# Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011

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Law and Bills Digest Section

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Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011

Date introduced: 21 September 2011

House: House of Representatives

Portfolio: Immigration and Citizenship

Commencement: The day after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of this Bill is to amend the Migration Act 1958 (the Migration Act) and the Immigration (Guardianship of Children Act) 1946 (IGOC Act) to:

• replace the existing framework in the Migration Act for taking offshore entry persons to another country
• clarify that guardianship obligations under the IGOC Act do not affect the operation of the Migration Act, particularly in relation to the making and implementation of any decision to remove, deport or take a non-citizen child from Australia, and
• replace discretionary detention with mandatory detention for all asylum seekers entering Australia at an ‘excised offshore place’ such as Christmas Island.

Background

Existing statutory requirements under the Migration Act

Existing section 198A of the Migration Act contains the statutory basis upon which asylum seekers arriving by boat can be taken by an officer (including a member of the Australian Defence Forces) from Australia to another country. The section also clarifies that people ‘being dealt with’ under this section are deemed not to be in ‘immigration detention’, as the term is defined in the Migration

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Act. However, the power to transfer asylum seekers to a foreign country is dependent upon a declaration in respect of the country being in force under subsection 198A(3). Existing paragraph 198A(3)(a) provides that the Minister may declare, in writing, that a specified country:

- provides access, for persons seeking asylum, to effective procedures for assessing their need for protection
- provides protection for persons seeking asylum, pending determination of their refugee status
- provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country, and
- meets relevant human rights standards in providing that protection.

Declarations were previously made by the former Coalition Government with respect to Nauru and Papua New Guinea. A ministerial declaration pursuant to section 198A of the Migration Act was also made by the current government with respect to Malaysia on 25 July 2011. The High Court, in the recent case of Plaintiff M70/2011 v Minister for Immigration and Citizenship (discussed below) recently clarified the requirements of this provision and ultimately held the Malaysia declaration to be invalid.

**Basis of policy commitment**

Three months after the Australian Labor Party (ALP) won the 2007 federal election the then Minister for Immigration and Citizenship, Senator Chris Evans, announced the arrival in Australia of the last refugees from Nauru and that Australia had initiated discussions with the Nauruan Government over the closure of the facilities there. This announcement was consistent with the ALP National Platform (formally adopted in April 2007) which stated ‘Labor will end the so-called Pacific Solution’.

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1. See section 5 of the *Migration Act 1958*.

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with its huge cost to Australian taxpayers. However, the Government did not subsequently seek to repeal the provision in the Migration Act which enabled the transfer of asylum seekers to a foreign country for processing.

In this context, it is relevant to note that the 2007 Platform also stated that ‘it is also in our national interest to conduct ourselves as a good international citizen, to do our fair share for those who are subject to persecution and who need protection’, and that Labor’s refugee and asylum seeker policy would be based (amongst other things) on the principle that Australia should comply with the letter and the spirit of the Refugee Convention and other relevant international instruments. The Platform also said refugee and asylum seeker policy would be based on the principle that Labor would ‘develop further multilateral solutions, recognising the importance of regional neighbours, with the aim of eradicating people smuggling, deterring secondary movement and enabling refugees to access processing and appropriate settlement outcomes’.

Similarly, though Labor’s 2009 National Platform confirmed Labor’s intention to maintain ‘the non-statutory processing on Christmas Island of persons who arrive unauthorised at an excised place’, it also reiterated that Labor would ‘continue to take all necessary steps to eradicate people smuggling by (amongst other things) ‘working in close cooperation with our regional neighbours to address people smuggling at its source and prevent attempts at dangerous sea journeys by people seeking to enter Australia unlawfully’. The party also pledged to pursue ‘strong regional and international arrangements to deter secondary movements of asylum seekers’.

By July 2010, in the context of increasing numbers of irregular maritime arrivals (IMAs), newly appointed Prime Minister Julia Gillard announced that the Government had begun having discussions with regional neighbours about the possibility of establishing a regional processing centre for the purpose of receiving and processing irregular maritime arrivals. More explicitly, she announced that she had recently discussed with President Ramos Horta of East Timor ‘the possibility of establishing a regional processing centre for the purpose of receiving and processing ... irregular entrants to the region’. Though very little detail about the proposal was provided, the Prime Minister argued the policy would not be a new ‘Pacific Solution’, rather a ‘sustainable, effective regional protection framework’.

The Fourth Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime (also known as the Bali Process), co-chaired by Australia and Indonesia, was

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7. Ibid.
10. Ibid.

