

CHANGE AND CONTINUITY

THE RUDD GOVERNMENT AND ASYLUM-SEEKERS

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OVERVIEW

The Australian Labor Party's recent approach to migration law has been interesting to say the least. During the 2007 election campaign, lively debate on immigration was conspicuous largely by its absence. This is particularly curious when one considers how controversial an area migration law was under the Howard government, particularly with regard to asylum seekers. A quick scan of the ALP's policy web page

demonstrates this silence.

Of all the policy areas in the lead-up to the 2007 federal election, immigration had the fewest press releases (three), none of which was an official election policy document.

By way of contrast, arts,

recreation and tourism scored 22 news releases and one official election policy document, and veterans affairs managed 14 news releases and one official election policy document. Immigration was one of only a handful of policy areas where the ALP did not release an official election policy document.

This virtual silence was broken by a flurry of activity in the Immigration Department when the Rudd government was elected. In November 2007 the Burmese and Sri Lankans at the offshore processing camp at Nauru were to be resettled, Tony Tran (wrongly detained for five years) was finally granted permanent residency, and the government announced that it would close the detention centres on Nauru and Manus Island, effectively ending the "Pacific Solution".

On the other hand, the new government could hardly be characterised as sweeping away the old migration regime and replacing it with a shiny new system of its own. The ALP recently announced that it planned to continue with the \$396 million upgrade of the Christmas Island detention centre for

boat arrivals, meaning there was no plan in sight to end offshore processing or mandatory detention. David Manne, from the Refugee and Immigration Legal Centre, described this move as "replacing the Pacific Solution with an Indian Ocean Solution". Furthermore, Senator Chris Evans confirmed that ALP policy included the continued excision of Christmas Island and Ashmore Reef from Australia's migration zone, and that no decision had been made on whether to include the other 4000-odd islands excluded from the migration zone from the legislation.

The ALP's coyness, combined with its apparent reluctance (both pre- and post-election) to present a coherent and integrated approach to immigration, and particularly to asylum-seeker and refugee law, makes it difficult to assess what change, if any, the new government will bring to the area. It also marks in itself a significant departure from the Howard government's aggressive approach. What is behind this reticence, and what legislative and policy changes if any can we expect to see under the Rudd government? Young Lawyers Sean Vagg and Emma Swann recently interviewed Maria Psihogios-Billington, (solicitor for Melbourne's Asylum Seeker Resource Centre) to find out, from the perspective of a non-government asylum seeker advocacy and support organisation, what areas are expected to be reformed, what areas may be reformed, what areas look like remaining as they are, and how organisations such as the Asylum Seeker Resource Centre view their (thus far limited) interactions with Senator Evans and his department.

CHANGE – PEOPLE-SMUGGLING AND TEMPORARY PROTECTION VISAS

Maria makes the point that despite the reticence discussed above, the department has made some concrete changes in its short term in office.

AN INTERVIEW WITH MARIA PSIHOGIOS- BILLINGTON, SOLICITOR FOR MELBOURNE'S ASYLUM SEEKER RESOURCE CENTRE

“Tougher” stance on people smugglers

The ALP has indicated that it intends to be “tougher” than the Howard government on people-smugglers. This is reflected in the ALP National Platform and Constitution 2007 which says that “Protecting our national interest and our national borders requires zero tolerance for people smugglers, who will be subject to harsher penalties to deter their activities and stop unauthorised boat arrivals”.

Moreover, there are definite signs that the department is already taking steps towards implementing this approach. Senator Evans has recently exercised his discretionary power to refuse the protection application of Iraqi asylum seeker and people smuggler Ali Al Jenabi on character grounds. In doing so, Senator Evans said: “The Rudd Government deplors people smuggling. It is a heinous crime that puts lives at risk, undermines Australia’s border security and weakens our immigration system...”

Temporary protection visas

A second area in which refugee advocate groups expect to see imminent change is temporary protection visas, or TPVs. An end to this particularly restrictive form of visa was an election promise by the ALP, but when the change will be enacted is

unclear. Maria notes that the visa is a creature of regulation rather than statute, and could be changed “at the stroke of a pen”. She is unimpressed that some ASRC clients are still being issued with TPVs at the discretion of DIMIA officials.

CONTINUITY – BRIDGING VISA E’S, WORK RIGHTS AND THE LANGUAGE OF ILLEGALITY

Bridging Visa E and work rights

Many clients at the ASRC are on the controversial Bridging Visa E. These visas are automatically given to people who arrive to Australia by boat or to people who do not lodge their application for asylum within 45 days of arrival in Australia. Bridging Visa E’s deny the holder work and study rights, and access to Medicare or Centrelink payments. These people survive on handouts from NGOs such as the ASRC. There has been a push for many years to abolish this visa because, as Maria says, “it’s punitive”.

