the Gillard Labor government, and later, Prime Minister Rudd introduced so-called regional resettlement arrangements with Papua New Guinea and Nauru.

Resettlement in these countries was never an option; nor was it an option in the third country added to the mix under the Abbott government, Cambodia.[32] Resettlement to other countries was slow in coming. The United States deal to accept some of the refugees held on Nauru and Papua New Guinea came late (towards the end of 2006) and has seen 1006 people resettled as of 31 May 2022.[33] New Zealand's offer to take 150 refugees per annum for three years was accepted in 2022, a decade after the offer was first made.[34] As of 31 December 2021, there were 105 people still in in Papua New Guinea, and as of 31 May 2022, 112 on Nauru,[35] all of whom were apparently living in the community.[36] Australia's arrangement with Papua New Guinea came to an end in December 2021.[37]

## Consequences and context

The Howard government's response to the *Tampa* did not emerge out of nowhere. The legal parsing of penalties and *non-refoulement* which emerged during the Howard era has a neat fit with an older political narrative, to which I will return, about 'queue jumping'. From the late 1980s onwards, there has been a steady accumulation of deterrence measures including maritime interception and return; variants of detention – mandatory, offshore, indefinite; and temporary, rather than permanent, protection visas for refugees. However, the response to *Tampa* marked a turning point from which it has proved nigh impossible to retrieve a more humane policy, and the consequences for refugees and asylum seekers arriving by boat have been extraordinarily harsh.

The situation for those refugees held in detention on Nauru and Papua New Guinea, a deprivation of liberty for which Australia retained responsibility,[38] has been described in numerous reports and inquiries, as well as media stories and some excellent books.[39] One of these is Behrouz Boochani's autobiography *No Friend But the Mountains*.[40] Mr Boochani is now resident in Aotearoa New Zealand. His book is a harrowing read, revealing in vivid detail the degradation and decline of those subjected to this harsh regime.

For refugees transferred from offshore to Australia for medical assessment or treatment under the short-lived medevac laws, the 'solution' was indefinite detention in hotels, with releases occurring abruptly and often with little fanfare.[41] The appalling experience of indefinite detention must surely resonate with Australians now, given our own experiences of rather shorter periods of effective home detention and/or hotel quarantine for public health reasons during the COVID-19 pandemic. Unlike the generally lawfully imposed restrictions on liberty and freedom of movement in Australia during the pandemic, in many cases, there appears to be no good reason for the continued detention of refugees and asylum seekers. Their detention is arbitrary, and thus a violation of Article 9 of the International Covenant on Civil and Political Rights.

Many other asylum seekers and refugees have lived in constant uncertainty on bridging visas or temporary protection visas, and indeed, rolling temporary protection visas that do not allow people to sponsor their families to live with them or, more generally, to move on with their lives.[42] Our own, usually less profound experiences of separation from family and inability to plan our lives during the pandemic must have given Australians some insight into the resulting torment for refugees.

Australia's policy on unauthorised arrivals has been in limbo, too. Refusing to accept that these refugees may have nowhere else to go and need to get on with their lives, Australia has suffered a crisis of nondecision[43] for the last twenty years. Our 'crises' over the *Tampa* and the 20,000 odd boat arrivals in 2012 may usefully be contrasted with the European Union's decisive response to millions of Ukrainian war refugees in 2022.[44]

As indicated earlier, *Tampa* was a low point in a steep decline in Australia's treatment of asylum seekers arriving without a visa. This can be dated back to the late 1980s and the mandatory detention of a group of Cambodian asylum seekers. Various narratives have been constructed as justifications for these policies, which have assisted in entrenching the perception that the measures are necessary or acceptable. One such narrative has been the idea of a queue constructed between Australia and the regions of conflict and persecution from which refugees have fled.