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held in Indonesia in March 2011. Not insignificantly, participating Ministers agreed that ‘an inclusive but non-binding regional cooperation framework would provide a more effective way for interested parties to cooperate to reduce irregular movement through the region’.¹¹ They also agreed that ‘where appropriate and possible, asylum seekers should have access to consistent assessment processes, whether through a set of harmonised arrangements or through the possible establishment of regional assessment arrangements, which might include a centre or centres, taking into account any existing sub-regional arrangements’.¹²

On 7 May 2011 the Prime Minister announced that the Government had abandoned its previous plan to build a regional processing centre in East Timor and was investigating alternative options, including Papua New Guinea.¹³ At the same time the Prime Ministers of Australia and Malaysia jointly announced that they had agreed to enter into a bilateral agreement fully funded by Australia that would include 800 irregular maritime arrivals who arrive in Australia being transferred to Malaysia for refugee status determination; while, over the course of four years, Australia would ‘resettle’ 4000 recognised refugees already residing in Malaysia.¹⁴

‘Resettlement’ is a scheme that should be distinguished from obligations owed by state parties under the Refugee Convention to spontaneous arrivals (irregular maritime arrivals). ‘Resettlement’ is a term used to describe ‘the transfer of refugees from the country in which they have sought refuge to another state that has agreed to admit them’.¹⁵ Broadly speaking, resettlement is a mechanism which provides protection to refugees whose life, liberty, safety, health or fundamental human rights are at risk in the country in which they have sought refuge (country of first asylum).¹⁶ Refugees do not have a right to be resettled and states are not legally obligated under the 1951 Refugee Convention or any other instrument to accept refugees for resettlement. It is a voluntary scheme coordinated by the UNHCR which, amongst other things facilitates burden and responsibility sharing amongst signatory states. During the period 1 July 2009 to 30 June 2010, Australia accepted 340 refugees from Malaysia—all of whom were from Burma. During the period 1 July 2010 to 28 February 2011, Australia accepted 178 refugees from Malaysia—again, all of whom were Burmese.¹⁷

¹². Ibid.
¹⁴. Ibid.

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Nearly two months later, an *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* was signed to take effect from 26 July 2011.\(^{18}\)

By 19 August 2011 the Minister for Immigration and Citizenship, Chris Bowen, announced that the governments of Australia and Papua New Guinea had signed a Memorandum of Understanding for the establishment of an assessment centre on Manus Island. His announcement emphasised that ‘the Manus Island centre will complement the Malaysia transfer arrangement and provide further disincentive for people considering risking their lives on dangerous boat journeys’ [emphasis added].\(^{19}\)

**The High Court challenge**

On 7 August 2011 proceedings were commenced in the High Court of Australia to seek an interim injunction restraining the removal of the first group of asylum seekers to be transferred to Malaysia the following day under the bilateral Arrangement signed on 25 July 2011. Justice Hayne granted the plaintiffs interlocutory relief on the basis that there was a sufficiently serious question to be tried about the proper construction of section 198A.\(^{20}\)

On 22 and 23 August 2011 the Full Bench of the High Court convened to primarily consider whether the Minister’s Malaysia declaration had been validly made under section 198A of the Migration Act, and whether the Minister had satisfied the requirements of the IGOC Act in relation to the second plaintiff (a 16 year old Afghan citizen). On 31 August 2011 the High Court by majority (6:1) found that the Minister’s declaration had been made without power and was thus invalid. The basis for this finding, as succinctly summarised in the joint majority judgment, was that:

...the references in s 198A(3)(a) to a country that provides access and provides protection are to be construed as references to provision of access or protection in accordance with an obligation to do so. Where, as in the present case, it is agreed that Malaysia: first, does not recognise the status of refugee in its domestic law and does not undertake any activities related to the reception, registration, documentation and status determination of asylum seekers and refugees; second, is not party to the Refugees Convention or the Refugees Protocol; and, third, has made no legally binding arrangement with Australia obliging it to accord the protections required by those instruments; it was not open to the Minister to conclude that Malaysia provides the access or protections referred to in s 198A(3)(a)(i) to (iii). The Minister’s conclusions

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that persons seeking asylum have access to UNHCR procedures for assessing their need for protection and that neither persons seeking asylum nor persons who are given refugee status are ill-treated pending determination of their refugee status or repatriation or resettlement did not form a sufficient basis for making the declaration...²¹

In contrast, Heydon J (dissenting) was of the view that ‘in the absence of clear words, to read the language as calling for legal obligations to achieve the results stated in s 198A(3)(a) and for courts to enforce them is to add a fifth wheel to the coach’.²² In his Honour’s opinion, the decision to make a declaration under paragraph 198A(3)(a) is ‘a decision which pertains to the conduct of Australia’s external affairs...those dealings are within the province of the Executive’.²³

The majority also found that the Minister was precluded from removing the second plaintiff from Australia because:

A determination by the Minister (or his delegate) that an unaccompanied minor should be taken from Australia to a country declared under s 198A(3)(a) of the Migration Act would not constitute a consent in writing of the kind required by s 6A of the IGOC Act. Nor would the exercise of power to take an offshore entry person to another country pursuant to s 198A(1) fall within the operation of s 6A(4) of the IGOC Act and its provision that s 6A “shall not affect the operation of any other law regulating the departure of persons from Australia”...

