Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

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Law and Bills Digest Section

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Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

Date introduced: 31 October 2012
House: House of Representatives
Portfolio: Immigration and Citizenship
Commencement: Sections 1, 2 and 3: Royal Assent

Schedule 1, items 1 to 14 and items 17 to 62: date to be fixed by proclamation, or if the provisions do not commence within six months from the date of Royal Assent, the following day.

Schedule 1, items 15 and 16: day after Royal Assent.

Schedule 2: the later of (i) date to be fixed by proclamation, or if the provisions do not commence within six months from the date of Royal Assent, the following day and (ii) the commencement of section 69 of the Maritime Powers Act 2012.¹

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/Parliamentary_Business/Bills_Legislation. 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 of the Bill

The Bill seeks to implement Recommendation 14 from the report by the Expert Panel on Asylum Seekers, which was presented to the Prime Minister on 13 August 2012.² This recommendation was that the Migration Act 1958 be amended to ensure that arrival anywhere in Australia by irregular maritime means is not to provide individuals with a different lawful status to those who arrive at ‘excised offshore places’, chiefly Christmas Island, Cocos (Keeling) Islands and Ashmore and Cartier Islands.

This Bill extends the excision regime introduced in 2001 following events surrounding the MV Tampa. That regime continues to provide that asylum seekers entering Australia at excised offshore places are ‘offshore entry persons’, and as such are unable to apply for protection visas (in effect, refugee status under Australian law) unless the Minister for Immigration and Citizenship (the

¹ The Maritime Powers Bill 2012 has been passed in the House of Representatives and the second reading speech was moved in the Senate on 20 August 2012. The Bill’s homepage may be viewed at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fbillhome%2F4838%2F
Minister) considers it to be in the public interest that they do so. The effect of this Bill will be to extend the excision provisions to the whole country.

A new term, ‘unauthorised maritime arrival’ will cover any asylum-seeker entering Australia by sea who becomes an unlawful non-citizen upon entry. Such persons will be unable to apply for a protection visa unless the Minister considers it to be in the public interest that they do so. Unauthorised maritime arrivals will be liable to be sent to ‘regional processing countries’ (currently Papua New Guinea and Nauru) for the processing of their refugee claims.

Structure of the Bill

The Bill amends the Migration Act 1958 (the Act) and is brief. There are three sections (short title, commencement and reference to the schedules) together with two schedules containing various amendments to the Act.

The Bill consists primarily of the definition of the new term ‘unauthorised maritime arrival’, together with a series of adjustments to existing provisions so as to integrate the new term into the existing Act. The provisions presently applying to offshore entry persons will apply equally to unauthorised maritime arrivals.

Background

The Tampa and the 2001 excision legislation

The events surrounding the Tampa in 2001 are well known. As detailed in the Digest prepared by the Parliamentary Library to accompany the Migration Amendment (Excision from Migration Zone) Bill 2001:

On 26 August 2001, a routine surveillance flight by Coastwatch revealed the presence of a fishing boat approximately 80 nautical miles northwest of Christmas Island. The vessel was carrying 433 potential asylum seekers on route to Australia before it broke down. The following day Australian Search and Rescue (AUSAR) broadcast a call to any merchant ships in the vicinity to render assistance to the stricken vessel. A Norwegian freighter, the Tampa, responded to the call, intercepting the vessel and bringing its passengers aboard. The master of the Tampa, Captain Arne Rinnan, had intended to take the rescuees to a port in Indonesia but was requested by the passengers to proceed to Christmas Island. Before the Tampa reached Australia’s territorial waters it was instructed to remain in the contiguous zone. On 28 August the Tampa issued a distress signal based on the fact that assistance had not been provided within 48 hours. On 29 August it proceeded into the territorial waters surrounding Christmas Island and was interdicted by 45 SAS members. The same day the Government introduced border protection legislation into Parliament which would have expressly validated these actions. The Bill did not pass the Senate.

On 30 August 2001 the Norwegian Ambassador went on board the Tampa and was handed a letter signed 'Afghan refugees now off the coast of Christmas Island'. On Friday 31 August 2001 two applications were filed in the Federal Court of Australia, which commenced the proceedings in Victorian Council for Civil Liberties Incorporated v The Minister for Immigration and Multicultural Affairs and Ruddock v Vadarlis.

