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**Migration, Nationality and  
Detention**

# Desperation, Displacement and Detention:

## Australia's Treatment of Asylum Seekers Past and Present

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**Few matters have been more fiercely debated in the Australian Parliament or more unsparingly ventilated in the media than the recent and ongoing treatment of asylum seekers arriving by boat. To understand what motivates a democratic government in peacetime to implement policies that imprison indefinitely thousands of men, women and children who have not been charged with or convicted of any crime we must turn to historical, social and political attitudes. Though countries around the world guard their sovereign powers jealously to determine who may enter, the treatment of asylum seekers in Australia has been particularly high profile and divisive. This article seeks to understand why.**

### The White Australia Policy

Immigration has been contentious in Australia since the early days of European settlement. It was an issue during the establishment of the Federal Parliament in 1901 when two early bills underpinned what became known as the 'White Australia Policy'. *The Pacific Islanders Act* prohibited islanders from entering Australia and the *Immigration Restriction Act* imposed an English language test, effectively barring entry for most non-English speaking people. One Member of Parliament (MP) said: 'No matter what measures are necessary, Australia must be kept pure for the British race who have begun to inhabit it.'<sup>2</sup>

Between 1945 and 1955 one million immigrants came to Australia. Even after the Menzies government signed up to the 1951 UN Convention (the Convention), refugees continued to be selected according to the colour of their skin. It took another seven years for the controversial English language test to be abolished by the passage of *The Migration Act*

1958, and over a decade before skilled Asian immigrants had the same rights as Europeans to settle in Australia.<sup>3</sup>

In 1972, newly elected Labor Prime Minister Gough Whitlam took the final legal steps to dismantle the 'White Australia Policy,' although he had shown little sympathy for Indo-Chinese refugees.<sup>4</sup> As waves of Indo-Chinese refugees arrived, concerns grew about porous borders. Following the double dissolution that ended Whitlam's prime-ministership and led to fresh national elections, the incoming Prime Minister, Malcolm Fraser, was determined that Indo-Chinese refugees would not be incarcerated long-term in camps.

For the next decade, regional cooperation between prospective host countries with Malaysia, Thailand and Vietnam saw these refugees resettled in the USA, Canada and Australia.<sup>5</sup> The government and the Labor opposition forged bi-partisan cooperation on a non-racial immigration and multicultural policy. That cooperation evaporated when the Labor party expressed hostility to large intakes of Indo-Chinese, colloquially referred to as 'boat people' during the 1977 election campaign.

The debate foreshadowed views expressed 25 years later — that 'boat people' were avoiding the proper channels, that they were merely economic migrants, and that they needed to be deterred by harsh policies.<sup>6</sup> Nevertheless, mature leadership ensured that at this time Indo-Chinese 'boat people' were sympathetically received by the public as 'genuine' refugees.<sup>7</sup> Asylum seekers arriving by boat were not in locked detention centres although they were held in a facility where they had to attend roll-call each day and which they could not leave until their case was resolved. They were processed by the Immigration Department and provided permanent residence without delay.<sup>8</sup>

1. The Hon Judi Moylan is a former Minister for Family Services, Minister Assisting the Prime Minister on the Status of Women and former Chair of the Joint Standing Committee on Public Works (1999-2007).
2. The Hon William McMillan MP, Member for Wentworth, *Immigration Restriction Bill*, Hansard, September 6, 1901, Australian Parliament.
3. Communications Branch, Department of Immigration, Fact Sheet 8, Australian Government 2009.
4. Fr. Frank Brennan, *Tampering With Asylum*, p74, University of Queensland 2006.
5. The Australian Government pressed the UN to hold international conferences, which then developed these plans to deal with the problem of Indo-Chinese refugees.
6. Senator Mulvihill, argued that 'if a person wants to get into this country quickly he should not line up at an Embassy; he should be one of the artful dodgers.' Hansard, 22nd March, 1977, Australian Parliament.
7. Fr. Frank Brennan, *Tampering With Asylum*, p32, University of Queensland 2006.
8. Janet Phillips and Harriet Spinks, *Immigration Detention in Australia*, January 23, 2012, p3 of 43, Social Policy Section Parliament of Australia.