The origins of the term 'queue' in the asylum context are debated[45] but the response to the IndoChinese refugee crisis, including components of orderly departure from Vietnam and resettlement from countries of first asylum may have assisted the entrenchment of this idea.[46] Unlike the response to Vietnamese refugees in the 70s and 80s, however, there are usually very few resettlement places available in most refugee crises, and orderly departure programmes or evacuations are rarely initiated.[47] Generally, less than one per cent of the world's refugees are able to access a resettlement place;[48] the pandemic meant that far fewer refugees were resettled in 2020–2021.[49] The queue is factually non-existent; legally, there is no requirement to join this factually non-existent queue. Queuing for nothing is pointless and a queue to nowhere for refugees is dangerous given the risk of *refoulement* or return to their country of origin.

More recently, particularly during the Gillard era, a purportedly humanitarian rationale of 'breaking the people smugglers' business model' and 'preventing deaths at sea' emerged.[50] The problem is that through interception and detention, we have supplemented life-threatening journeys to safety with a black hole of despair and sometimes death, as documented in Boochani's book and numerous other records. We have created the possibility of 'constructive' or 'disguised' *refoulement* where people are forced to return to dangerous countries of origin, pressured into leaving by the appalling circumstances in which they find themselves.[51] The interception programme has been extremely risky, and the focus on interception, rather than pro-active search and rescue made it more likely that sinkings such as SIEV X could occur.[52] Temporary protection visas have encouraged family members to get on boats, thus adding to dangerous journeys.[53] And the Australian approach – whether supported by a populist or paternalist narrative – has migrated. One only has to look at Italy while Berlusconi or Salvini were in charge[54] and the UK's Rwanda proposal[55] to see this.

The contagious effect of Australian policy means that those countries with the means to do so push the responsibility for refugees back onto less able countries which struggle to meet the needs of refugees and their own citizens. It is untenable to argue that the asylum seekers on board the *Tampa* or the 20,000 boat arrivals in 2012 could not have been accommodated in Australia or that this posed a risk to Australian citizens. Why should this responsibility be passed to other countries?

There have also been detrimental impacts on Australian democracy and the rule of law. Playing on people's fears – whether of cultural difference or competition for jobs – provides an excuse for government not to take real action on the sorts of issues that make us fearful, be it unemployment and wage stagnation or climate change.

And rational discussion about boat arrivals has become almost impossible.

Let us think about the discussion around the inquiry into the publicisation of a boat arrival on election day in 2022.[56] An inquiry was clearly merited. But the fact that secrecy about 'on water' or 'operational' matters was ever thought appropriate, and has been maintained for so long, should be extremely concerning in a liberal democracy.[57] The public deserves to know whether Australia complied with its international obligations and ensured the people on board were safe. Apparently they were flown back, rather than being subject to a tow back.[58] We were told there was a thorough screening of the passengers.[59] Where did this take place – on board, or on Christmas Island? With legal assistance and interpreters? Finally, what are the appeal avenues and is there a role for the courts here?

The framing of even one or two boat arrivals as a national emergency has meant that the courts are seen as a problem for swift executive action, rather than an important safeguard for the rights of the people seeking safety. In contrast, tennis player Novak Djokovic, who made world headlines when he attempted to enter Australia for the Australian Open claiming an exemption from the vaccination mandate, had the benefit of two court hearings prior to his eventual deportation.[60] Sadly, it appears that the special interest group of elite tennis players gets a better hearing than people seeking our protection.

## Conclusion

At the beginning of my paper, I quote some much-loved lines from a poet formerly described as the national poet.[61] In fact, Gordon's brave words masked a world of pain. His family's wealth was built, in part, on slavery[62] and he violently took his own life. Yet, he once had enormous appeal as a 'rebellious, devil-may-care under-dog, shy, caring, loyal, fearless, with a well-hidden sensitive side [who] fits the kind of legend that later became the Anzac legend; part of the concept of being Australian that Australians like to accept as part of themselves'.[63]

Gordon's words and the title of his poem seem particularly apt given the subject-matter of my paper. But like Gordon himself, Australians' reactions to asylum seekers are complex. We are reacting with fear in times of trouble, blaming others for it and theirs. This seems only marginally better as a response than that proposed by Dame Edna Everage, who once advised us to 'laugh at other people's troubles, it helps to bear your own.'

