

# AUSTRALIA MAKES A U-TURN WITH THE REVIVAL OF THE PACIFIC SOLUTION: SHOULD ASYLUM SEEKERS FIND A NEW DESTINATION?

## I. INTRODUCTION

“The picture we had in our mind changed suddenly because the Australian authority started to treat us like criminals. They transferred us to the Detention Centre in the middle of the desert, far, far away from any people. We were just behind the razor wires with security around us all the time, day and night, watching us.”<sup>1</sup>

This was the experience shared by a myriad of the 1,637<sup>2</sup> asylum seekers who remained detained in Australian offshore detention centers between 2001 and February 2008<sup>3</sup> while their asylum claims were processed and reviewed.<sup>4</sup> Mandatory detention in Australia is not a new policy,<sup>5</sup> nor is the country’s policy of offshore processing, known as the “Pacific Solution,”<sup>6</sup> which was formally ended on February 8, 2008.<sup>7</sup> However, what is new is the resurrection of the Pacific Solution by Prime Minister Julia Gillard just four years after she described the policy as “costly, unsustainable and wrong as a matter of principle.”<sup>8</sup>

Human rights and refugee advocacy groups<sup>9</sup> widely criticized the Pacific Solution as being “contrary to the spirit and the letter of

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1. LINDA BRISKMAN, CHRIS GODDARD & SUSIE LATHAM, HUMAN RIGHTS OVERBOARD: SEEKING ASYLUM IN AUSTRALIA 113 (2008).

2. JANET PHILLIPS & HARRIET SPINKS, DEP’T OF PARLIAMENTARY SERVICES, IMMIGRATION DETENTION IN AUSTRALIA 10 (2013), available at [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1311498/upload\\_binary/1311498.pdf](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1311498/upload_binary/1311498.pdf).

3. *Id.*

4. *Id.* at 9.

5. GEORGE VENTURINI, AUSTRALIA’S MALTREATMENT OF ASYLUM SEEKERS AND REFUGEES 4(2012), available at <http://www.countercurrents.org/venturini031012.pdf>. “The policy of mandatory detention in Australia—that is the legal requirement to detain all non-citizens without a valid visa—was introduced by the Keating (Labor) Government in 1992 in response to a wave of Indochinese boat arrivals.” *Id.*

6. *Id.* at 13.

7. *Id.* at 30.

8. Kathy Marks, *Julia Gillard Revives Plans to Deport Australia’s Boat Refugees*, INDEPENDENT (Aug. 14, 2012), <http://www.independent.co.uk/news/world/australasia/julia-gillard-revives-plans-to-deport-australias-boat-refugees-8038721.html>.

9. VENTURINI, *supra* note 5, at 35 (UNHCR describing the policy as “deeply problematic”). Richard Towels of the UNHCR went on to explain, “[m]any bona fide refugees caught by the policy spent long periods of isolation, mental hardship and uncertainty and prolonged separation from their families.” *Id.* at 30. See also PHILLIPS & SPINKS, *supra* note 2 at 34–35. Research collated by the International Detention Coalition found that the common arguments put forward include:

international law, is inhumane, is largely ineffective in reducing/containing the number of unauthorised arrivals and . . . economically very costly.”<sup>10</sup> Nonetheless, after an increase in deaths at sea,<sup>11</sup> subjection to political attack for soft border protection,<sup>12</sup> and failed attempts to introduce alternative measures to deal with the increasing number of asylum seekers arriving in Australia by boat,<sup>13</sup> Prime Minister Gillard agreed to opposition pleas to reopen offshore detention centers.<sup>14</sup>

The purpose of this Note is to examine how, if at all, the reintroduced Pacific Solution differs from the highly criticized Pacific Solution of the Howard Government, and whether the Pacific Solution serves its purpose of discouraging new arrivals.<sup>15</sup> Part II of this Note provides a historical overview of Australia’s refugee policy and the Pacific Solution; Part III examines international law relating to the Pacific Solution and the humanitarian and economical issues involved in such examination; and Part IV recommends changes that should be made to the Pacific Solution to ensure that Australia’s U-turn is a step in the right direction.

Detention is not an effective deterrent of asylum seekers and irregular migrants in either destination or transit contexts. Detention fails to impact on the of destination country and does not reduce numbers of irregular arrivals. Studies have shown asylum seekers and irregular migrants either are not aware of detention policy or its impact in the country of destination; may see it as an inevitable part of the journey; and do not convey the deterrence message to others back to those in the country of origin. Detention undermines an individual’s right to liberty and places them at greater risk of arbitrary detention and human rights violations.

*Id.* See also Matt Siegel, *Reversal on Immigration Policy in Australia*, N.Y. TIMES (Aug. 15, 2012), <http://www.nytimes.com/2012/08/16/world/asia/immigration-reform-moves-forward-in-australia.html>. Domestic and international groups say, “the practice is cruel and violates Australia’s obligations under the United Nations refugee convention.” *Id.*

10. VENTURINI, *supra* note 5, at 40.

11. James Grubel, *Australia Reopens Asylum Detention in Nauru Tent City*, CHI. TRIB. (Sept. 14, 2012), [http://articles.chicagotribune.com/2012-09-14/news/sns-rt-us-australia-asylumbre88d071-2012-0913\\_1\\_auru-asylum-seekers-pacific-solution](http://articles.chicagotribune.com/2012-09-14/news/sns-rt-us-australia-asylumbre88d071-2012-0913_1_auru-asylum-seekers-pacific-solution) (explaining 200 died in December 2011 when overcrowded boat sank off the coast; 50 asylum seekers died in 2010 when their boat was thrown onto rocks at Christmas Island).

12. *Id.*

13. PHILLIPS & SPINKS, *supra* note 2, at 10.

14. See Grubel, *supra* note 11.

15. Matthew Pennington, *Australian Says Asylum Seeker Policy, Criticized by Rights Groups, is More Humane*, WASH. POST (Sept. 24, 2012), [http://www.washingtonpost.com/national/australian-says-asylum-seeker-policy-criticized-by-rights-groups-is-more-humane/2012/09/24/597f187c-067b-11e2-9eea-333857f6a7bd\\_story.html](http://www.washingtonpost.com/national/australian-says-asylum-seeker-policy-criticized-by-rights-groups-is-more-humane/2012/09/24/597f187c-067b-11e2-9eea-333857f6a7bd_story.html) (Foreign Minister Bob Carr explained, “plans to send asylum seekers to Papa New Guinea and the remote Pacific Island of Nauru for screening was designed to deter human smuggling and would be more humane for the would-be refugees”).