Accordingly removal of a person from Australia who is a "non-citizen child" within the meaning of the IGOC Act, or the taking of that child to another country pursuant to s 198A, cannot lawfully be effected without the consent in writing of the Minister (or his delegate). The decision to grant a consent of that kind would be a decision under an enactment and would therefore engage the provisions of the Administrative Decisions (Judicial Review) Act 1977 (Cth) and, in particular, the provisions of that Act concerning the giving of reasons as well as the availability of review on any of the grounds stated in that Act.²⁴

Justice Heydon adopted a different interpretation of the requirements of subsection 6A(4) of the IGOC Act. In his Honour’s view, ‘the fundamental difficulty in the second plaintiff’s position is that s. 6A(4) provides that the section does not affect the operation of any other law "regulating the departure of persons from Australia." Section 198A is a law of that kind’.²⁵

In response to the High Court’s ruling, Prime Minister Julia Gillard stated the decision represented ‘a missed opportunity’:

Can I say at the outset, yesterday’s High Court decision was a deeply disappointing one...Our legal advice was that our ability to do this was in the current law, we were advised that our legal

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²¹ Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship, [2011] HCA 32 (31 August 2011), as per Gummow, Hayne, Crennan, and Bell JJ at [135].
²² Ibid., at [162].
²³ Ibid., at [163].
²⁴ Ibid., at [143] and [146].
²⁵ Ibid., at [198].

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case was strong, we were advised that our legal case was strong in part because the courts have considered similar questions in the past and looking to those precedents we were advised that if those precedents were followed our legal case would be a strong one. Yesterday in the High Court what we saw was the High Court enter into a different construction of the relevant section of the Migration Act. Effectively, if you like, yesterday the refugee and asylum seeker law of this country changed, changed from how it had been known and understood before with a different interpretation of the legislation. The High Court’s decision basically turns on its head the understanding of the law in this country prior to yesterday’s decision.26

David Bennett QC was Commonwealth Solicitor-General during the period 1998—2008. In his opinion, the High Court was not ‘wrong’ or misguided:

It came to one of two possible conclusions. The High Court made no "new law" and the criticisms which have been publicly made of it are totally unfounded...The second criticism is that the High Court "missed an opportunity". But the court does not reason by choosing a politically preferred result and endeavouring to reach it in some legal way. Such a process would be improper and contrary to the rule of law.27

On 12 September 2011, less than a fortnight after the High Court delivered its ruling, the Prime Minister announced that the Government would be introducing legislation to enable the transfer of irregular maritime arrivals to third countries for the processing of their asylum claims.28

Implications of the High Court ruling for processing on Papua New Guinea and Nauru

A couple of days after the High Court delivered its judgment, legal opinion prepared by the Solicitor-General Stephen Gageler and two other senior counsel, Stephen Lloyd and Geoffrey Kennett, examined the implications of the High Court’s ruling on offshore processing in Papua New Guinea and Nauru. In brief they concluded that:

Our short advice is as follows. In the light of Plaintiff M70 we do not have reasonable confidence on the material with which we have been briefed that the power conferred by s 198A could currently be exercised to take asylum seekers from Australia to either Nauru or to PNG for determination of their refugee status. The accession of Nauru to the Convention Relating to the Status of Refugees (Refugees Convention) and the Protocol Relating to the Status of Refugees (Protocol) on 28 June 2011 nevertheless raises the possibility that the power conferred by s 198A would in the future be available to be exercised to take asylum seekers from Australia to Nauru


28. J Gillard (Prime Minister), Legislation to restore Migration Act powers, media release, 12 September 2011.

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for determination of their refugee status. We would have confidence that the power conferred by s 198A would be available to be exercised to take asylum seekers from Australia to Nauru only if it were able to be demonstrated to the satisfaction of an Australian court: first, that appropriate arrangements were in place to ensure practical compliance by Nauru with its obligations under the Convention and the Protocol; and, secondly, that Nauru in its treatment of asylum seekers and refugees complied in practice with human rights standards acceptable at least to the United Nations High Commissioner for Refugees. These are complex issues of fact and degree requiring detailed assessment and analysis. Even when that assessment and analysis was complete, the issues might well be the subject of contested evidence. In the absence of a detailed assessment and analysis of these issues, we are unable to form a view as to whether either of the two conditions we have identified would be capable of being demonstrated to the satisfaction of an Australian court.29 [Emphasis added].

In contrast, David Bennett QC (former Commonwealth Solicitor-General) is of the view that the High Court’s ruling does not necessarily preclude offshore processing in a third country and that the Solicitor-General’s advice (that is, Stephen Gageler’s advice) should not be regarded as conclusive because he did not have sufficient material to draw a detailed assessment of the relevant factors. In addition, he is of the view that the newly interpreted legislative criteria would be satisfied if Australia were to be delegated the relevant operations in a third country, a matter he acknowledges was not directly addressed by the Court:

The remaining question is what can be done. The position is complicated by the fact that there is a passage in the judgment of the Chief Justice suggesting that the minister needs to be satisfied on both legal compliance and compliance on the ground.

The second complication is that the High Court appears to have considered that its requirement of “legal compliance” could be met by domestic laws, international conventions or a binding agreement with Australia.