I understand why it is thought to be political suicide to suggest that the policy of turning back boats should be abandoned. We all saw how the Coalition used boat arrivals to its advantage during the Rudd/Gillard government, and the Opposition will use their arrival in exactly the same way during the current parliamentary term. But I think it is important to question the populist impetus to close borders and think about what mainstream Australian values really are. Let us stop talking about the right and wrong ways to enter Australia and focus on our own processes and obligations – the matters we really do control.

There is a right way to return people who do not need protection: it involves a fair hearing with avenues of appeal so as to guard against mistakes. It is wrong to put people in a rightless black hole of detention offshore as a deterrent to others. We should remember that the grant of asylum avoids complicity in the harms that could occur if we return someone to a place of danger, and that treating them with dignity and allowing them to contribute to our country, as so many refugees have done,[64] is to our advantage. We also need to remember that the signal we send when we do not respect the right to seek asylum in our country, is that other countries should not either. If that took hold, no refugee would ever find safety. Is that a 'fair go'?

### Endnotes

1   Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) as modified by the Protocol relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (hereinafter 'Refugee Convention'). Under Article 1A(2) of the Convention (as modified by the Protocol) a refugee is, in essence, someone who is outside their country of origin and unable to return owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

2   See UNHCR, 'Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions', HCR/GIP/16/12, 2 December 2016; Cornelis (Kees) Wouters, 'Conflict Refugees' in Cathryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee* Law, OUP, Oxford, 2021, pp. 815—831.

3   Presumably no Ukrainians have travelled to Australia on a people smuggler's boat; available monthly updates regarding Operation Sovereign Borders during the relevant period speak only of Sri Lankan asylum seekers. Ukrainians have been authorized to travel

to Australia (on tourist visas, for example), and visa extensions and temporary humanitarian visas have been available for Ukrainians in Australia.

4   Reinhart Kosselleck, 'Crisis', *Journal of the History of Ideas*, vol. 62, no. 2, 2006, pp. 357—400, p.358.

5   John Howard, Election Speech, Sydney, 28 October 2001<https://electionspeeches.moadoph.gov.au/speeches/2001-john-howard>

6   If anything, the opposite is true: Rainer Hofmann and Tillmann Löhr, 'Introduction to Chapter V: Requirements for Refugee Status Determination Procedures' in Andreas Zimmermann (ed.) *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol. A commentary*, OUP, Oxford, 2011, pp. 1082—1128, p.1126. For discussion of international standards for the process of determining who meets the definition of a refugee, see Álvaro Botero and Jens Vedsted-Hansen, 'Asylum Procedure' in Cathryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee* Law, OUP, Oxford, 2021, pp. 588—606, pp.  599—605.

7   Refugee Convention, Article 31.

8   Refugees are entitled to most of the protections of the UN human rights treaties to which Australia is a party.

9   Refugee protection is often described as 'surrogate' protection: James C Hathaway & Michelle Foster, *The Law of Refugee Protection*, 2nd edition, CUP, Cambridge, 2014, p.51. This 'gloss' on the words of the Refugee Convention must be handled with care, however. See Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International* Law, 4th edition, OUP, Oxford, 2021, p.8.

10  For discussion of the Howard government's approach to One Nation, see Robert Manne, 'Reflections on the Tampa "crisis"', *Postcolonial Studies*, vol.5, no.1, 2002, pp. 29—36; Lucy Wark, 'John Howard did not slay the One Nation Dragon', 6 September 2016, *Sydney Morning Herald*, <https://www.smh.com.au/opinion/john-howard-did-not-slay-the-one-nation-dragon-20160906-gr9py9.html>

11  John Howard, The Role of Government, Headland Speech, 1995 <https://australianpolitics.com/1995/06/06/john-howard-headland-speech-role-of-govt.html>

12  Marian Sawer, 'Framing Feminists: Market Populism and its Impact on Public Policy in Australia and Canada' in Yasmeen Abu-Laban (ed.) *Gendering the Nation-State: Canadian and Comparative Perspectives*, UBC Press, Vancouver, 2008, pp. 120—138, p.126.