## II. HISTORICAL BACKGROUND ON AUSTRALIA'S REFUGEE POLICY AND THE PACIFIC SOLUTION

Australia historically supported strict immigration policies due to racial and ethnic discrimination, commonly referred to as the “White Australia” policy.<sup>16</sup> The Immigration Restriction Act of 1901<sup>17</sup> used a difficult language test to favor Europeans and subtly exclude uneducated non-Europeans from admission.<sup>18</sup> Legislation following World War II concentrated on the removal of “Asian and other non-white migrants”<sup>19</sup> who fled to Australia to evade the war. In fact, to ensure that immigrants permitted to enter between the 1940s and 1950s did not compete with citizens for union jobs, legislation required immigrants to sign two-year contracts allowing the Australian government to determine their initial employment.<sup>20</sup>

The 1958 obliteration of the Immigration Restriction Act of 1901 and the abolishment of the “White Australia” policy by the Whitlam Labor Government in 1973 marked a movement towards migration policies absent overt racism and discrimination.<sup>21</sup> This movement continued as a bipartisan effort made by successive governments to foster the development of improved non-discriminatory migration legislation.<sup>22</sup> Since 1945, Australia has admitted approximately half a million refugees, making it “one of the highest rates of refugee resettlement per capita among industrialized states.”<sup>23</sup> This has contributed to the international

16. Emily C. Peyser, “Pacific Solution”? *The Sinking Right To Seek Asylum In Australia*, 11 PAC. RIM. L. & POL’Y J. 431, 436 (2002). See also Robert Birrell, *Immigration Control in Australia*, 534 ANNALS AM. ACAD. POL. & SOC. SCI. 106, 107–08 (1994). The central idea of “White Australia” was “the creation of a nation free of Old World social and religious cleavages, in which all could live a dignified lifestyle. It was believed that the importation of migrants who were Asians or Pacific Islanders would undermine these ideals by degrading the dignity of manual labor.” *Id.*

17. The Immigration Restriction Act 1901 was renamed the Immigration Act 1901 in 1912, and repealed by the Migration Act 1958.

18. See Peyser, *supra* note 16. See also MARY CROCK, IMMIGRATION AND REFUGEE LAW IN AUSTRALIA 13 (1998). The Immigration Restriction Act 1901 required applicants to “write out at dictation and sign in the presence of an officer, a passage of fifty words in length in an European language directed by the officer.” *Id.* (quoting Immigration Restriction Act 1901 §3(a)).

19. Peyser, *supra* note 16, at 436.

20. See Birrell, *supra* note 16, at 108.

21. See Peyser, *supra* note 16, at 436.

22. “In 1973, the short-lived Whitlam Government took bold steps to remove race as a factor in Australia’s immigration policies. The Fraser Coalition Government, which came into office in 1975, and the succeeding Hawke Labor Government in 1983, continued to stress multiculturalism such that Asia became a main source of immigrants in the 1980s and 1990s.” *Id.*

23. Tara Magner, *A Less Than ‘Pacific’ Solution for Asylum Seekers in Australia*, 16 INT’L J. REFUGEE L. 54, 58–59 (2004).

perception of Australia as a “leader among nations”<sup>24</sup> in providing protection for refugees.<sup>25</sup>

However, this perception is lost with regard to Australia’s policy on “boat people.”<sup>26</sup> Initially, the Australian public received the first influx of boat people, seeking asylum from the aftermath of the Vietnam War (1976-81), with sympathy.<sup>27</sup> Sympathy quickly turned into antipathy as continuing arrivals,<sup>28</sup> referred to in the press as an “invasion, flood and yellow peril,”<sup>29</sup> created a skewed perception that Australia was losing control over its borders.<sup>30</sup> In reality, “[t]he number of unauthorized arrivals in Australia—whether by boat or other manner of transportation—is . . . rather small by comparison to other industrialized asylum-providing states.”<sup>31</sup> By the late 1970s Australia had three immigration detention facilities in Sydney, Perth, and Melbourne,<sup>32</sup> although only a little more than 2,000 people embarked to Australia in the first wave of Indochinese boat arrivals (1976-81).<sup>33</sup>

24. *Id.* at 58.

25. *Id.*

26. JANET PHILLIPS & HARRIET SPINKS, DEP’T OF PARLIAMENTARY SERVICES, BOAT ARRIVALS IN AUSTRALIA SINCE 1976 1(2013), available at [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1782447/upload\\_binary/1782447.pdf](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1782447/upload_binary/1782447.pdf). “Boat people is a term used in the media and elsewhere to describe asylum seekers who arrive by boat or attempt to arrive by boat without authority to enter Australia.” The Department of Immigration and Citizenship uses the term ‘unauthorized boat arrivals’ or ‘unlawful boat arrivals’. *Id.* at 21. See also Magner, *supra* note 23.

27. See PHILLIPS & SPINKS, *supra* note 2, at 2.

28. *Id.* at 2–3. “The initial wave of boat people comprised 56 boats from Vietnam containing a total of about 2100 people. The first arrived in Northern Australia in April 1976 and the last in August 1981. From November 28, 1989 to January 27, 1994 another eighteen boats arrived in a second wave of boats carrying 735 people.” *Id.*

29. See PHILLIPS & SPINKS, *supra* note 26, at 6.

30. *Id.* at 7. See, e.g., PHILLIPS & SPINKS, *supra* note 2, at 5. See also Katharine Betts, *Boatpeople and Public Opinion in Australia*, 9 PEOPLE & PLACE 34 (2001). Sociologist Katharine Betts analyzed opinion poll data on the issue of boat arrivals from the previous twenty-five years and her analysis showed that in the late 1970s, 60% of Australian’s wanted to let a limited number of refugees arriving by boat stay, between 7% and 13% wanted to let any number stay, and between 20% and 32% wanted to stop them from staying. *Id.* at 40. In 1993, 44% of people wanted to send boat people straight back without assessing their claims, and 46% approved of holding boat people in detention while their claims were being assessed. *Id.* at 41. Only 7% believed boat arrivals should be allowed to stay. *Id.* In September 2001, 77% of Australians supported the Howard Government’s decision to refuse entry to the *Tampa* and 71% believe boat arrivals should be detained for the duration of the processing of their asylum application. *Id.* at 41–42.

31. See Magner, *supra* note 23, at 59.

32. See PHILLIPS & SPINKS, *supra* note 2, at 3. “[M]ost of the Indochinese asylum seekers arriving from 1976 to 1981 were housed in Sydney’s Westbridge Migrant Centre . . . . They were not allowed to leave the Centre during processing and had to report for rollcall daily.” *Id.*

33. *Id.* at 2.