These applications sought to prevent the Minister for Immigration and Multicultural Affairs from allowing the removal of the rescuees from territorial sea off Christmas Island.

On 3 September the rescuees were transshipped from the Tampa to the HMAS Manoora.

On 7 September the HMAS Warramunga intercepted a second vessel bound for Ashmore Reef. It was boarded ‘as a stateless vessel without a flag’ and warned to turn around. Subsequently, the vessel was identified as an Indonesian fishing vessel, the Aceng. It was repeatedly boarded and the potential asylum seekers were transshipped to the Manoora.

On 23 September the Minister for Immigration and Multicultural Affairs confirmed plans to build a refugee processing centre on Christmas Island.

On 8 September the Prime Minister announced proposed legislation to be introduced in the Spring Sittings that would excise Christmas Island and Ashmore Reef from the ‘migration zone’. He said that the effect would be that ‘any arrivals at Christmas Island or Ashmore Islands ... will not be sufficient grounds for application for status under the Migration Act’. He stated, from a legal point of view, that the territories would ‘technically become like Norfolk Island which has its own migration regime but ... is still a territory of Australia’. However, he indicated that ‘[t]here will still of course be our obligations under the refugee convention and those obligations continue to be fully met by Australia’.

The Government has also stated that it would excise the territory of the Cocos (Keeling) Islands from the migration zone with effect from noon 17 September 2001.

The intention of the legislation is, as stated in the Second Reading Speech by the Minister for Immigration and Multicultural Affairs, to ensure that the territories ‘will become “excised offshore places” which will mean that simply arriving unlawfully at one of them will not be enough to allow visa applications to be made’. The effects of the Bill ‘will be limited only to those who arrive without lawful authority’. The Second Reading Speech also reiterates that Australia will continue to honour international obligations.

Under the 2001 legislation, which is still in effect today, asylum seekers arriving at ‘excised offshore places’ were unable to apply for protection visas unless specifically allowed to do so by the Immigration Minister under section 46A of the Act. These persons were defined to be ‘offshore entry persons’. They were liable to be sent to Nauru or Manus Island for the ‘offshore processing’ of their claims for refugee status. This program was known as ‘the Pacific Solution.’ Under this program, if offshore entrants are found to come within the scope of the Refugee Convention, there is no guarantee that Australia will accept them for resettlement. Key excision provisions contained in the Act are set out in Appendix 2, below.

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4. D Spooner and N Hancock, Migration Amendment (Excision from Migration Zone) Bill 2001, Bill Digest, no. 69, 2001–02, Parliamentary Library, Canberra, 2001, pp. 1-2, viewed 22 February 2013, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=Title%3Aexcision%20Date%3A01%2F01%202001%20%3E%3E%2001%2F01%202002%20Dataset%3Abillsdgs;rec=1;resCount=Default
The Australian community was divided about events surrounding the Tampa. Many people, perhaps a majority, were concerned about (i) a perceived lack of border control, (ii) that there were people ‘jumping the queue’ at the expense of others who did the’ right thing’ and applied for visas offshore, and (iii) that many refugee claims were bogus. These views may be summed up as ‘we will decide who comes to this country’.\(^7\) The events of September 11 took place around this time, and may well have increased opposition to further unauthorised boat arrivals.

Set against these views was a concern that asylum seekers in Australian territory should be able to make claims for refugee status. Many felt it was wrong to send such people to offshore processing centres with the possibility of many years of confinement. These two strands of opinion continue to exist today.