Third, there is a question not answered directly by the High Court whether compliance by the country delegating to Australia the relevant operations is sufficient to satisfy the criteria (as was achieved with Nauru). In my view it is.

Having said this, there is no legal reason why steps could not be taken with Nauru, Papua New Guinea or Malaysia (or indeed any other willing partner country), which would enable the minister to declare them satisfactory. It is significant that Nauru has now acceded to the Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees. Much attention to detail would be required. In particular, any agreement with Australia should, unlike the agreement with Malaysia, be expressed to be legally binding.

The Solicitor-General’s advice that he did not have reasonable confidence that the power could be exercised in relation to Nauru or PNG depended on the fact that he had not been provided


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with sufficient material from which a detailed assessment of the relevant factors could be made. He does not appear to have been asked the question at all in relation to Malaysia or anywhere else. For these reasons, his views should not be regarded as final.\textsuperscript{30} [Emphasis added].

Moreover, Leader of the Opposition, Tony Abbott, MP, advised that on 19 September:

\begin{quote}
Former Solicitor-General David Bennett AC QC has provided written advice today on the two sets of amendments proposed by Labor as well as the Coalition’s alternative. In Mr Bennett’s opinion the Coalition’s plan “provides more protection for asylum-seekers than the two Government versions and it is less likely to be the subject of complex judicial proceedings.”\textsuperscript{31}
\end{quote}

Legal opinion prepared by Stephen Estcourt QC also considers whether a critical distinction can be drawn by the delegation of operations to a signatory state such as Australia. He appears to suggest that the question of whether the country in question is legally obligated to provide the requisite access and protection may still be determinative of the issue:

\begin{quote}
Further, it was relevant to the High Court’s decision that Malaysia would not be processing the asylum claims of Australian offshore entry persons under its own laws or obligations but would merely permit the presence in its country of those persons and allow the UNHCR to process their refugee claims. That would not be the case with Nauru and Papua New Guinea as Australia would no doubt process the asylum claims in those countries. Whether that is a significant point of distinction however will inevitably raise the question of whether Nauru and Papua New Guinea are themselves legally obligated to provide the required access and protection or would simply be permitting Australia to fulfil the role that under the so called Malaysian Solution was to be fulfilled by the UNHCR.\textsuperscript{32}
\end{quote}

Former Justice of the Federal Court of Australia, Ron Merkel QC, makes the point in his legal opinion that the High Court did not consider the question of whether Nauru satisfied the criteria in subsection 198A(3) and that any consideration of the validity of a future declaration in respect of Nauru or PNG would, unlike the case of Malaysia, require careful consideration of all the relevant factual and legal obligation elements of the criteria in order to determine their validity. He also qualified his advice (that on the available information to him, there must be great doubt about the validity of any future declarations with respect to Nauru and PNG) by emphasising that the prospects

\begin{footnotesize}
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  \item \textsuperscript{30} D Bennett, ‘Offshore processing still possible despite High Court decision’, op. cit.
  \item \textsuperscript{31} T Abbott, If Julia Gillard was serious about stopping the boats she would support the Coalition’s amendments, media release, 19 September 2011, viewed 21 September 2011, http://www.tonyabbott.com.au/LatestNews/PressReleases/tabid/86/articleType/ArticleView/articleId/8335/If-Julia-Gillard-was-serious-about-stopping-the-boats-she-would-support-the-Coaltions-amendments.aspx.
\end{itemize}
\end{footnotesize}
of a successful legal challenge would of course be subject to any future international agreements that are binding, or changes to the domestic laws in Nauru and PNG.  

Implications for unaccompanied minors

Legal opinion prepared by the Solicitor-General Stephen Gageler also examined the implications of the High Court’s ruling on the transfer of unaccompanied minors from Australia. In succinct terms he opined as follows:

No unaccompanied minor who has arrived in Australia as an asylum seeker can, while still a minor, be removed or taken from Australia in the exercise of any power under the Migration Act unless the Minister, in the exercise of a separate statutory power as guardian of that minor, gives written consent to the removal or taking. The Minister cannot give consent to the removal or taking unless the Minister forms a state of satisfaction, able to be regarded by a court as reasonable, that the removal of the minor would not prejudice the interests of the minor...any decision of the minister to give consent under s 6A of the Immigration (Guardianship of Children) Act would be reviewable under the Administrative Decisions (Judicial Review Act 1977 (Cth) (in addition to being reviewable under s 75(v) of the Constitution and s 39B of the Judiciary Act 1903 (Cth)) and would be subject to the requirement for reasons imposed by s 13 of that Act.

On this issue Ron Merkel QC observed that ‘it will not be an easy task for the Minister to discharge that duty [to act in the best interests of the child] by transferring a minor to Nauru or PNG, for a purpose that appears to be ‘to break the business model of people smugglers’.

Legal opinion prepared by Stephen Estcourt QC and Sydney University academics also highlights that irrespective of whether a treaty has been directly incorporated into legislation—real concerns arise as to the compatibility of Australia’s international obligations when transferring unaccompanied minors to a third country for processing:

Any arrangement, including the arrangement under the legislation proposed by the Gillard Government by which unaccompanied minor asylum seekers are transferred to a third country, may lead to breaches of Australia’s international human rights obligations under treaty and customary law. In respect of unaccompanied children, real concerns arise as to whether such action could ever be compatible with Article 3(1) of the Convention on the Rights of the Child.