The next wave of boat people, who arrived beginning in 1989,<sup>34</sup> were met with the enactment of the Migration Legislation Amendment Act 1989, which “allowed officers to arrest and detain anyone suspected of being an ‘illegal entrant.’”<sup>35</sup> This new policy essentially called for the “‘administrative detention’ for all people entering Australia without a valid visa . . . while their immigration status was resolved.”<sup>36</sup> Due to the relatively limited number of arrivals, some argued that “policy responses by governments to unplanned migration in Australia over the years [has] been excessive.”<sup>37</sup>

Nonetheless, these protests did not stop the Keating Government from introducing mandatory immigration detention for unauthorized arrivals in 1992 with bipartisan support.<sup>38</sup> Initially, the Migration Amendment Act 1992<sup>39</sup> was understood to be a “temporary and exceptional measure”<sup>40</sup> used to address “designated persons.”<sup>41</sup> Subsequently, The Migration Reform Act 1992<sup>42</sup> extended mandatory detention to *all* ‘unlawful non-citizens’<sup>43</sup> when the Act commenced on September 1, 1994. The Act made a distinction between visa “overstayers” and boat people in that the former were able to avoid detention by acquiring lawful status with the grant of a

34. *Id.* at 4. Between November 1989 and January 1994, eighteen boats arrived carrying mostly Cambodians, Vietnamese and Chinese nationals. *Id.*

35. *Id.* at 3.

36. *Id.*

37. *See* PHILLIPS & SPINKS, *supra* note 26, at 10.

38. *See* PHILLIPS & SPINKS, *supra* note 2, at 5.

39. *Id.*

40. *Id.*

41. *Id.* Designated persons referred to Indochinese unauthorized boat arrivals. *Id.* The rationale given by then immigration minister, Gerry Hand, was:

The Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community . . . this legislation is only intended to be an interim measure. The present proposal refers principally to a detention regime for a specific class of persons. As such it is designed to address only the pressing requirement of the current situation. However, I acknowledge that it is necessary for wider consideration to be given to such basic issue as entry, detention and removal of certain non-citizens.

*Id.*

42. *See id.* “The Act established a new visa system making a distinction between a ‘lawful’ and ‘unlawful’ non-citizen. Under Section 13 of the Act, a migration officer had an obligation to detain any person suspected of being unlawful. The Act removed the 273-day detention limit which had been applied under the Migration Amendment Act 1992. Overstayers could apply for a bridging visa, which allowed them to stay in the community while their claims were assessed.” *Id.* at 6.

43. Unlawful non-citizen is defined as “a national from another country who does not have the right to be in Australia; that is they do not hold a valid visa. The majority of unlawful non-citizens in Australia at any given time have either overstayed the visa issued to them or are people who have had their visa cancelled.” PHILLIPS & SPINKS, *supra* note 26, at 28.

bridging visa.<sup>44</sup> In contrast, bridging visas were not made available to boat people.<sup>45</sup> The Act also allocated liability to an unlawful non-citizen for the costs of his or her immigration detention due to the high costs of mandatory detention.<sup>46</sup>

The purpose of extending mandatory detention to all unlawful non-citizens was to “effectively regulate not only the determination of refugee status but also the removal of people who do not establish an entitlement to be in Australia.”<sup>47</sup> Successive governments have claimed that mandatory detention is an integral part of supporting “the integrity of Australia’s immigration program” and ensuring “the effective control and management of Australia’s borders.”<sup>48</sup> When John Howard won the federal election on March 2, 1996, he was sworn in as the Prime Minister of a country “preoccupied with domestic control over transnational human movement.”<sup>49</sup> The Howard Government sustained this preoccupation by proposing legislation designed to reduce further boat arrivals and limit the number of people in detention.<sup>50</sup>

This legislation began with the introduction of Temporary Protection Visas (“TPVs”) in October of 1999.<sup>51</sup> TPVs allowed for many detainees who had been granted refugee status to be released into the community,

44. See PHILLIPS & SPINKS, *supra* note 2, at 7.

45. *Id.* In a speech, Minister Gerry Hand explained the Government’s rationale:

In the Migration Reform Bill currently before the House I propose a range of measures to enhance the Government’s control of people who wish to cross our borders. . . . At present, we have an array of laws which govern detention and removal, depending upon how a person arrived in Australia. This is confusing to the public and administrators alike. The Bill will provide for a uniform regime for detention and removal of persons illegally in Australia. . . . Unlawful non-citizens who satisfy prescribed criteria will be able to acquire lawful status and release from detention by the grant of a bridging visa. Bridging visas will not be available to people who arrive in Australia without authority. Depending on their circumstances, they will be immediately removed from Australia or will be subject to detention until any claim they wish to make has been resolved. . . .

The Department of Immigration and Ethnic Affairs also argued that there was a sound basis for the mandatory detention of anyone who had clearly bypassed the offshore entry processes required by Australia’s universal visa system. Visa overstayers on the other hand had ‘submitted themselves to a proper application and entry process offshore.’

*Id.* at 6–7.

46. *Id.* at 6.

47. See PHILLIPS & SPINKS, *supra* note 26, at 11.

48. See PHILLIPS & SPINKS, *supra* note 2, at 7 (explaining that supporters of Australia’s mandatory detention have claimed it is an integral part of highly developed visa and border controls necessary to maintain the integrity of world class migration and refugee resettlement programs).

49. Jane McAdam & Kate Purcell, *Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum*, 27 AUST. YBIL 87, 92 (2008).

50. See PHILLIPS & SPINKS, *supra* note 2, at 8.

51. *Id.*

but only on a temporary basis.<sup>52</sup> Although TPVs were widely criticized<sup>53</sup> by many, this did not discourage Howard from pushing a step further in response to the events of August 2001.