13  Howard, Headland Speech, 1995.

14  See Sawer, 2008, pp. 120—121. See also Robert Manne, 'The Howard Years: a Political Interpretation', in Robert Manne (ed.) *The Howard Years*, Black Inc, Melbourne, 2004, pp. 3—53, p. 44.

15  See for example, Commonwealth of Australia, Department of Immigration and Multicultural and Indigenous Affairs, *Interpreting the Refugees Convention – an Australian contribution*, Australian government,

Canberra, 2002. In 2014, Australia adopted a statutory interpretation for national purposes of various aspects of the Refugee Convention definition: *Migration Act 1958* ss 5H—5M.

16  David Marr and Marian Wilkinson, *Dark Victory*, Allen & Unwin, Sydney, 2003, p.151.

17  Commonwealth of Australia, Report of the Senate Select Committee, 'A Certain Maritime Incident', 23 October 2002, ch 3—6.

18  Howard, Election Speech, 28 October 2001.

19  Didier Bigo, 'Security and immigration: toward a critique of the governmentality of unease', *Alternatives: global, local, political*, vol. 27, no. 1, 2002, pp. 63—92.

20  Benjamin Moffitt, 'How to Perform Crisis: A Model for Understanding the Key Role of Crisis in Contemporary Populism', *Government and Opposition*, vol. 50, no. 2, 2006, pp. 189—217.

21  Draft Report of the Ad Hoc Committee on Statelessness and Related Problems. Proposed Draft Convention relating to the Status of Refugees: E/AC.32.L.38, 15 February 1950; Annex II (comments p.57), cited in Guy S. Goodwin-Gill, 'Article 31 of the Refugee Convention: Non-penalization, Detention and Protection' in Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, CUP, Cambridge, 2003, pp. 185—252, p.190.

22  Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records, A/CONF.2/SR.14, 22 November 1951, pp. 10—11 and 13, cited and discussed in Guy S. Goodwin-Gill, 2003, pp. 192—193. See also discussion in Cathryn Costello and Yulia Ioffe, 'Non penalization and non-criminalization' in Cathryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee* Law, OUP, Oxford, 2021, pp. 917—932, p.923.

23  Commonwealth of Australia, *Interpreting the Refugees Convention*, 2002, p.127.

24  Commonwealth of Australia, *Interpreting the Refugees Convention*, 2002, p.135.

25  Commonwealth of Australia, *Interpreting the Refugees Convention*, p. 146. Admittedly, some interesting questions concerning the application of Article 31 are raised – for example, when interception occurs prior to entry into state territory and outside the territorial sea.

26  Commonwealth of Australia, *Interpreting the Refugees Convention*, p.130.

27  Human Rights Watch, 'By Invitation Only:' Australian Asylum Policy, Vol 14, No10(C), December 2002, ch III & IV <https://www.hrw.org/reports/2002/australia/australia1202.pdf>

28  Nauru's instrument of accession was received on 26/6/2011 and the Convention entered into force for Nauru on 26/9/2011. Regarding the additional aid to Nauru, see Commonwealth of Australia, 'A Certain Maritime Incident', 2002, [11.68].

29    See Greg Fry, 'The "Pacific Solution"?' in William Maley et al, *Refugees and the Myth of the Borderless World*, ANU, Canberra, 2002, pp. 23—31, pp. 26—27; Savitri Taylor, 'The Pacific Solution or a Pacific Nightmare? The Difference between Burden Shifting and Burden Sharing', *Asian-Pacific Law & Policy Journal*, vol. 6, no. 1, 2005, pp. 1—43, pp. 28—30.