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(‘CRC’), which requires that in all actions concerning children, the best interests of the child be a primary consideration...[Footnotes omitted].

Policy position of non-government parties

The Coalition has not been supportive of the Government’s Arrangement with Malaysia, and has instead consistently urged the Government to reinstate the border protection policies of former Prime Minister John Howard including, offshore processing on Nauru, temporary protection visas and turning boats around where it is safe to do so. With respect to this Bill, the Coalition has recently adopted the view that it will only support the Bill if the Government agrees to its proposed amendment requiring the offshore processing country to be a signatory to the Refugee Convention though of course as recently acknowledged by the High Court, consideration of the extent to which a country actually adheres to its international obligations may be another matter altogether. The Leader of the Opposition, Tony Abbott recently stated in an interview with Chris Uhlmann on ABC’s 7.30 report:

...Well, the executive government will put its proposals to the Parliament and the Parliament will deal with them. But there has never been any principle that says that the Opposition has got to support bad policy from a bad government to give a blank cheque to the executive.

CHRIS UHLMANN: And if your amendments fail will you support the Government’s?

TONY ABBOTT: No, we won’t. Our amendments are quite minor in the scheme of the Government’s act. We are only proposing one amendment to a 20-page bill. But nevertheless it is a very significant principle. It - as the former Solicitor-General David Bennett made clear, our amendment means that the Government’s bill will be more certain and more safe. There’ll be more legal certainty and more protections in it if our amendment is passed and that’s why we’re going to insist upon it.

CHRIS UHLMANN: And doesn’t this standoff mean that inevitably Australia will return to only onshore processing?

TONY ABBOTT: No, because if the Government is committed to offshore processing at Manus as well as at Malaysia, our amendment will certainly allow it to happen at Manus.

The Australian Greens are opposed to offshore processing in a third country, irrespective of location. They believe that ‘Australia must assess in good faith all asylum seekers who arrive on our mainland


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or any of our islands, without discrimination based on the method of arrival’. 38 In addition, their policy states that they would:

- restore the Australian migration zone to match Australia’s territory and accept responsibility for processing all asylum seekers who seek Australia’s protection within the migration zone
- increase the share of places for off-shore refugees and humanitarian entrants.

Opposition by both non-government parties led to referral on 17 August 2011 of the Malaysia Arrangement to the Legal and Constitutional Affairs References Committee for inquiry and report by 11 October 2011.39

**Position of major interest groups**

Major interest groups recognise the need for regional and international cooperation on asylum seekers but have generally opposed the reinstatement of offshore processing of asylum claims and more specifically, the proposed transfer of asylum seekers to Malaysia. Thus, for instance, the Refugee Council of Australia has commented:

> The Refugee Council of Australia (RCOA) has expressed deep regret that the Federal Government has decided to push ahead with legislative amendments to allow offshore processing of asylum seekers in Malaysia and Papua New Guinea....

> “The proposed legislation will set an even lower standard for human rights than the legislation introduced in September 2001 by the Howard Government when it established the offshore processing regime,” Mr Power [the Council’s CEO] said.40

The Human Rights Commission has also expressed concern that the Bill could lead to serious human rights breaches.41

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UNHCR

UNHCR’s position is that ‘claims for international protection made by intercepted persons are in principle to be processed in procedures within the territory of the intercepting state’. Speaking recently on ABC radio following the High Court ruling, Erika Feller Assistant High Commissioner for Refugees - Protection in Geneva said that the Malaysia transfer arrangement was ‘workable’ but qualified her statement somewhat by adding:

The ultimate test of that arrangement would have been how it was implemented. So we were in fact holding our final assessment on the arrangement depending on how it would have played out in relation to the people who would have been transferred under it...

Our position was always, and I have to repeat this again, was always predicated on there being effective pre-transfer arrangements in place to safeguard the most vulnerable from being more exposed, made more vulnerable through transfer to Malaysia.

With respect to Manus Island she expressed reservations:

In relation to Manus Island, again, we have not been party to the discussions to date on Manus Island. We were not particularly enthusiastic as you will be aware, of the Manus Island arrangement that existed at the time of the so-called Pacific Solution. I mean, Manus Island is a very remote place, it doesn’t offer the greatest prospects for people who may have health difficulties. Solutions are rather elusive when people are in a place like that and it’s not clear to me how this arrangement would actually work in the long run.

Ms Feller also makes interesting comments on how UNHCR envisaged a regional cooperation framework should operate—it not being simply about a regional processing centre:

...we are very supportive of the idea of a regional cooperation framework. For us a regional cooperation framework is not about regional processing centres. It doesn’t exclude that there be some degree of regional processing, but that is not the be all and the end all of a regional cooperation framework; that’s the first point I want to make.