## The Evolution of Punitive Detention

Six years after the Hawke Labor government was elected in 1983, in the face of mounting arrivals from Cambodia, parliament toughened its stand against 'boat people,' passing the *Migration Legislation Amendment Act 1989* with strong bipartisan support. This act was notable for the power which allowed officers to arrest and detain anyone suspected of being an 'illegal entrant'. Although detention remained discretionary until 1992, this Act essentially introduced a policy of 'administrative detention' for all people entering Australia without a valid visa.<sup>9</sup>

Such was the resurgence of onshore arrivals that by 1991 a disused mining camp in Port Hedland, Western Australia became Australia's first remote detention centre. Some Cambodians, after two years incarceration, made an application to the Federal Court to be released on the basis that their detention was unlawful.<sup>10</sup> Goaded by High Court criticisms of its treatment of asylum seekers and anxious to allay public disquiet over the resurgence of boat arrivals, the Keating Government rushed *The Migration Amendment Act 1992* through the Parliament two days before the Cambodians' case was to be heard. The bill authorised mandatory detention making it clear that the government was determined to send a clear signal that migration could 'not be achieved by simply arriving in this country.'<sup>11</sup> This tough approach to detaining unauthorised boat arrivals was in contrast to the treatment of visa over-stayers. The differential treatment still applies today.<sup>12</sup>

## Echoes of White Australia

As far back as 1988 Coalition opposition leader John Howard echoed the criticisms of immigration and multiculturalism published by conservative historian Geoffrey Blainey.<sup>13</sup> In his *One Australia* policy Howard expressed concern about the pace of Asian immigration suggesting that 'it would be in our immediate-term

interest and supporting of social cohesion if it were slowed down a little, so that the capacity of the community to absorb would be greater.'<sup>14</sup> In the ensuing public furore the government brought on a debate seeking reaffirmation of the previously bipartisan policy that prohibited race being a factor in the selection of migrants. Howard declared 'I don't believe it is wrong, racist or immoral for a country to say we will decide what the cultural identity and the cultural destiny of this country will be.' Three members of his party crossed the floor against their leader. One MP argued: 'The simple fact is that opinion is easily led on racial issues. It is now time to unite the community on the race issue before it flares into an ugly reproach to us all.'<sup>15</sup> In 1989, John Howard lost the leadership and did not regain it until 1995 by which time he had retreated from his previous views.

With Howard at the helm again, the Coalition Party was swept to power in 1996. That same year witnessed the rise of far-right politician Pauline Hanson, a disendorsed Liberal candidate, who as an independent won the federal seat of Oxley, on an anti-Asian immigration platform. In her first speech in Parliament she declared: 'I and most Australians want our immigration policy radically reviewed and that of multiculturalism abolished. I believe we are in danger of being swamped by Asians.'<sup>16</sup> Hanson unsuccessfully attempted to regain her seat in 1998. She remained an influential voice in public debate on immigration.

Boat arrivals remained steady until a precipitate increase beginning in 1998. That year a poll showed the average Australian overestimated by 70 times the number of 'boat people' arriving each year in the country.<sup>17</sup> By 1999 asylum seekers arriving by boat, began to surge.<sup>18</sup> 'Politicians across the spectrum joined in persistent, low level abuse of boat people as 'queue jumpers' for not waiting in foreign camps and 'illegals' for arriving without proper papers.'<sup>19</sup>

Processing slowed and with six, now overcrowded, detention centres on the Australian mainland<sup>20</sup> the government introduced three year

9. Ibid page 3 of 43.

10. From the outset, Cambodians suffered from the misfortune that their claims for asylum contradicted the peace plan for Cambodia and efforts to repatriate 300,000 Cambodians from Thailand. There was political interest in labelling these 'boat people' as economic migrants. Fr. Frank Brennan, *Tampering With Asylum*, University of Queensland 2006.