30    Ariane Rummery, 'Australia's "Pacific Solution" draws to a close', UNHCR, 11 February 2008 <https://www.unhcr.org/news/latest/2008/2/47b04d074/australias-pacific-solution-draws-close.html>

31    Rummery, 2008.

32    Andrew & Renata Kaldor Centre for International Refugee Law, Fact sheet, 'Australia—Cambodia Agreement for Refugees in Nauru', 1 October 2019 <https://www.kaldorcentre.unsw.edu.au/publication/cambodia-and-refugee-protection>

33    Australian Government, Regional Processing and Resettlement <https://www.homeaffairs.gov.au/about-us/what-we-do/border-protection/regional-processing-and-resettlement>.

34    Michael Neilson, 'New Zealand and Australia reach deal over refugee resettlement offer', New Zealand Herald, 24 March 2022 <https://www.nzherald.co.nz/nz/new-zealand-and-australia-reach-deal-over-refugee-resettlement-offer/K3GTXNYUXX2JNN2EN2TI2NSC2Y/>.

35    Refugee Council of Australia, Offshore Processing Statistics, 13 June 2022 <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/>

36    'Transitory persons' (i.e., refugees and asylum seekers transferred from Australia) live in the community on Nauru, according to the regular Operation Sovereign Borders updates: Australian Border Force, 'Operation Sovereign Borders Monthly Update: June 2022', 29 July 2022 <https://www.abf.gov.au/newsroom-subsite/Pages/Operation-Sovereign-Borders-monthly-update-June-2022.aspx>.

37    The arrangement came to an end on 31 December 2021: Australian Government, Regional Processing and Resettlement <https://www.homeaffairs.gov.au/about-us/what-we-do/border-protection/regional-processing-and-resettlement>.

38    There are several ways in which Australia may be held responsible. When an individual remains within the power or effective control of a country, the human rights obligations accepted by that country still apply. Further, where one country aids and abets another in the violation of human rights (for example, by paying for the construction of a detention centre), both countries may be held responsible.

39    Madeline Gleeson's book is a comprehensive account: Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru*, NewSouth Publishing, Sydney, 2016.

40    Behrouz Boochani, *No Friend but the Mountains*, Picador, Sydney, 2020. For other memoirs, see Abbas Nazari, *After the Tampa: From Afghanistan to New*

Zealand, Allen & Unwin, Auckland, 2021; Jaivet Ealom, *Escape from Manus: The untold true story*, Penguin Random House Australia, 2021.

41    Cait Kelly, 'A Form of Cruelty: 51 Asylum Seekers brought to Australia under medevac laws still languish in detention', *The Guardian*, 20 March 2022 <https://www.theguardian.com/australia-news/2022/mar/21/a-form-of-cruelty-51-asylum-seekers-brought-to-australia-under-medevac-laws-still-languish-in-detention>

42    See Mary Anne Kenny, Nicholas Procter and Carol Grech, Policy Brief 13, 'Temporary Protection Visas in Australia: A reform Proposal', Kaldor Centre, June 2022. Temporary protection for persons determined to be refugees should be distinguished from the temporary protection afforded in a mass influx (such as Ukrainians in the EU) which is a short-term measure designed in part to ease the strain on individual refugee status determination procedures.

43    The Meriam Webster dictionary defines a nondecision as 'an inadequate decision: a statement or determination that is presented as a decision but that avoids or leaves unresolved the issue being considered.'

44    The EU has applied a document known as the Temporary Protection Directive. Under the Temporary Protection Directive, a temporary form of protection may be granted to displaced people during a mass influx. Displaced persons are those 'unable to return in safe and durable conditions because of the situation prevailing in [their] country', in particular, those who are fleeing armed conflict, endemic violence and systematic or generalized violations of human rights. Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and Bearing the Consequences Thereof [2001] OJ L212/12, Article 2(c).

45    The term was used in the late 1970s and Klaus Neumann attributes it to Gough Whitlam: Klaus Neumann, *Across the Seas: Australia's Response to Refugees – A History*, Black Inc, Melbourne, 2015, p. 276.