For us it’s about helping states in the region deal on a cooperative and a burden sharing basis with a set of shared problems. There are a number of asylum seeking groups who come to the region, pass through several countries in the region and occasionally make their way also on to Australia, and we would see a regional cooperation framework putting in place arrangements which would enable the burdens and responsibilities to be shared, not shifted, which would eventually lead to building up the capacity of the states in the region to manage their own

44. Ibid.

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asylum systems in a responsible and cooperative way and which would ensure that solutions for people who come into the region and who need protection are available in the region or beyond.

So we had suggested that a regional cooperation framework could have three pillars, if you like. The first pillar would be an asylum support office, regional support office, which would be available to all states in the region. They would be able to come to this office and obtain support for managing their asylum problems.

We also suggested that there could be a structure or a process to deal with the problem of rejected asylum seekers - that is, asylum seekers who are found not to have valid refugee claims and in relation to whom the solution of return is probably the best solution.

And then the third pillar of this could be, for example, a common resettlement identification office, so that, let us say theoretically people were found to be refugees in Malaysia, in Thailand, in Indonesia, perhaps even in Australia, a resort could be had to a common solutions office, a common resettlement office, where the responsibilities for finding resettlement options could be shared. So, to put it more simply, not everybody who arrives in a particular country and is found to be a refugee has to stay in the country, but they do need a solution which addresses their protection concerns and this office could help find solutions in the region or elsewhere.45

Financial implications

The Explanatory Memorandum notes that ‘the financial impact of these amendments is low. Any costs will be met from within existing resources of the Department of Immigration and Citizenship’.46

The operational costs for a processing centre in a foreign country would vary depending upon location and any arrangements as to expenditure that is agreed between the parties to an agreement.

Main issues

Prime Minister Julia Gillard in the context of this debate has repeatedly asserted that:

... the issue that will come before the parliament and the issue that needs to be determined is whether or not executive government, any executive government, should have the power and


46. Explanatory Memorandum, op. cit., p. 2.

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authority it needs in order to put in place and beyond legal doubt offshore processing measures. I will be seeking to amend the Migration Act so that that legal authority is there.\textsuperscript{47}

However, the debate surrounding this Bill is unlikely to be so confined. This Bill simultaneously raises a number of broad and complex issues for consideration. These potentially include:

- the merits or otherwise of processing asylum seekers in a third country
- whether the Government’s Arrangement with Malaysia should be given the legislative basis to proceed
- whether the only condition precedent to the Minister designating an ‘offshore processing country’ should be considerations of the ‘national interest’
- whether offshore processing in a foreign country is consistent with Australia’s human rights obligations under international law
- whether mandatory detention should be (legislatively) extended to persons being processed at an excised offshore place, such as Christmas Island
- whether it is desirable to grant additional extensive powers to a Minister where there is no parliamentary and limited judicial review,\textsuperscript{48} and
- whether the IGOC Act and the guardianship obligations imposed on the Minister therein should be ‘trumped’ by migration laws.

Key provisions

Schedule 1—Offshore processing under the Migration Act 1958

Section 2 provides that the Act commences upon Royal Assent. Item 36 also explicitly clarifies that section 198AD will only apply to those who enter Australia on or after commencement.

Item 12 amends existing subsection 189(3) which will extend mandatory detention to irregular maritime arrivals arriving at an excised offshore place, such as Christmas Island. This is currently discretionary, though Labor Government policy had consistently been that all irregular maritime arrivals arriving at an excised offshore place would be detained. The Explanatory Memorandum provides no reason for this proposed legislative amendment and the second reading speech did not refer to the matter at all.

Item 18 amends existing subsection 196(1) by providing that an unlawful non-citizen detained under section 189 must be kept in immigration detention until ‘an officer begins to deal with the non-citizen under subsection 198AD(3)’. The Explanatory Memorandum notes that ‘new paragraph 196(1)(aa) refers to when an officer begins to deal with the non-citizen under subsection 198AD(3).


\textsuperscript{48} Though note Parliamentary tabling requirements contained in proposed sections 198AC and 198AE(4)—(6).

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This means that once an officer begins to deal with a person by taking any of the actions under subsection 198AD(3), immigration detention comes to an end. 49

Item 25 repeals existing section 198A (the subject of the High Court challenge) in its entirety and substitutes it with proposed new sections 198AA—198AH.

Proposed new section 198AA expresses the reason for the new Subdivision B—Offshore processing. Of particular relevance to the High Court’s ruling in Plaintiff M70/2011 v Minister for Immigration and Citizenship paragraph (d) states ‘the designation of a country to be an offshore processing country need not be determined by reference to the international obligations or domestic law of that country’.