11. At the same time as the end of the orderly departure programme in 1989, the High Court found in favour of Chan Yeek Kin, a Chinese stowaway, who had claimed refugee status. The Court criticised the Department of Immigration for having reached a conclusion in the case: 'so unreasonable as to amount to an improper exercise of the power to determine refugee status.' Ibid.

12. Bridging visas were issued to people who satisfied certain criteria, usually over-stayers who had arrived on a visa and then claimed asylum, but never people who came irregularly by boat. Peter Mares, *Borderline*, p30, University of New South Wales (UNSW) 2002.

13. Geoffrey Blainey, *All for Australia*, Methuen Haynes, 1984.

14. George Megalogenis, *Asian Influence Spices up Contest*, The Australian, February 27, 2007.

15. Steele Hall MP, Hansard, 25<sup>th</sup> August, 1988. Australian Parliament.

16. Pauline Hanson, First Speech, 10<sup>th</sup> September 1996, Hansard, Australian Parliament.

17. Mary Crock and Ben Saul, *Future Seekers: Refugees and the Law in Australia*, p22 The Federation Press Sydney 2002.

18. Janet Phillips and Harriet Spinks, *Boat Arrivals in Australia since 1976*. p6 9<sup>th</sup> July 2012 Australian Parliamentary Library, Parliament of Australia.

19. David Marr and Marion Wilkinson, *Dark Victory*, P37. Allen & Unwin 2003.

20. Curtin at Derby in northwest Western Australia (WA), Port Hedland, in northwest WA, Woomera in remote South Australia, Perth WA at the domestic airport, Villawood in Sydney NSW and Maribyrnong in Melbourne Victoria.

Temporary Protection Visas (TPVs), releasing some detainees to live in the community.<sup>21</sup> The government fed the public perception that the nation was besieged by an 'avalanche' of 'boat people' who had to be stopped. A line had to be drawn.<sup>22</sup> Detention centres became increasingly privatised and remote. They were progressively fortified until many resembled maximum-security prisons shocking some MPs during a visit in 2001.<sup>23</sup>

### **'Excision' of Australian Territories and the 'Pacific Solution'**

On 26<sup>th</sup> August 2001 a rescue call was received from the *Palapa 1*, a dilapidated 20 metre Indonesian fishing boat with 433 passengers on board. The vessel was lost and struggling to stay afloat. Australian authorities complied with humanitarian principles and called for ships to locate and rescue the ailing vessel. The Norwegian freighter the *Tampa* came to the rescue. Its captain gave as much assistance as the cramped deck would allow. He asked permission from the Australian government to convey the asylum seekers to Christmas Island. It was refused and the government threatened to charge the captain of the *Tampa* with people smuggling if the ship landed them on Christmas Island.

Determined to prevent asylum seekers from reaching Australian shores, the government orchestrated a ship-to-ship transfer. At the same time it rushed legislation through Parliament so as to avoid giving asylum seekers any right to legal processes in Australia and to force the *Tampa* (or any other boat carrying asylum seekers) back out to sea, providing immunity to the government, its officers and agents from civil or criminal prosecution for such action.<sup>24</sup> Although the Opposition was generally supportive of the government resolve to 'stop the boats', they refused to support this legislation labelling it 'ill-considered, draconian and unconstitutional' and only agreed to support the bill if it was specific to the *Tampa*. The government responded by offering to introduce a six month sunset clause and the Opposition eventually supported the legislation.<sup>25</sup>