The ALP has made no official comment on whether it will abolish Bridging Visa E’s. Maria argues that Bridging Visa E’s fundamentally contradict the Labor Party’s historical philosophy



of the sanctity of the right to work. For a Labor government to maintain a visa such as this, which denies such a basic right, seems to be inconsistent and hypocritical.

It would also appear to directly contradict the Labor Party's statement in its National Platform that:

"Labor recognises that the arbitrary 45-day rule results in legitimate asylum seekers on bridging visas being unnecessarily denied the right to work while their claim is being processed. It also prevents immigration officers from denying work rights to frivolous claims lodged within the 45-day period. Labor will work to develop guidelines based on merit so that frivolous or vexatious visa applications will be denied those rights, instead of applying an arbitrary 45-day time limit."

The reform or preferably abolition of Bridging Visa E is a primary concern of many refugee groups, and the Rudd government's approach to this issue will be watched with great interest.

The language of illegality – demonising asylum seekers

As noted above, Senator Evans recently denied asylum to a convicted people smuggler. He issued a news release relating to this decision in February 2008 in which he described the people-smuggler's conduct as "bringing boatloads of illegal immigrants into Australia". Maria stresses that this kind of characterisation of asylum seekers as "illegal" is a major concern of refugee advocacy groups. She says it is worrying that this language continues to be used by official bodies when describing asylum seekers. Maria argues that the language of "illegality" is misleading because asylum seekers have broken neither international law nor Australian domestic law in coming to Australia without an appropriate visa to seek asylum. The ASRC and like bodies further argue that this type of language subtly "demonises" asylum seekers in public discourse.

Maria is hopeful, however, that with time and continued advocacy the situation will improve. When asked why she felt hopeful, she referred us to a recent article by Senator Evans in *The Age* on 19 February 2008 in which he expressed his discomfort at being asked to "play god" in refugee determination decisions in which he is called on to exercise ministerial discretion. He has also told a Senate committee that he thinks he has too much discretionary power. "What sort of politician thinks that they have too much power?," Maria asks incredulously. She thinks this signifies a welcome change in attitude from previous immigration ministers and hopes that with time this attitude might trickle down through the department.

DEPARTMENTAL CULTURE – THE INTER-ACTIONS OF POLICY, POLITICS AND LAW

The old guard – too much policy and too little law

As discussed, the ALP kept a low profile on immigration during the election campaign – a tactical decision that appears on its face to be somewhat counter-intuitive given the heated debate in this area. Another related question was whether the Rudd government can be trusted to reform immigration law to the satisfaction of refugee non-governmental organisations when one notes that the ALP was historically not merely

silent as the migration regime was being set up during the late 20th and early 21st centuries, but in fact introduced mandatory detention in 1994 and gave each major subsequent immigration policy initiative bipartisan support. We asked Maria what she made of these facts.

She says the ALP was "completely hamstrung ... there was a groundswell of support for this issue [i.e. tough stance on asylum seekers] and the Howard government was re-elected on that basis". She asserts that while the early years of the 21st century were not the ALP's finest in terms of its immigration policies, it would have been "political suicide" for the party to oppose such broadly popular policies. She reads the party's support for the Howard government's immigration policies as being tactically motivated rather than indicating an actual inclination to pursue a similar approach once in power.

A culture of communication – a little more conversation, a little less action

We asked Maria what she thought the biggest changes have been so far in the department and its policies. She says the most significant changes have been more about culture, style and approach than about concrete policies. She feels that the Palmer Report has been instrumental in bringing issues such as the need for departmental transparency and improved procedures to the fore. She also feels that Senator Evans is willing to take on many of the suggestions in the report, but that this change in culture will take a long time to filter down all the levels of the department. In her words, "some [departmental officials] come from a culture of total disregard to law and due process. No one person from the top can change that."

Despite these obstacles, Maria is hopeful because she feels Senator Evans is serious about changing the culture of the Immigration Department. A major concern of advocacy groups has previously been the perceived overuse of ministerial discretion in the *Migration Act*, and the deployment of that discretion to achieve political goals rather than to administer a stable and coherent system of refugee determination. Senator Evans appears to be speaking directly to those concerns in his opinion piece in *The Age*, in which he felt that the extensive discretion referred to the minister under the *Migration Act* called on him to "play god" – a situation he indicated may be subject to some reform. Maria believes that the minister's attitude in this regard reflects a general return to law and consistency in decision-making in the department.

Aside from these indications, Maria has generally found, in her own experience, that the department has been much easier to communicate with than its predecessor. She feels that non-governmental organisations are being genuinely listened to and their submissions fully considered. As such, she is not overly concerned at the apparent lack of sweeping changes or specific announcements of an overhaul of the *Migration Act*. She suspects that Senator Evans is taking these early days to fully brief himself on his portfolio and the direction it should take in the future. Given what she describes as "positive murmurings from the government", she looks forward to seeing what form any reforms take, and in the meantime continues to be a part of the political process of law reform through advocacy and casework at the ASRC. ■