Proposed section 198AB empowers the Minister to designate a country as an ‘offshore processing country’ if the Minister thinks that it is in the ‘national interest’ to do so. In considering what is in the national interest, the Minister must have regard to whether or not the country has given Australia any assurances to the effect that they would not expel or return (‘refouler’) a refugee, and any assurances that the country will make or permit a refugee status determination to be undertaken. Significantly, these assurances need not be legally binding (proposed subsection 198AB(4)). Lastly, the Minister may have regard to ‘any other matter’ which, in his or her personal opinion, ‘relates to’ the national interest. With respect to ‘national interest’ the Explanatory Memorandum simply notes that:

The term ‘national interest’ has a broad meaning and refers to matters which relate to Australia’s standing, security and interests. For example, these matters may include governmental concerns related to such matters as public safety, border protection, national security, defence, Australia’s economic interests, Australia’s international obligations and its relations with other countries. Measures for effective border management and migration controls are in the national interest. 50

It is worth mentioning that the first draft of the Bill adopted a different statutory formulation. It simply required the Minister to designate a country if the Minister thought it to be in the ‘public interest to do so’. Though the Explanatory Memorandum is silent on the point, it appears the amendment was as a result of concerns raised by the opposition and legal advice which to date has not been made publicly available.

Significantly, under proposed subsections 198AB(5) and (6), a designation made by the Minister is not a legislative instrument nor do the rules of natural justice apply to the exercise of the power. 51

The rules of natural justice (or procedural fairness require): a hearing appropriate to the

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49. Explanatory Memorandum, op. cit., p. 11.
51. Under the Legislative Instruments Act 2003 the Government is required to arrange for a copy of legislative instruments to be tabled before each House of Parliament within six sitting days of that House after being registered. If a legislative instrument is not tabled in both Houses of the Parliament within six sitting days after registration, it ceases to have effect.

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circumstances; lack of bias; evidence to support a decision; and inquiry into matters in dispute.\textsuperscript{52} The Explanatory Memorandum notes that ‘the purpose of this provision is to make clear that the Minister is not required to give a right to be heard to individuals who may be taken to a country, in relation to the designation of that country as an offshore processing country, or the revocation of such a designation’.\textsuperscript{53}

Proposed subsection 198AD(2) places a statutory obligation upon an officer to take an offshore entry person to an offshore processing country ‘as soon as reasonably practicable’. However, proposed subsection 198AE(1) provides the Minister with the non-compellable discretion to determine that section 198AD does not apply to an offshore entry person if he or she considers that it is in the public interest to do so. Again, such a determination is not a legislative instrument and the rules of natural justice do not apply to the exercise of this power (proposed subsections 198AE(3) and (8)). The Explanatory Memorandum relevantly notes that:

This is the mechanism whereby the Minister can exempt persons from the duty to be taken to an offshore processing country where the individual assessment of their circumstances that is undertaken prior to a person being taken to an offshore processing country, indicates that taking the person to that country would not be appropriate. For example, the person may have vulnerabilities that cannot be accommodated in the offshore processing country, or have protection claims against the offshore processing country (in addition to those they claim to have against their country of origin or habitual residence).\textsuperscript{54}

Proposed subsection 198AD(5) provides that if there are two or more offshore processing countries, the Minister must direct an officer to take an offshore entry person or a class of offshore entry persons to the country specified by the Minister. Again, such a direction is not a legislative instrument and the rules of natural justice do not apply to the performance of this duty (proposed subsections 198AD(9) and (10)). The Explanatory Memorandum relevantly notes that ‘if it is not appropriate to take an offshore entry person to an offshore processing country, having regard to their personal circumstances, the person’s case would be referred to the Minister for consideration of the exercise of his or her personal power under section 198AE’.\textsuperscript{55}

Item 26 expands the definition of ‘uncooperative conduct’ in existing subsection 198D(3) relating to transitory persons. The Explanatory Memorandum notes that Section 198D deals with a certificate of non-cooperation, and provides that if the secretary is satisfied that a transitory person (defined in section 5 of the Act) has engaged in uncooperative conduct, either before or after the person was brought to Australia, then the secretary may issue a certificate to that effect to the Refugee Review Tribunal. ‘Uncooperative conduct’ will now mean (amongst other things) a transitory person refusing

\textsuperscript{52} Attorney-General’s Department, \textit{What are the principles of natural justice?}, AGD website, viewed 21 September 2011, \url{http://www.ag.gov.au/www/agd.nsf/Page/Securityvetting_Whatarestheprinciplesofnaturaljustice}.

\textsuperscript{53} Explanatory Memorandum, op. cit., p. 14.

\textsuperscript{54} Ibid., p. 18.

\textsuperscript{55} Ibid., p. 16.

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or failing to cooperate with relevant authorities in connection with their detention under section 189.

**Item 30** confirms that a Ministerial determination made under **proposed new section 198AE** (that section 198AD does not apply to an offshore entry person) is a privative clause decision within the meaning of existing subsection 474(2). The Explanatory Memorandum notes that ‘this is to achieve consistency with other provisions in the Migration Act relating to the exercise of the Minister’s non-compellable power’.

**Item 34** extends the bar on certain legal proceedings relating to offshore entry persons to ‘proceedings relating to the performance or exercise of a function, duty or power under Subdivision B of Division 8 of Part 2 in relation to an offshore entry person’. The Explanatory Memorandum relevantly notes that:

> The effect of this amendment is that proceedings against the Commonwealth relating to any performance or exercise of a function, duty or power under new Subdivision B of Division 8 of Part 2 of the Migration Act in relation to an offshore entry person cannot be instituted or continued in any court. However, this amendment does not affect the jurisdiction of the High Court under section 75 of the Constitution.