More than eight days after the rescue, the Royal Australian Navy (RAN) intercepted the *Tampa*. Special Armed Services personnel forcibly removed asylum seekers onto the *HMAS Manoora*. The Indonesian government refused to take those who had been rescued, leaving the Australian government to cast about for a solution. The asylum seekers were eventually transferred from the *HMAS Manoora* directly to offshore detention centres in Nauru and Manus Island in the Pacific Ocean.<sup>26</sup>

Two pieces of legislation were passed with bipartisan support to give effect to offshore processing or the 'Pacific Solution': the *Migration Amendment (Excision from Migration Zone) Bill 2001* and *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bills 2001*.<sup>27</sup>

The Tampa crisis generated fevered controversy in Australia in the lead up to the 2001 election, as did the 'Children Overboard' affair in October 2001. Following an encounter with the Royal Australian Navy frigate the *Adelaide*, the *Olong*, a wooden-hulled boat carrying 223 asylum seekers, experienced engine failure. Amidst the panic on board some asylum seekers abandoned the boat leading to claims, which persisted throughout the 2001 election campaign, that asylum seekers were throwing their children overboard.<sup>28</sup> As these events unfolded, the Prime Minister proclaimed: 'We will decide who comes to this country and the circumstances in which they come.'<sup>29</sup> A 2002 Inquiry into a Certain Maritime Incident found that no children had been thrown overboard and that the government had known that prior to the 2001 election.<sup>30</sup> Government Senators labelled the inquiry 'an undignified sideshow' and produced a dissenting report.<sup>31</sup>

The Howard government was re-elected in 2001 and again in 2004. In 2006 it introduced a bill to extend 'excision' of the migration zone to the mainland. Although it did not mean Australia had entirely abdicated all of its obligations under the UN Convention, its purpose was to stop boat arrivals from reaching the mainland and applying for asylum, with all the domestic legal and administrative protections that

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21. After the three-year term, refugees had to reapply and could be returned if their home country was then deemed to be safe. They could not sponsor family members and could access some but not the full range of services available to refugees with permanent status. Following the introduction of TPVs the numbers of boat arrivals with women and children on board increased. Janet Phillips and Harriet Spinks *Immigration Detention in Australia*, January 2012 Parliamentary Library, Parliament of Australia.
  22. Fr Frank Brennan, *Tampering With Asylum*, University of Queensland 2006.
  23. *Joint Committee on Foreign Affairs, Defence and Trade, Report on Visits to Immigration Detention Centres*, June 2001, P31 Australian Parliament.
  24. Nathan Hancock, *Border Protection (Validation and Enforcement Powers) Bill 2001*, Bills Digest, Parliamentary Library, Australian Parliament.
  25. *Ibid* p.3.
  26. Peter Mares, *Borderline* p126 UNSW Press 2002.
  27. Janet Phillips and Harriet Spinks *Immigration Detention in Australia*, P7 of 43 January 2012 Parliamentary Library, Parliament of Australia.
  28. David Marr and Marion Wilkinson, *Dark Victory*, Chapter 14, Allen and Unwin 2003.
  29. The Hon John Howard MP, Prime Minister, Federal Election Campaign Speech, 2001.
  30. Senate Select Committee, *A Certain Maritime Incident*, Australian Parliament, October 23, 2002.
  31. Cynthia Banham and Mark Metherrall, Article, *Liberal Senators Slam Children Overboard Inquiry*, Sydney Morning Herald, 24<sup>th</sup> October 2002.

offered.<sup>32</sup> The bill was opposed by a small group of Liberal backbenchers. Despite the revolt, the bill gained passage through the House of Representatives. It was only withdrawn when Liberal Senator Judith Troeth threatened to cross the floor, which would have ensured its defeat in the Senate.