On August 26, 2001, Australian search and rescue authorities located the “biggest boatload of asylum seekers ever to attempt to reach” Australia<sup>54</sup> between Indonesia and Christmas Island.<sup>55</sup> The sinking boat<sup>56</sup> was in need of assistance when Captain Arne Rinnan of a Norwegian container ship,<sup>57</sup> called the *MV Tampa*, diverted from his route from Fremantle to Australia in order to respond to a rescue request from the Australian government.<sup>58</sup> The *Tampa* rescued the passengers and headed toward Indonesia, the closest port.<sup>59</sup> However, in acceding out of fear<sup>60</sup> to passenger demands to be taken to Christmas Island in order to seek asylum in Australia, Captain Rinnan reversed course and headed for Christmas Island.<sup>61</sup>

Before the *Tampa* reached Australian territorial waters, Captain Rinnan received a note from an Assistant Secretary of the Department of

52. *Id.* The Howard Government believed introduction of TPVs “would remove incentives for asylum seekers who were considering making the journey to Australia by boat.” *Id.* See also Peyser, *supra* note 16, at 448 (explaining the TPV was introduced after the number of unauthorized boat people rose from 921 in fiscal year 1998–99 to 4175 in 1999–00 in attempt to counterbalance the increase in numbers). “In order to discourage the perception of Australia as a soft target, asylum seekers who arrive illegally, e.g., by boat and without a visa, and who are owed protection obligations by Australia, are only provided with a temporary residence solution.” *Id.*

53. TPVs were criticized “for only providing protection for a limited period of time (three years initially); not allowing refugees to sponsor family members under the family reunion program (with the result that more family groups began to arrive by boat); and not affording access to the full range of government service provided to refugees with permanent visas.” PHILLIPS & SPINKS, *supra* note 2, at 9.

54. See Peyser, *supra* note 16, at 431. See also Martin Flynn & Rebecca LaForgia, *Australia’s Pacific Solution to Asylum Seekers*, 2002 LAWASIA J. 31, 32 (2002) (explaining the boat was a twenty meter wooden fishing boat with an Indonesian crew and 433 predominantly Afghan passengers aboard).

55. See Flynn & LaForgia, *supra* note 54, at 32.

56. Mary Crock, *In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows*, 12 PAC. RIM L. & POL’Y J. 49, 53 (2003).

57. See Flynn & LaForgia, *supra* note 54 (describing the Tampa as a standard container ship that had a crew of twenty-seven and was licensed to carry no more than fifty people). See also Magner, *supra* note 23, at 53.

58. See Magner, *supra* note 23, at 53.

59. See Flynn & LaForgia, *supra* note 54.

60. See McAdam & Purcell, *supra* note 49, at 93 (explaining Captain Rinnan received advice from Norwegian healthcare expert that ten unconscious survivors and one pregnant woman in considerable pain was a massive crisis). See also Penelope Mathew, *Current Development: Australian Refugee Protection in the Wake of the Tampa*, 96 AM. J. INT’L L. 661 (2002) (explaining Captain Rinnan was pressured into changing course by five of his passengers, who had threatened to commit suicide).

61. See Flynn & LaForgia, *supra* note 54.

Immigration (“DIMA”) on August 27 directing him not to enter Australian territorial waters and not to advance on Christmas Island.<sup>62</sup> Captain Rinnan was advised that if he attempted to disembark the asylum seekers aboard within Australia, he would subsequently be “subject to prosecution under the Migration Act 1958 for people smuggling.”<sup>63</sup> As a result, the *Tampa* hovered approximately 13.5 nautical miles from Christmas Island for three days.<sup>64</sup> Soon thereafter, the captain issued a distress signal as the *Tampa* was only equipped to hold 50 crewmembers, not provide basic services to 433 rescued passengers.<sup>65</sup> Concerned about declining health and safety conditions<sup>66</sup> on board, Captain Rinnan entered Australian waters despite Australia’s prior orders.<sup>67</sup>

Following government orders, Special Air Service Forces seized control of the *Tampa* in order to prevent passengers from disembarking.<sup>68</sup> Ultimately, arrangements were made for New Zealand<sup>69</sup> and Nauru<sup>70</sup> to accept the asylum seekers with Papua New Guinea serving as a transit point.<sup>71</sup> This marked the beginning of Australia’s new policy: the Pacific

62. *Id.* The legal basis for the Australian government’s refusal to disembark the rescued asylum seekers was never made entirely clear, although Howard’s mantra about border control and national security certainly played a domestic political role. The Howard government skillfully manipulated the events of 9/11 to suggest that the asylum seekers on board the *Tampa* might themselves be terrorists and thus presented a danger to the security of Australia, harnessing public support for the ensuing Pacific Solution. *See also* McAdam & Purcell, *supra* note 49, at 93. Prime Minister John Howard “vowed that Australia would send a message to a rising tide of illegal immigrants: the government would not allow the asylum seekers to set foot on Australian soil.” Magner, *supra* note 23, at 54.

63. *See* McAdam & Purcell, *supra* note 49, at 93–94.

64. *Id.* at 93.

65. *See* Magner, *supra* note 23, at 54.

66. *See* McAdam & Purcell, *supra* note 49, at 93 (explaining asylum seekers plead and threatened that they would jump overboard if taken to Indonesia). *See also* Mathew, *supra* note 60 (explaining Captain Rinnan alerted Australian officials of scarcity of food and water on board and four persons on board were unconscious, one had a broken leg, and three were pregnant women). *See also* Flynn & LaForgia, *supra* note 54 (describing Captain Rinnan’s concern about safety of crew and medical conditions of asylum seekers because several were unconscious, one had a broken leg, and two pregnant women were in pain).

67. *See* Magner, *supra* note 23, at 54.

68. *See* Peyser, *supra* note 16, at 432.

69. *See* Magner, *supra* note 23, at 54 (explaining New Zealand, a party to the Convention Relating to the Status of Refugees, offered to accept up to 150 asylum seekers).

70. *See* Magner, *supra* note 23, at 55 (explaining Australia hastily negotiated agreement with Nauru, a non-party to the Convention, to process refugee claims). *See also* Flynn & LaForgia, *supra* note 54, at 33 (describing how Australia agreed to pay all of Nauru’s costs of holding and processing the asylum seekers).

71. *See* Flynn & LaForgia, *supra* note 54, at 33. *See also* Savitri Taylor, *The Pacific Solution or a Pacific Nightmare?: The Difference Between Burden Shifting and Responsibility Sharing*, 6 ASIAN-PACIFIC L. & POL’Y J. 1 (2005) (explaining how Australia took advantage of fact that there is no clear obligation imposed on any state to take responsibility for rescuees who did not wish to return home in international law).