**Item 35** clarifies the same arrangements for transitory persons.

**Schedule 2—Amendments to the Immigration (Guardianship of Children Act) 1946**

The IGOC Act in effect establishes the Immigration Minister as the Guardian of the non-citizen child and in effect requires the Minister not to refuse consent (to leave Australia) unless satisfied that to do so would be prejudicial to the interests of the child (existing section 6A).

There are three significant provisions proposed by Schedule 2, amendments to the IGOC Act, which together operate to allow the Minister to dispense with his responsibilities as a guardian in the case of actions taken under migration law.

Currently section 6 of the IGOC Act provides for the Minister’s on-going guardianship of non-citizen children. This guardianship ends when the child turns 18 or ‘leaves Australia permanently’. The Bill proposes to insert a more inclusive definition of the expression ‘leaves Australia permanently’ so that it encompasses the various proposed processes that would constitute ‘offshore processing’. This would mean that the Minister’s guardianship responsibilities end when non-citizen children leave Australia under offshore processing arrangements.

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56. Ibid., p. 24.
58. The author would like to gratefully acknowledge the kind assistance of Kirsty Magarey in preparing the material for Schedule 2.

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The IGOC Act does currently provide in subsection 6A(4) that section 6A does not ‘affect the operation of any other law regulating the departure of persons from Australia.’ The Bill proposes to repeal that subsection.

Subsection 6A(4) operates to exempt certain laws from the IGOC Act’s provisions. Specifically it currently provides that laws ‘regulating the departure of persons from Australia’ are not subject to the provisions of the IGOC Act. In Plaintiff M70/2011 v Minister for Immigration and Citizenship the majority decided that the IGOC Act’s provisions nevertheless required the Minister to give written permission for a non-citizen child to be taken out of the country. They made this finding on the basis that existing section 198A was not a law covered by the exemption in subsection 6A(4), that is a law ‘regulating the departure of persons from Australia’, because of the involuntary or forcible nature of the arrangements.

The joint majority judgement in that case explained the distinction as follows:

...Just as it may often be necessary to distinguish between regulating and prohibiting, it is necessary in the present case to recognise the distinction between a law regulating the departure of persons from Australia and a law which gives power to remove persons from Australia.

The changes proposed by this Bill make this distinction redundant because much broader powers are explicitly set down as being exempt from the operation of the IGOC Act’s provisions. Consequently the removal of paragraph 6A(4) is more in the nature of statutory orderliness than being a necessary amendment. The migration laws are given ample protection by other provisions proposed to be inserted into the IGOC Act by the Bill.

Specifically there are provisions which change the current Act’s relationship to other legislation (item 8). At the moment, existing section 8 allows state and territory laws governing child welfare to apply to non-citizen children. The Bill would add provisions which would make ‘the migration law’ (defined in section 4 as the Migration Act and Regulations and any instruments made under them), operate irrespective of obligations imposed under the IGOC Act. The provision goes on to enumerate in proposed subsection 8(3) the various ways in which the government is exempted from the provisions of the IGOC Act, specifically nominating the legislative provisions which would be used in ‘offshore processing’ but also when removing or deporting a non-citizen child from Australia.

In summary the changes invert the current relationship between the IGOC Act and migration law so that acts done under the migration law ‘trump’ the provisions currently governing the Minister’s guardianship responsibilities.

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60. Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship [2011] HCA 32 (31 August 2011) as per Gummow, Hayne, Crennan and Bell JJ at [144].

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Concluding comments

When the High Court delivered its judgment on existing subsection 198A(3) it effectively asserted the supremacy of Australia’s obligations under international law. This Bill aims to return the law to its former status—to how it had been interpreted by the current and former governments since its enactment in 2001 in response to the MV *Tampa* arrivals. However, this in turn raises the question whether to do so now, nearly ten years on, is in the ‘national interest’. As former Justice of the Federal Court of Australia, Ron Merkel QC observed with respect to the outcome of the High Court case, ‘it is obvious that these outcomes are neither convenient nor expedient for the Government. However, it is important to recognize that that situation reflects no more than Australia’s longstanding Refugee Convention obligations as enacted by Parliament and as now enunciated by the High Court’. 61 This Bill is unlikely to secure passage through Parliament because as currently drafted it does not have enough support. Perhaps to this end it is relevant to recall the words of Erika Feller of the UNHCR who recently observed with respect to the debate in Australia about asylum seekers and regional processing that:

...I think it’s also a great pity that it’s become an issue at the political level. It’s actually a humanitarian issue, it’s an issue of human rights, it’s an issue of people in desperate circumstances and desperate need. And it would, I think, have been responsible for the government and for the political parties and, indeed, for opinion makers in civil society to show strong and ethical leadership on this issue, rather than politicise it for whatever ends that they have.” 62


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