In the time period following the adoption of the Pacific Solution, the number of unauthorised boat arrivals of asylum seekers dropped significantly.\(^8\) The number of unauthorised asylum seeker arrivals remained small for several years.\(^9\)

The Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

The Howard Government’s Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (‘the 2006 Bill’) sought to extend the 2001 excision regime, and therefore offshore processing, to all ‘designated unauthorised arrivals’ – a broader term which encompassed asylum seekers arriving by boat anywhere in Australia.\(^10\)

The proposed section 5AA in the current Bill is a more concise version of the section proposed in the 2006 Bill (section 5F). There appears to be no substantive difference between ‘designated unauthorised arrivals’ and ‘unauthorised maritime arrivals.’ Both apply to unauthorised seaborne arrivals anywhere in Australia after their respective commencement days (noting of course that the 2006 Bill never commenced). To facilitate comparison both proposed sections are set out in Appendix 1 to this Digest.

The 2006 Bill passed the House of Representatives on 10 August 2006. It was opposed by the Australian Labor Party (ALP) together with certain Coalition members who crossed the floor.\(^11\)

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9. Irregular maritime arrivals were 179 in 2008, rising to 2850 in 2009 and 6850 in 2010. Ibid., p. 23.

10. The homepage for the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 is available at: [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=Title%3A%22Migration%20Amendment%20(Designated%20Unauthorised%20Arrivals)%20Bill%202006%22%20Dataset%3AbillsPrevParl;rec=0;resCount=Default](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?query=Title%3A%22Migration%20Amendment%20(Designated%20Unauthorised%20Arrivals)%20Bill%202006%22&Dataset%3AbillsPrevParl%3Arec%3D0%3BresCount%3DDefault)


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On 13 June 2006, the Senate Legal and Constitutional Legislation Committee recommended the Bill not proceed.\(^\text{12}\) It was never debated in the Senate, and lapsed when Parliament was dissolved prior to the 2007 election.\(^\text{13}\)

### The Rudd and Gillard governments

Soon after the election of the Rudd Government, the Pacific Solution was abandoned. The detention facilities in Nauru and Manus Island were closed down and offshore processing ceased. The 2001 legislation remained in force, with all asylum seeker arrivals at excised offshore places being allowed to apply for protection visas by the Minister under section 46A of the Act. For many years the numbers of unauthorised boat arrivals remained small. Over time, however, the numbers have risen and concerns held by many in the Australian community have resurfaced.

By way of background, it should be noted that the number of asylum applications made in Australia in recent years (both boat and air arrivals) has not been high when compared to the numbers in the United Kingdom, France, Germany, Sweden, the United States and Canada.\(^\text{14}\)

The Government sought to resolve the asylum seeker issue, at least in part, by way of the so-called ‘Malaysia Solution.’ An agreement between the governments of Australia and Malaysia was announced on 25 July 2011. Under it, Australia was to accept 4000 refugees residing in Malaysia together with another 1000 per year over four years. In return, Malaysia was to accept 800 offshore entry persons from Australia.\(^\text{15}\) The intention of the agreement was to make the boat journey to Australia less attractive as boat arrivals would be sent to Malaysia. So if, for instance, one were already in Malaysia, it would make sense to stay there pending possible resolution of a claim for refugee status. A key step in the implementation of the arrangement to remove the 800 persons to Malaysia was ruled invalid by the High Court on 31 August 2011.\(^\text{16}\) The Malaysia Solution was over, at least for the time being.

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15. Ibid., p. 49.
16. By a majority of 6:1, the Court found invalid the Immigration Minister’s declaration that Malaysia was a suitable country for the purposes of then section 198A of the *Migration Act 1958*. Then subsection 198A(3) provided:

   The Minister may:

   (a) declare in writing that a specified 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
On 21 June 2012, a vessel carrying asylum seekers sunk near Christmas Island. There were 17 persons confirmed dead, a further 75 persons unaccounted for and presumed drowned, and 110 rescued. By late 2001 and June 2012, 964 asylum seekers and crew are known to have died at sea while undertaking journeys to Australia. Of this number, 604 people have been lost since October 2009.

By late June 2012, the different community attitudes towards asylum seekers remained broadly similar to what they had been at the time of the Tampa. However, there was now a further complication: it was more immediately apparent that the boat journeys themselves were very dangerous, given the length of the journey, the weather conditions and the unseaworthiness of many of the vessels. If such voyages continued there would inevitably be further deaths. There was a strong feeling in both the community and amongst politicians that action must be taken.