Solution.<sup>72</sup> The Pacific Solution required asylum seekers who arrived aboard unauthorized vessels at excised places to be transferred to offshore processing centers on Nauru<sup>73</sup> and Manus Island in Papua New Guinea<sup>74</sup> while their asylum claims were assessed.<sup>75</sup>

The Pacific Solution consisted of three key pieces of legislation.<sup>76</sup> In September 2001, Parliament passed the Border Protection Act, the Migration Amendment (Excision from Migration Zone) Act, and the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act. The Border Protection Act retrospectively validated the actions taken by Australia with respect to the *Tampa* by “preventing the commencement or continuance of any civil or criminal proceeding challenging actions covered by the legislation.”<sup>77</sup> The Border Protection Act also prescribed new border protection powers, including interdiction<sup>78</sup> and authorization of officers to remove people on detained vessels from Australia.<sup>79</sup> In addition, the Border Protection Act clarified that the “exercise of any executive power of the Commonwealth to protect Australia’s borders” was not prevented by the Act.<sup>80</sup>

72. See Peyser, *supra* note 16.

73. JANET PHILLIPS & HARRIET SPINKS, DEP’T OF PARLIAMENTARY SERVICES, THE ‘PACIFIC SOLUTION’ REVISITED: A STATISTICAL GUIDE TO THE ASYLUM SEEKER CASELOADS ON NAURU AND MANUS ISLAND 10 (2012), available at [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1893669/upload\\_binary/1893669.pdf](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1893669/upload_binary/1893669.pdf). “The processing facility in Nauru comprise[d] two separate sites known as Topside and State House. . . . The Government of Nauru [agreed] that up to 1500 people may be accommodated in the processing facilities at any one time, under arrangements” which were to expire on June 30, 2005. *Id.* See also Taylor, *supra* note 71, at 22. “Nauru agreed to host 283 of the Tampa asylum seekers and 237 other asylum seekers intercepted by the Australian Navy. In return, Australia agreed to a AUD \$20 million assistance package (equal to approximately twenty percent of Nauru’s gross domestic product).” *Id.* at 21.

74. See Taylor, *supra* note 71, at 29. “Papua New Guinea agreed to host an identified group of 225 asylum seekers and to consider hosting further groups of asylum seekers” until an expiry date of October 21, 2002. “The only formal funding . . . Papua New Guinea received in exchange for its assistance was that Australia would meet all the costs associated with the asylum seekers.” *Id.*

75. See PHILLIPS & SPINKS, *supra* note 26, at 14. See also Mathew, *supra* note 60, at 662.

76. *Id.* See also Crock, *supra* note 56, at 70.

77. See Crock, *supra* note 56, at 70.

78. See McAdam & Purcell, *supra* note 49, at 96. The Australian Defence Force developed an operational strategy under the code name “Operation Relax.” “Operation Relax marked a significant shift in Australia’s border protection strategy, which had previously been limited to the reactive detection, interception, and escort of unauthorized boats in Australian waters to Australian ports. It extended the government’s new border protection policy beyond the border itself by combining operational strategies of disruption, interception, and deterrence on the high seas. The fundamental aim was to prevent the entry of unauthorized vessels into territorial waters and thereby deter asylum seekers . . . from targeting Australia.” *Id.*

79. See Mathew, *supra* note 60, at 663.

80. *Id.*

The Migration Amendment (Excision from Migration Zone) Act introduced a new concept of place, the excised offshore place,<sup>81</sup> and a new concept of asylum seeker,<sup>82</sup> the offshore entry person. The Act gave the Prime Minister discretion to declare certain parts of Australia's offshore territory to be outside the "migration zone" to prevent asylum seekers from exploiting these locations in order to disembark and claim asylum.<sup>83</sup> As a result, Christmas, Ashmore, Cartier, and Cocos (Keeling) Islands were excised from Australia's migration zone.<sup>84</sup> Non-citizens arriving unlawfully at the aforementioned places, referred to as "offshore entry persons," were deemed not to have entered Australia's migration zone and were unable "to make a valid application for a visa to Australia, including Protection Visas, unless the bar on the visa application process was lifted at the discretion of the Minister."<sup>85</sup> Moreover, denial of a visa disallowed further recourse to rights, as an appeal of the Minister's decision was not permitted.<sup>86</sup> "The result of this law is a complete denial of access to refugee tribunals, appeal procedures, and legal representation—in short, to the refugee protection system of Australia."<sup>87</sup>

The Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act allows Australian officials to detain offshore entry person in Australia or remove them, with reasonable force if necessary, to a declared country.<sup>88</sup> The Prime Minister has the authority to declare that a particular country:

- (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
- (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and

81. See Flynn & LaForgia, *supra* note 54, at 40 (defined excised offshore place to mean Christmas Island, Ashmore and Cartier Islands, Cocos (Keeling) Island, Australian seas and resources installations, any prescribed island of a State or Territory).

82. *Id.* (defined offshore entry person as an asylum seeker who enters an excised offshore place without permission).

83. See Crock, *supra* note 77.

84. See Mathew, *supra* note 60, at 664.

85. See PHILLIPS & SPINKS, *supra* note 2, at 10.

86. Catherine Skulan, *Australia's Mandatory Detention of "Unauthorized" Asylum Seekers: History, Politics and Analysis Under International Law*, 21 GEO. IMMIGR. L.J. 61, 74 (2006).

87. *Id.*

88. See Flynn & LaForgia, *supra* note 54, at 40 (defined declared country as one that the Minister has declared in writing to be a country that meets certain criteria according to Section 198A(3) *Migration Act 1958*, including the provision of access, for persons seeking asylum, to effective procedures for assessing their need for protection).

(iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and

(iv) meets relevant human rights standards in providing that protection.<sup>89</sup>

Australia negotiated agreements with Nauru and Papua New Guinea to be declared countries and admit asylum seekers.<sup>90</sup> The Act also extended the 1999 version of the TPV by creating two new visa classes, for asylum seekers intercepted in transit to Australia<sup>91</sup> and offshore entry persons.<sup>92</sup>

### III. PRECARIOUS PACIFIC SOLUTION: INHUMANE AND CONTRAVENTION OF INTERNATIONAL LAW?

Australia is a signatory to virtually every major international human rights agreement, including the International Covenant on Civil and Political Rights (“ICCPR”),<sup>93</sup> the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”),<sup>94</sup> the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (“CAT”),<sup>95</sup> and the Convention on the Rights of the Child (“CRC”).<sup>96</sup>

89. Mathew, *supra* note 60, at 664.

90. *Id.*

91. *Id.* Visa subclass 451 applies to people who spend more than seven days in another safe country en route to Australia, but who is not an offshore entry person. Visa subclass 451 is only temporarily issued for five years. They may apply for a permanent visa after four and a half years, and their family can only join them after they successfully obtain a permanent visa. *See also* Skulan, *supra* note 86, at 76.

92. *Id.* Visa subclass 447 is for offshore entry persons. Visa 447 is granted for three years, and holders of this visa are precluded from applying for a permanent protection visa. *See also* Skulan, *supra* note 86, at 76.

93. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. The ICCPR is a multilateral treaty that obligates countries that have ratified the treaty to respect and preserve basic civil and human rights of individuals such as the right to life and to human dignity, equality before the law, freedom of speech, assembly and association, religious freedom and privacy, freedom from torture, ill-treatment and arbitrary detention, gender equality, fair trial and minority rights. The ICCPR is a part of the International Bill of Human Rights. Australia signed the treaty on December 18, 1972 and ratified on August 13, 1980.

94. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. The ICESCR is a multilateral treaty that obligates its parties to grant economic, social, and cultural rights to individuals. The ICESCR is a part of the International Bill of Human Rights. Australia signed the treaty on December 18, 1972 and ratified on December 10, 1975.

95. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. The Convention Against Torture requires its signatories to prevent torture within their respective states and forbids them from returning people to their home country if there is likelihood the individual will be tortured. Australia signed the treaty on December 10, 1985 and ratified on August 8, 1989.

Australia was also the sixth country to sign the 1951 Convention Relating to the Status of Refugees and is a party to its 1967 Protocol.<sup>97</sup> Australia defends its policy of mandatory detention of unauthorized asylum seekers pursuant to its sovereign power to enact laws to protect its borders.<sup>98</sup> While this power is authorized, it may not be used by Australia to breach its obligations of international law.

Article 27 of the Vienna Convention on the Law of Treaties states that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>99</sup> Additionally, article 26 of the Vienna Convention on the Law of Treaties mandates that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>100</sup> Australia’s mandatory detention regime contravenes these provisions and puts Australia in breach of international law.

The international standard with regard to detention can be found in article 9 of the International Covenant on Civil and Political Rights.<sup>101</sup> According to article 9(1), “no one shall be subjected to arbitrary detention.”<sup>102</sup> The term “arbitrary” goes beyond detention that is unlawful. The term has been defined by the UN Human Rights Committee as detention that includes elements of “inappropriateness, injustice, and lack of predictability.”<sup>103</sup> A man who spent six years in Australia’s mandatory

96. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. The Convention on the Rights of the Child recognizes the vulnerability of children and requires its parties to provide basic human rights to children including: right to survival, to protection from harmful influences, to develop to the fullest, and to participate fully in family, cultural, and social life. Australia signed the treaty on August 22, 1990 and ratified on December 17, 1990.

97. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. The 1967 Protocol removed geographical and temporal restrictions from the Convention. Australia joined the Convention on January 22, 1954 and the Protocol on December 13, 1973. The Convention Relating to the Status of Refugees defines who is a refugee, their rights and the legal obligations of state. The Refugee Convention, however, does not provide a right to claim asylum. “It has been long recognized that, according to customary international law, the right of asylum is a right of States, not of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a State which that individual is not a national.” See *Ruddock v. Ibrahim* (2000) 204 CLR 1, 45–46 (Austl.) (footnotes omitted).

98. See Skulan, *supra* note 86, at 93.

99. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. The Vienna Convention on the Law of Treaties is a multilateral treaty regarding the international law on treaties between states. Australia ratified on June 13, 1974.

100. *Id.*

101. International Covenant on Civil and Political Rights, *supra* note 93.

102. *Id.*

103. Van Alphen v. Netherlands, U.N. Doc. CCPR/C/39/D/305/1988 (Aug. 15, 1990). See also GUY S. GOODWIN-GILL, ARTICLE 31 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES: NON-PENALIZATION, DETENTION, AND PROTECTION 122 (2001), available at <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3bcfdf> (affirming the principle that “arbitrary embraces not only what is illegal, but also what is unjust”).

detention identified such inappropriateness, injustice, and lack of predictability with the following testimony:

I know the feeling of humiliation because I have been humiliated. Not only me. They provoke people, they harass people, they humiliate people and they enjoy that. I never seen their regret or they feel sorry for us. Their job is simply to look after us but we been judged by them, why we came to Australia by boat. We do all the legal things, request form, ask officer for your own rights, which are not privileges. And they will deny you and provoke you. In detention, there is no law.<sup>104</sup>

Pursuant to sections 183 and 196 of Australia's Migration Act, ordering the release of asylum seekers from detention is prohibited by the courts.<sup>105</sup> This absence of judicial review puts Australia in violation of article 9(4) of the ICCPR, which affords a detainee the right "to take proceedings before a court, in order that that court may decide without delay on the lawfulness of the detention and order his release if the detention is not lawful."<sup>106</sup>

The UN Working Group on Arbitrary Detention expressed concern regarding the "lack of sufficient judicial review" when it visited Australian

104. See BRISKMAN, GODDARD, & LATHAM, *supra* note 1, at 134. See also PRAFULLACHANDRA NATWARLAL BHAGWATI, HUMAN RIGHTS AND IMMIGRATION DETENTION IN AUSTRALIA: REPORT OF THE REGIONAL ADVISOR FOR ASIA AND THE PACIFIC OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, MISSION TO AUSTRALIA (2002), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/424e6fc8b8e55fa6802566b0004083d9/bc4c8230f96684c8c1256c070032f5f1/> FILE/ (describing detention as "prison-like"). See also U.N. High Comm'r for Refugees Executive Comm., *Note on Accession to International Instruments and the Detention of Refugees and Asylum Seekers*, U.N.H.C.R. Doc. EC/SCP/44 (Aug. 19, 1986), quoted in JAMES HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 370 (2005) (explaining "asylum seekers are treated far worse than prisoners in the prison system").

105. *Migration Act 1958* (Austl.), available at <http://www.unhcr.org/refworld/docid/4afad9682.html>. Section 183 states, "a court is not to order the release from immigration detention of a designated person." *Id.* § 183. Section 196 reads as follows:

- (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
  - (a) removed from Australia under section 198 or 199; or
  - (b) deported under section 200; or
  - (c) granted a visa.
- (2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.
- (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

*Id.* § 196.

106. International Covenant on Civil and Political Rights, *supra* note 93.

detention centers in 2002.<sup>107</sup> The group was also troubled by the lack of legal aid accessible by detainees and enquired about whether “judicial proceedings meet the requirements that courts must take a decision speedily.”<sup>108</sup> These concerns revealed themselves to be warranted after Australian Lawyers for Human Rights argued in a submission to a senate committee that proposed legislation<sup>109</sup> seemed to be “aimed at intimidating lawyers rather than improving access by asylum seekers to proper legal advice as to the merits of their claim.”<sup>110</sup> Moreover, it is virtually impossible<sup>111</sup> for the general public to gain access to detention centers, the location of detention centers inhibits attorneys from meeting sufficiently with their clients, and telephone and fax communication with clients is unreliable.<sup>112</sup>

Australia also has obligations as a signatory to the 1951 Refugee Convention<sup>113</sup> and its 1967 Protocol. The protections provided in article 31 of the Refugee Convention ensure non-penalization of refugees who illegally enter or are present in a country.<sup>114</sup> “Although over eighty percent

107. United Nations Comm’n on Human Rights, Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention: Visit to Australia, 19, U.N. Doc. E/CN.4/2003/8/Add.2 (Oct. 24, 2002).