'Out of sight, out of mind' was elevated to a principle of policy.<sup>33</sup> Asylum seekers in offshore facilities did not have rights to legal or administrative review of their claims and Nauru was not a signatory to the UN Convention at that time. Author Peter Mares wrote that 'The detention deals Australia struck with Nauru and Papua New Guinea appeared to violate fundamental laws in both countries.'<sup>34</sup> Access to asylum seekers by human rights lawyers and others was limited by both regulation and by the island state's remoteness.<sup>35</sup> A Parliamentary Committee visiting Nauru in 2001 found conditions to be unacceptable; there were claims of violence both amongst and against detainees, isolation and handcuffing, unsanitary conditions, hunger strikes and trauma.<sup>36</sup>

Amnesty International reported that 'conditions were harsh' and Greg Roberts of the Sydney Morning Herald, made an undercover visit to Manus Island in 2002 reporting that 'diseases such as malaria, typhoid and tuberculosis were widespread'. As federal Labor MP Carmen Lawrence put it: '[T]he lack of hope and the brutality, both physical and psychological, produces devastating consequences on human beings.'<sup>37</sup>

The government ridiculed critics of mandatory detention and the 'Pacific Solution' rejecting adverse criticism and almost all recommendations for improvements. Critics were cast as 'naive' and 'do gooders' who lacked life experience.<sup>38</sup> When asylum seekers went on a hunger strike on Nauru, Immigration Minister Amanda Vanstone said: 'it's not in Australian territory: it's on Nauru and being run by other people. If someone doesn't want to be there, they can go home.'<sup>39</sup>

By 2004 indefinite mandatory detention was entrenched, with the High Court accepting that aliens had fewer rights than citizens.<sup>40</sup> It accepted that detainees had the power to end their incarceration by voluntary repatriation.<sup>41</sup> The Court also upheld by a slim margin (4-3) the validity of indefinite detention, providing that the immigration minister retained the intention of eventually deporting an individual.<sup>42</sup>

Minority judges dissented, submitting the argument that 'aliens' power must be subject to the limitations imposed by other parts of the Australian constitution. Justice Michael Kirby observed that while Australia has no equivalent of the US Fifth Amendment the requirement in our constitution that only courts can impose punishment had a similar effect: '[T]he common thread that runs through all these cases is that judges of our tradition incline to treat unlimited executive detention as incompatible with contemporary notions of the rule of law.'<sup>43</sup>

Public perception of a 'crisis' in border protection persisted, encouraged by anti-refugee rhetoric of politicians and popular media. In the late 1970s, 60 per cent of Australians wanted to let people arriving by boat stay. An analysis by sociologist Katherine Betts in 2001 revealed that in 1993, 44 per cent wanted to send 'boat people' back without assessing their claims and 46 per cent approved of holding them in detention while their claims were assessed. In 2001, 77 per cent of Australians supported the Coalition government's decision to refuse entry to the *Tampa* and 71 per cent believed boat arrivals should be detained.<sup>44</sup>

### The Gang of Four — Children Out of Detention

When Parliament resumed in 2005, four Liberal Party Members of Parliament, Petro Georgiou, Russell Broadbent, Bruce Baird and the author (Judi Moylan) met to discuss concerns about indefinite mandatory detention and the impact on children.<sup>45</sup>

32. Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration, Law, Policy and Practice in Australia*. The Federation Press 2011.

33. Stanley Cohen elaborates on this concept in *States of Denial: Knowing about atrocities and suffering*, Cambridge Polity Press.

34. Peter Mares, *Borderline* p131, UNSW Press 2002.

35. It took Joint Committee a year to negotiate their visit in 2001.

36. Joint Standing Committee on Foreign Affairs, Defence and Trade, Human Rights sub-committee, *A Visit to Immigration Detention Centres*, June 2001.

37. Wendy Bacon, *Our Nauru Amnesia*, p5 of 11, <http://newmatilda.com>, July 25 2012.

38. The Hon Philip Ruddock, Minister for Immigration, June 19, 2001, Press Reports.

39. Editorial, Sydney Morning Herald, December 19, 2003.

40. Mary Crock and Laurie Berg *Immigration Refugees and Forced Migration, Law, Policy and Practice in Australia*, p 68, The Federation Press 2011.