46    Gareth Evans, for example, once stated that 'the reality that we must all acknowledge is that there are many Vietnamese who will simply not be willing to wait in the Orderly Departure queue, and who will go on chasing the dream of a life elsewhere so long as the prospect of ultimate resettlement has not been absolutely excluded.' Gareth Evans, International Conference on Indo-Chinese Refugees, Statement by the Australian Delegation, Delivered by Senator the Honourable Gareth Evans QC, Minister for Foreign Affairs and Trade, Geneva, 13 June 1989, UNHCR Fonds 11 Series 3, 391.89, UNHCR Archives.

47    For some examples of 'protected entry procedures' enabling people to apply for protection from their home countries or transit countries, see Claire Higgins, Policy Brief 8, 'Safe Journeys and Sound Policy: Expanding Protected entry for refugees', Kaldor Centre, November 2019.

48    UNHCR, Resettlement, <https://www.unhcr.org/resettlement.html>.

49    UNHCR, 'Global Trends: Forced Displacement in 2021', 16 June 2022, p. 38.

50    Sharon Pickering and Leanne Weber, 'New Deterrence Scripts in Australia's Rejuvenated Offshore Detention Regime for Asylum Seekers', *Law & Social Inquiry*, vol. 39, no. 4, 2014, pp. 1006—1026, p.1009.

51    For discussion see Penelope Mathew, 'Constructive Refoulement' in Satvinder Singh Juss (ed.) *Research Handbook on International Refugee Law*, Edward Elgar, Cheltenham, 2019, pp. 207—223; Penelope Mathew, '*Non-refoulement*' in Cathryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee* Law, OUP, Oxford, 2021, pp. 899—916, pp. 913—915.

52    Marr and Wilkinson, 2003, pp. 228—229.

53    See for example, the story of Sundous Ibrahim and her three little girls who were unable to join Sundous' husband, Ahmaed Al-Zalimi, because of his temporary protection visa, and travelled on the ill-fated SIEV X (Suspected Illegal Entry Vessel 'X'), resulting in the deaths of all three children: Marr and Wilkinson, 2003, ch 17.

54    See for example, Jacquelin Magnay, Italy Immigration: New Interior Minister Matteo Salvini promises to 'stop the death boats', *The Australian*, 4 June 2018.

55    The language of queue jumping and breaking the business model of the people smugglers was used by Prime Minister Johnson: Alistair Smout & Clement Uwiringiyimana 'Britain Plans to send migrants to Rwanda under tougher asylum policy', Reuters, 15 April 2022 <https://www.reuters.com/world/uk/uks-johnson-seeks-put-fine-behind-him-with-immigration-plan-2022—04-13/>.

56    Letter to Clare O'Neil, Minister of Home Affairs, from Michael Pezzullo, Secretary of the Department of Home Affairs, 1 June 2022; appendix 'SIEV 915 and the Commander Joint Agency Task Force Operation Sovereign Borders Public Statement', https://minister.homeaffairs.gov.au/ClareONeil/Documents/siev-915-JATFOSB-statement.pdf. (Hereinafter Pezzullo report.)

57    The protocols around information are purportedly designed to protect against undesirable consequences such as informing the strategies of people smugglers. See Pezzullo report, 2022, pp. 2—4.

58    Karen Middleton, 'Claims Coalition colluded in election day boat arrival', *The Saturday Paper*, May 28 – June 3 2022.

59    Stephanie Borys, 'Labor sends election-day boat arrivals back to Sri Lanka, slamming mass text "disgrace"', ABC News, 24 May 2022 < https://www.abc.net.au/news/2022—05-24/labor-turns-back-election-day-asylum-seeker-boat-arrival/101095322>.

60    Sherryn Groch, 'Djokovic is gone. How did the case unfold and what does it mean for Australia's border rules?' *The Age*, 17 January 2022.

61    Frank Davidson, 'Adam Lindsay Gordon (1833—1870) – a Great Scottish-Australian Poet?', *Journal of the Sydney Society for Scottish History*, vol. 12, 2010, pp. 27—46.