108. *Id.* at 22.

109. *See* BRISKMAN, GODDARD, & LATHAM, *supra* note 1, at 284. After refugee lawyers had success in assisting asylum seekers, the government subsequently targeted them. In March 2005, then immigration minister Amanda Vanstone announced legislation which ordered courts to consider the imposition of personal costs against lawyers and migration advisers who brought cases “which have no reasonable prospect of success.” *See, e.g.*, Press Release, Migration Litigation Reform: Better Access, More Integrity (Mar. 10, 2005), available at [http://pandora.nla.gov.au/pan/31543/20050430-0000/www.minister.immi.gov.au/media\\_releases/media05/v05041.htm](http://pandora.nla.gov.au/pan/31543/20050430-0000/www.minister.immi.gov.au/media_releases/media05/v05041.htm).

110. *See* BRISKMAN, GODDARD, & LATHAM, *supra* note 1, at 284.

111. *Id.* at 271. Many visitors experienced grave difficulty when visiting detention centers. A refugee supporter who visited Curtin detention center in January 2002 explained:

I wasn’t allowed to visit but the manager told the people inside that we decided not to visit them. They had been waiting for us for a couple of months and had written submissions for us and nominated people to talk to us. People called us quite angry, saying why have you decided not to visit. Four of us tried walking in and they stopped us and said they couldn’t get a decision on whether we were allowed because the manager had gone fishing.

Another visitor described her experience:

One time we visited with another couple and the woman wasn’t allowed to visit. She had to go back and sit in the car for three hours because she didn’t have the right type of shoes on. She was wearing sandals instead of covered-in shoes and yet the detainees were coming over in sandals. It just didn’t seem to make sense.

*Id.*

112. *Id.* at 279.

113. Convention Relating to the Status of Refugees, *supra* note 97.

114. *Id.* art. 31. Article 31(1) states:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization,

of asylum seekers who have arrived without previous authorization in Australian territory in the last few years have been recognized as refugees, Article 31 is devoid of meaning unless it also extends ‘not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith.’<sup>115</sup> As such, article 31 applies to all individuals detained in immigration centers, regardless of whether they ultimately obtain refugee status or not.

Australia’s mandatory detention regime penalizes asylum seekers who arrive illegally by boat. The Australian High Court determined in 1992 that detention laws are valid “if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered.”<sup>116</sup> Conversely, “if the detention which those sections require and authorize is not so limited . . . they will be punitive in nature.”<sup>117</sup> This interpretation by the High Court aligns with the general understanding of article 31 that “[p]rovisional detention is permitted if necessary for and limited to the purposes of preliminary investigation.”<sup>118</sup> The Australian Government reasoned that even if detention is punitive, it is permissible if a person spent at least seven days in a country where protection was available. The Government has argued that:

[A] person to whom Australia owes protection will fall outside the scope of article 31(1) if he or she spent more than a short period of time in a third country whilst traveling between the country of persecution and Australia, and settled there in safety or was otherwise accorded protection, or there was no good reason why they could not have sought and obtained effective protection there.<sup>119</sup>

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provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

*Id.*

115. Skulan, *supra* note 86, at 96–97 (citing FRANK BRENNAN, TAMPERING WITH ASYLUM: A UNIVERSAL HUMANITARIAN PROBLEM 159 (2003) (“In the last three years of the fourth wave of boat people, 82 percent of all Afghan and Iraqi applicants were found to be refugees by the primary decision makers . . .”).

116. *Chu Keng Lim v. Minister for Immigration, Local Gov’t and Ethnic Affairs* (1992), 176 CLR 1, 32 (Austl.).

117. *Id.* at 32.

118. GOODWIN-GILL, *supra* note 103, at 109.

119. Skulan, *supra* note 86, at 98 (citing Dep’t of Immigration and Multicultural and Indigenous Affairs, *Article 31—Refugees Unlawfully in the Country of Refuge: An Australian Perspective*, in

The Australian government's argument cannot be supported by interpretations of the Refugee Convention. "Article 31 was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries . . . who have 'good cause' for not applying in such country or countries. The drafters only intended that immunity from penalty should not apply to refugees who had settled, temporarily or permanently, in another country."<sup>120</sup> Australia's punitive mandatory detention is in breach of article 31(1) because of its harmful effects on detainees and foundation in deterrent objectives.

Australia also contravenes article 31(2)<sup>121</sup> of the Refugee Convention. Article 31(2) explains "after any permissible initial period of detention, States may only impose restrictions on movement which are 'necessary.'"<sup>122</sup> According to the drafting history of the Convention, article 31(2) only provides for a "provisional right of detention for a few days."<sup>123</sup> Thus, an initial period of detention should not be long. The years that some asylum seekers have been detained clearly exceeds an initial period of detention. Australia's mandatory detention regime also contravenes article 32<sup>124</sup> of the Refugee Convention.<sup>125</sup> Australia

INTERPRETING THE REFUGEES CONVENTION—AN AUSTRALIAN CONTRIBUTION 123–73, 135 (2002), available at [http://www.immi.gov.au/media/publications/refugee/convention2002/10\\_illegal.pdf](http://www.immi.gov.au/media/publications/refugee/convention2002/10_illegal.pdf).

120. *Id.* at 98–99.

121. Convention Relating to the Status of Refugees, *supra* note 97. Article 31(2) states:

The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

*Id.* art. 31(2).

122. *See* Skulan, *supra* note 86, at 99.

123. *Id.*

124. Convention Relating to the Status of Refugees, *supra* note 97. Article 32 states:

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

*Id.* art. 32.

125. Temporary protection schemes, such as Australia's TPV, seem to contravene the Refugee Convention's Article 33 obligation of nonrefoulement, because refugees, though not immediately returned, are eventually returned to their country of origin. *See* Hossein Esmaili & Belinda Wells, *The 'Temporary' Refugees: Australia's Legal Response to the Arrival of Iraqi and Afghan Boat-People*,

essentially eliminated due process for asylum seekers who arrived at territorial islands. Although asylum seekers were processed for refugee status determination at Nauru and other islands, they were subsequently ejected from Australian territory<sup>126</sup> without due process of law as required by article 32. Australia's "disproportionately harsh migration laws pertaining to boat people"<sup>127</sup> are illegal and breach international law.