41. *Ibid.* p69.

42. Peter Prince, *The High Court and Indefinite Detention: Toward a national Bill of Rights?* Executive summary, p2. Law and Bills Digest, Parliament of Australia, November 16, 2004.

43. *Ibid* p7.

44. Janet Phillips and Harriet Spinks, *Boat Arrivals in Australia Since 1976*. p6, July 9, 2012 Australian Parliamentary Library, Parliament of Australia.

45. Joint Select Committee, *Australia's Immigration Detention Network*, p15. Paragraphs 2.13 and 2.14 Final Report, 2012, Parliament of Australia.

Petro Georgiou had commenced drafting a Private Members Bill to amend the Migration Act. Once the drafting was complete, the group met with the Prime Minister to advise their intentions. To avoid the embarrassment of a split on the benches, the Prime Minister asked for time to speak to his cabinet colleagues.<sup>46</sup> During the hiatus, the mistaken and unlawful detention of two Australian citizens, Cornelia Rau and Vivian Alvarez Solon, aroused considerable public disquiet and sympathy. Cornelia Rau was erroneously held in immigration detention for ten months and Vivian Alvarez Solon wrongly deported and 'dumped' at the Manila airport in a wheelchair. Inquiries into both cases led to a damning exposé of inadequate care, lack of openness and scrutiny in the system and the pervasive culture of 'denial and self justification' within the Department of Immigration.<sup>47 48</sup>

Public alarm over detainees covertly held indefinitely heightened with the case of Peter Qasim, a stateless person detained for seven years. Qasim's case became a cause célèbre when it was taken up by prominent businessman Dick Smith. *The Sydney Morning Herald* revealed the government's decision to soften its hard line on mandatory detention. Under a headline *Free at last, but a prisoner still of his tortured mind*, it disclosed that Mr Qasim would be one of 50 people locked up for more than two years, who would now be summarily released on bridging visas.<sup>49</sup>

Intense pressure from church, non-government organisations and a growing number of web-based social media commentators exerted growing pressure on government to change the policy. The threat of a private members bill was a crucial element in the government's turnabout.<sup>50</sup> The government announced that 'a child shall only be detained as a matter of last resort.'<sup>51</sup> The Ombudsman was to review cases of detainees who had been in detention for more than two years and make recommendations about their release. The Minister was required to report the recommendations to Parliament within 15 days, but could not be compelled to act on them.<sup>52</sup> Other elements of the changes forced by the

backbenchers included an agreement to place time limits on the processing of protection visa applications and offer the existing 4000 refugees on TPVs permanent protection within 90 days.<sup>53</sup>

### Winding Forward, Winding Back

In 2007 the Rudd Labor government was elected. As the boats slowed, the new government made good its election promise to dismantle the 'Pacific Solution'.<sup>54</sup> It ended TPVs and abolished detention charges.<sup>55</sup> Mandatory detention and 'excision' of the migration zones remained firmly in place.

Two years later, boat arrivals bounded from 7 in 2008 to 60. A deepening sense of panic gripped the government. A withering attack was unleashed by the Opposition accusing the government of not protecting the borders and encouraging smugglers. The government suspended processing refugees from Afghanistan and Sri Lanka claiming that the situation in both jurisdictions was evolving and that [the] 'Taliban's fall, durable security in parts of the country and constitutional and legal reform to protect minorities' rights have improved their circumstances.' This led to increased periods of detention, overcrowding and outbreaks of violence. Incarcerated children became a resurgent issue.