62    Georgina Arnott, 'Australia's deep connection with enslavement', *The Age*, 16 June 2020.

63    Davidson, 'Adam Lindsay Gordon', 2010, p. 46.

64    Graeme Hugo*, Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants: Final Report to the Department of Immigration and Citizenship*, Department of Immigration and Citizenship, June 2011.
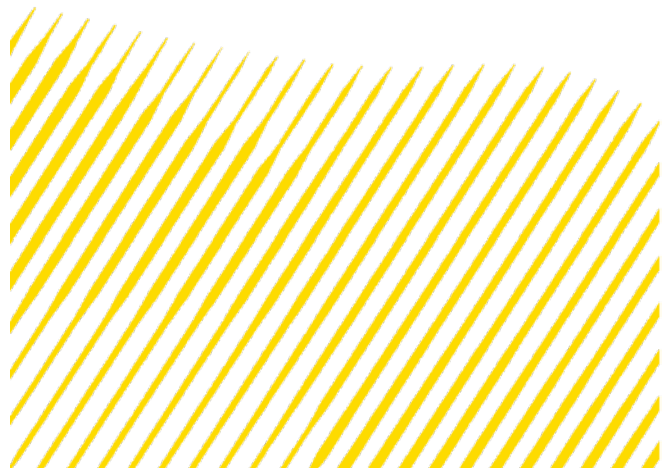
# The Howard Library Annual Conference Series



The Liberal-National Party Coalition led by John Howard won office on 2 March 1996 and continued to hold power until 3 December 2007 (after losing the election held on 24 November 2007). UNSW Canberra is hosting a series of retrospective conferences to assess the performance of the Howard Government. Each event provides the basis for collections of essays contributed by principal participants, key public servants, leading commentators and notable scholars drawing on documents in the John Howard Collection held at the Australian Defence Force Academy Library and other papers managed by the Howard Library at Provisional (Old) Parliament House. This series has become the authoritative treatment of the Howard years.

Contributors are asked to focus critically on the Coalition's policies and performance to reveal the Government's shortcomings and failures. This commitment to a candid critique attracts the attention of the press and current-serving politicians, affording the volumes a substantial public profile at the time of their release. UNSW Press is the series publisher.

The first conference covered the 1996 election, the Coalition's readiness for office, the main policy decisions and practical challenges of the first year of the Howard Government, including gun control and ministerial responsibility.

The second conference dealt with the second and third years of the Coalition's first term in office (1997-98) and most of its second term (1998-2001). It canvasses the High Court's Wik decision and native title, the Patricks waterfront dispute, the constitutional convention, the Coalition's near defeat at the 1998 poll, the Government's response to post-independence violence in Timor-Leste and the introduction of the GST.

The third conference focused on the controversial events leading to the 2001 election including the MV *Tampa* crisis, the collapse of Ansett Airlines, the '9/11' terrorist attacks and the invasion of Afghanistan. It looked at the decision to invade Iraq in 2003, the outbreak of the 'history wars', managing the environment and health care, the challenges faced by the Labor Opposition and the rise of Mark Latham.

The fourth conference was concerned with the period October 2004 to November 2007 and examined the Coalition's control of the Senate, the advent of Work Choices, the progress of Indigenous Reconciliation and the Northern Territory intervention, and the election that saw the Coalition lose office and the Prime Minister his seat in parliament.

Our 2022 conference focused on crisis management and assessed the Howard Government's responses to the crises it encountered in its eleven years in office. From the beginning of the 'war on terror', through the (almost simultaneous) collapse of Australia's second airline, to the scandal of the Australian Wheat Board's dealings with Iraq's leader, Saddam Hussein and the waterfront struggles of Australia's stevedoring companies against union control. How did it 'frame' these crises for public understanding and support; what role did the media play in explaining particular crises and critiquing Government's responses; how were the Government's responses evaluated – by it and its critics - after each crisis had passed; was there a pattern from which we can learn to better inform contemporary government responses to crises such as the COVID-19 pandemic, and those that lie in wait? The ensuing papers aim to critically reflect on those policy decisions of the Howard Government in order to provide context and perspective for contemporary policy debates and facilitate discussion among the policy community and the broader Australian public.

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