#### IV. CONCLUSION: A U-TURN IN THE RIGHT DIRECTION

One of the first matters on the Labor Party's agenda when coming into power in 2007 was to do away with the Pacific Solution. Prime Minister Julia Gillard described the policy as "costly, unsustainable and wrong as a matter of principle."<sup>128</sup> However, just a few years later, Prime Minister Gillard is planning to revive the Pacific Solution. Prime Minister Gillard has been able to dodge the bullet by attributing these changes to an expert panel she appointed to break a political deadlock. "The panel, led by the former head of the defence force, Angus Houston, called for moth balled detention centers on Nauru and the Papua New Guinean Island of Manus to be reopened immediately."<sup>129</sup> The government accepted all of the expert panel's twenty-two recommendations<sup>130</sup> on the policy options available to prevent asylum seekers from attempting to get to Australia by boat.

23(3) U. NEW S. WALES L.J. 224, 238–40 (2000). *See also* Convention Relating to the Status of Refugees, *supra* note 97. Article 33 states:

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

*Id.* art. 33.

126. Peyser, *supra* note 16, at 458 ("Australia's new interpretation of the word 'territory'" excise territorial islands from migration territory, while the UNHCR asserts that international obligations apply 'whenever a state acts,' regardless of whether in territorial or extraterritorial waters.").

127. *Id.* at 459.

128. Marks, *supra* note 8.

129. *Id.*

130. A. HOUSTON, P. ARISTOTLE, & M. L'ESTRANGE, REPORT OF THE EXPERT PANEL ON ASYLUM SEEKERS (2012), available at [http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert\\_panel\\_on\\_asylum\\_seekers\\_full\\_report.pdf](http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert_panel_on_asylum_seekers_full_report.pdf).

1. The Panel recommends that the following principles should shape Australian policymaking on asylum seeker issues (paragraphs 2.6-2.22):

Under the “no advantage” principle put forth by the expert panel, asylum seekers may face lengthy periods in detention centers while their cases are assessed in order that they are not advantaged over others who have not traveled by boat.

Consequently, many refugee advocates<sup>131</sup> have renewed concerns with regard to the conditions of the offshore detention centers, the lack of scrutiny, and the mental health impacts on those held in detention centers.

The implementation of a strategic, comprehensive and integrated approach that establishes short, medium and long-term priorities for managing asylum and mixed migration flows across the region.

The provision of incentives for asylum seekers to seek protection through a managed regional system.

The facilitation of a regional cooperation and protection framework that is consistent in the processing of asylum claims, the provision of assistance while those claims are being assessed and the achievement of durable outcomes.

The application of a ‘no advantage’ principle to ensure that no benefit is gained through circumventing regular migration arrangements.

Promotion of a credible, fair and managed Australian Humanitarian Program.

Adherence by Australia to its international obligations.

2. The Panel recommends that Australia’s Humanitarian Program be increased and refocused:

The Humanitarian Program be immediately increased to 20,000 places per annum (paragraphs 3.3-3.8).

Of the 20,000 places recommended for the Humanitarian Program, a minimum of 12,000 places should be allocated for the refugee component, which would double the current allocation (paragraphs 3.3-3.8).

Subject to prevailing economic circumstances, the impact of the Program increase (recommended above) and progress in achieving more effective regional cooperation arrangements, consideration be given to increasing the number of places in the Humanitarian Program to around 27,000 within five years (paragraphs 3.3-3.8).

The Humanitarian Program be more focused on asylum seeker flows moving from source countries into South-East Asia (paragraphs 3.3-3.9).

3. The Panel recommends that in support of the further development of a regional cooperation framework on protection and asylum systems, the Australian Government expand its relevant capacity-building initiatives in the region and significantly increase the allocation of resources for this purpose (paragraphs 3.26-3.28).

4. The Panel recommends that bilateral cooperation on asylum seeker issues with Indonesia be advanced as a matter of urgency, particularly in relation to:

The allocation of an increased number of Humanitarian Program resettlement places for Indonesia (paragraphs 3.20-3.22).

Enhanced cooperation on joint surveillance and response patrols, law enforcement and search and rescue coordination (paragraphs 3.20-3.22).

Changes to Australian law in relation to Indonesian minors and others crewing unlawful boat voyages from Indonesia to Australia (paragraphs 3.20-3.22).

5. The Panel recommends that Australia continue to develop its vitally important cooperation with Malaysia on asylum issues, including the management of a substantial number of refugees to be taken annually from Malaysia (paragraphs 3.23-3.24).

*Id.*

131. PHILLIPS & SPINKS, *supra* note 2, at 10.

In the Australian Human Rights Commission's view, "there is an urgent need for the Australian Government to end the current system of mandatory and indefinite detention, and to make greater use of community-based alternatives that are cheaper, more effective and more humane than holding people in immigration detention facilities for prolonged periods."<sup>132</sup>

"During the past two decades, successive governments have introduced legislation specifically aimed at restricting the legal appeal rights of non-Australian citizens: they are routinely denied legal aid; their detention is not judicially reviewable; they have no legally enforceable right to a minimum standard of care while in detention; and some are made to pay for their incarceration."<sup>133</sup> In order for the Australian government to take a step in the right direction, it must make fundamental changes with regard to the human rights issues arising from the Pacific Solution. The most fundamental changes Australia should, and are urged to, make are to remove racism,<sup>134</sup> restore human rights,<sup>135</sup> and reinstate accountability.<sup>136</sup>

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132. VENTURINI, *supra* note 5.

133. See BRISKMAN, GODDARD, & LATHAM, *supra* note 1, at 391.

134. *Id.* at 392 (steps to remove racism include: abolishing mandatory detention, restore full access to judicial review of migration decisions, ensure any immigration detention longer than 48 hours is judicially reviewed, guarantee minimum standards in detention and a legal right to enforce them).

135. *Id.* (steps to restore human rights include: incorporate human rights conventions into domestic law, close all isolation facilities in detention centers, offer non-detention-based reparation assistance to failed asylum seekers, grants Australian citizenship to asylum seekers found to be stateless).

136. *Id.* at 393 (steps to reinstate accountability include: hold a coronial investigation into the deaths of asylum seekers, immigration detainees and those refused asylum in Australia, allow media, human rights groups, religious leaders, and politicians to make unannounced visits to detention centers, resource an independent authority to effectively investigate immigration detainee complaints and make binding recommendations for their resolution).

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