Flagging polls, further boat arrivals and a relentless campaign by the Opposition were among the issues which led to a change of leadership from Kevin Rudd to Julia Gillard on June 24, 2010. With an election imminent, the new Prime Minister cast about for her own version of the 'Pacific Solution'. Senior political journalist Michelle Grattan reported 'the dog whistle is sounding like a wolf howl' and quoted part of Gillard's speech announcing the latest proposal: 'Hardworking Australians wanted to know refugees settled here weren't getting special treatment. People like my own [migrant] parents who have worked hard all their lives can't abide the idea that others might get an inside track to special privileges.'<sup>56</sup> A month later the Prime Minister's plan to send asylum seekers to East Timor had been rejected by their Parliament.<sup>57</sup>

46. Ross Peake, National Affairs writer, *PM in bid to head off rebels*, Canberra Times, June 13, 2005.

47. Commonwealth Ombudsman, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, 2005 Australian Parliament.

48. Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, Report, Commonwealth of Australia, 2005.

49. Joseph Kerr, *Sydney Morning Herald*, June 21, 2005.

50. Samantha Maiden and Michelle Wiese Brockman, *Howard to Free Families and Limit Detention*. The Australian newspaper, June 14, 2005.

51. Migration Amendment Regulations 2005 (No 2) Australian Parliament.

52. The changes allowed the Minister to make a residence determination to allow people awaiting the outcome of an asylum claim to reside in the community. The Ombudsman also had the power to make recommendations into the management of the detainee caseload.

53. Petro Georgiou MP, Speech, Hansard Australian Parliament 2005.

54. The Hon Chris Bowen Minister for Immigration, Speech to Australian National University July 29, 2008 *New Directions in Detention – Restoring the Integrity to Australia's Immigration System*.

55. It also distinguished all outstanding debts, arguing that the policy was ineffective as only 4% of the 'debts' had ever been recovered.

56. Michelle Grattan, *It is Not a Good Time to Seek Asylum*, The Age, July 2010.

57. Paul Toohey, *Prime Minister Julia Gillard Backs Away From Plan for East Timor Processing Centre for Asylum Seekers*, the Advertiser, July 14, 2010.

In 2011 the Commonwealth Ombudsman initiated an investigation into suicide and self harm in detention facilities.<sup>58</sup> Later that year the government commissioned the Hawke review following violent incidents and episodes of self-harm by detainees. It noted that a recent surge in boat arrivals had placed the detention network under stress and despite efforts to train additional staff they had been overwhelmed, leading to problems of health, including mental health, anger, frustration and self harm.<sup>59</sup> Despite the 2008 guidelines favouring the release of families with children, there were still over 1000 children in detention centres in January 2011.

The government began negotiating what later became known as the *Malaysia Swap Deal* with the Malaysian government even though it is not a signatory to the UN Convention. The plan was to send 800 asylum seeking 'boat people', including unaccompanied minors, to Malaysia in return for Australia accepting 4000 refugees. The government believed that under section 198A of the migration legislation the Minister could make a *declaration* in respect of the country to which asylum seekers can be sent, as the former Coalition government had done.<sup>60</sup>

A High Court challenge prevented the removal of the first group of asylum seekers, finding against the Minister's declaration on the basis that Malaysia does not recognise the status of refugees in its domestic law. It also found that the plan breached the (*Guardianship of Children Act*) 1946.<sup>61</sup> The Prime Minister attacked the court decision as 'a missed opportunity' and for turning the current law 'on its head' and shortly after introduced the *Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011* to circumvent the court's findings and enable transfers to a third country.<sup>62</sup>

The Opposition would not support legislation allowing asylum seeker transfers to countries which are not signatories to the Convention. Opposition Leader, Tony Abbott said: 'if the government was serious about stopping the boats she [the Prime Minister] would support the Coalition's amendments'.<sup>63</sup> In the end, both the Government's legislation and the Opposition's amendment were defeated.

To quell public criticism as news broke of more deaths at sea, the Prime Minister announced the establishment of an 'expert panel' made up of three eminent Australians, to find a way to break the impasse. Several weeks later, the panel delivered twenty-two recommendations to the government, including the re-introduction of the 'Pacific Solution'. 'No advantage' would be permitted for asylum seekers arriving in Australia by boat. They would be transferred to Nauru and Manus Island waiting the same amount of time they would have waited for asylum claims to be determined in Malaysia or Indonesia. No instrument has been recommended to gauge that timeframe, so re-settlement could take years.<sup>64</sup>

One day after the Report was delivered, the government hastily re-introduced the legislation<sup>65</sup> to once again allow the transfer of 'boat people' (including unaccompanied minors seeking asylum) to the Pacific Islands. Malaysia or any other country not a signatory to the UN Convention could now become a destination for asylum seekers (including children), subject to the tabling of a Disallowable Instrument.<sup>66</sup> The legislation passed through both houses of Parliament in August 2012.

## In Conclusion

Four decades ago, Australia's response to Indo-China refugees did not invoke such harsh policies as indefinite mandatory detention, temporary protection visas and offshore processing. Neither did it result in the navy being sent to turn back the boats. Instead the government undertook energetic, diplomatic engagement with Indonesia and other nations of the region to share responsibility for successfully resettling tens of thousands of refugees. Despite initial public apprehension, it is widely accepted that these refugees have enriched Australia in a multitude of ways.

It is axiomatic that tough deterrent policies have not stopped boat arrivals and it is unlikely that any civilised jurisdiction can invoke penalties so harsh, that they stop people escaping unimaginable brutalities. Managing the human dimensions of refugees fleeing

58. Alan Asher, Commonwealth Ombudsman, *Inquiry to Examine Suicide and Self-harm in Australian Immigration Detention*. Media release, July 29, 2011. <http://www.ombudsman.gov.au/media>

59. A. Hawke and H. Williams, *Independent Review of Incidents at Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre, 2011* Department of Immigration and Citizenship, Canberra.

60. Elibritt Karlson, *Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011*, Laws and Digest Bills Section, pp2 & 3, Parliamentary Library, Commonwealth of Australia September 22, 2011.

61. *Ibid*, p.11.

62. *Ibid*, pp. 7 & 8.

63. The Hon Tony Abbott, Leader of the Opposition, Media Release, September 19, 2011.

64. Angus Houston et al, *Report of the Expert Panel on Asylum Seekers*, Australian Parliament 2012.

65. *The Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011*. Australian Parliament.

66. Disallowable Instrument is sub-ordinate legislation under the Legislative Instruments Act 2003. It is required to be tabled in both Houses of Parliament within a set time and it can be disallowed (repealed) by either House. [www.alpn.edu.au/subordinate](http://www.alpn.edu.au/subordinate)

war and civil unrest will require a return to regional processing, including 'effective protections' and a commitment to resettlement by participating host countries as indicated by UNHCR.<sup>67</sup>

Notwithstanding the well-documented harmful effects of offshore processing, Australia has now regressed to the principle of 'out of sight, out of mind' by the passage of legislation that once again invokes an offshore policy tougher and more sensational than ever before. This comes on the back of a March 2012 government report revealing that: 'Evidence overwhelmingly indicates that prolonged detention exacts a heavy toll on people, most particularly on their mental health.'<sup>68</sup>

The tragedy is that there is little evidence that the government heeds the facts in its own report, or that its remedy will 'stop the boats' or save people from drowning. Instead it persists with policies that are out of proportion to the so called 'problem'. At the time of writing, with the first transfers of asylum seekers taking place under the reincarnated 'Pacific Solution', boats are still coming. 35 vessels carrying 2,295 asylum seekers have arrived in September — a number far outstripping the capacity of Nauru and Manus Island to accommodate them.<sup>69</sup>



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67. Elibritt Karlson, *Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011*, Laws and Digest Bills Section, Pages 14 & 15 Parliamentary Library, Commonwealth of Australia September 22, 2011.

68. Joint Select Committee on *Australia's Immigration Detention Network* March 30, 2012 Australian Parliament.

69. Lainai Vasek, *Record Month for Asylum Seekers*, The Australian, October 1, 2012.