### The Expert Panel

Following the boat sinking of 21 June 2012, the Gillard Government appointed an Expert Panel on Asylum Seekers to provide advice and recommendation on policy options available to prevent asylum seekers undertaking unauthorised seaborne journeys to Australia. The Expert Panel comprised Retired Air Chief Marshall Angus Houston AC, former diplomat Professor Michael L’Estrange AO and refugee advocate Mr Paris Aristotle AM.

The Expert Panel’s report of 13 August 2012 contained 22 recommendations. There were two recommendations requiring specific legislative change.

Recommendation 7 was:

> The Panel recommends that legislation to support the transfer of people to regional processing arrangements be introduced into the Australian Parliament as a matter of urgency (paragraphs 3.54 and 3.57). This legislation should require that any future designation of a country as an appropriate place for processing be achieved through a further legislative instrument that would provide the opportunity for the Australian Parliament to allow or disallow the instrument (paragraph 3.43).

(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; and

(b) in writing, revoke a declaration made under paragraph (a).

The Malaysian legal system did not provide for the elements spelt out in section 198A(3)(a), set out above. Therefore, the six Judges in the majority found the Minister did not have the power to make the declaration. This meant his decision to specify Malaysia under section 198A(3) was invalid. The whole removal exercise, and thus the Malaysia solution, collapsed. See: 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), viewed 13 February 2013, [http://www.austlii.edu.au/au/cases/cth/HCA/2011/32.html](http://www.austlii.edu.au/au/cases/cth/HCA/2011/32.html)

18. Ibid., pp. 19 and 75.
19. Ibid., p. 19.
This recommendation was implemented via the enactment of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*. This Act amended both the Migration Act and the *Immigration (Guardianship of Children) Act 1946*. Both Nauru and Papua New Guinea have been designated to be ‘regional processing countries’ and offshore entry persons are currently being sent to facilities operated on behalf of the Australian Government in Nauru and on Manus Island. Key regional processing provisions contained in the Act are set out at Appendix 2, below.

The other legislative amendment recommended by the Expert Panel was Recommendation 14:

The Panel recommends that the *Migration Act 1958* be amended so that arrival anywhere on Australia by irregular maritime means will not provide individuals with a different lawful status than those who arrive in an excised offshore place (paragraphs 3.72-3.73).

This Bill seeks to implement this recommendation. The rationale behind both the recommendation and the Bill is stated to be the need to discourage asylum seekers from undertaking boat journeys to Australia because of the danger involved. Nevertheless it seems many in the community would support the Bill due to opposition to asylum seekers arriving by boat, rather than for concerns as to their safety.

**The current Bill**

The current Bill was introduced in the House of Representatives on 31 October 2012 and its second reading was moved the same day and further debate deferred.

On 1 November 2012, the Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee, which is due to report on 25 February 2013.

The second reading debate in the House of Representatives took place on 27 November 2012, during which an amendment proposed by the Member for Lyne, Mr Oakeshott, was accepted by the Government. This amendment inserts a provision requiring the Minister to present a report to the Parliament each year outlining activities in connection with the *Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime* (the Bali Process).

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23. See for example, the *Report of the Expert Panel on Asylum Seekers*, op. cit., p. 47 and the Minister’s second reading speech.
24. The amendment is now the proposed section 198A1 contained in Schedule 1 to the Bill.
The third reading also took place on 27 November 2012. There was a division in which all members present voted in favour of the Bill, with the exception of Messrs Bandt, Broadbent, Craig Thomson, and Wilkie, and Mrs Moylan, who each voted against it.  

The Bill was introduced into the Senate on 5 February 2013 when its second reading was also moved.

**Committee consideration**

**Senate Legal and Constitutional Affairs Committee**

On 1 November 2012, the Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee, who were due to report on the first sitting day of 2013. This deadline has now been extended until 25 February 2013. Details of the inquiry are at: [http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/unauthorised_maritime_arrivals/info.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/unauthorised_maritime_arrivals/info.htm).

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills noted that proposed subsection 198AE(1A) will empower the Minister to vary or revoke determinations made under subsection 198AE(1).

Subsection 198AE(1) of the Act currently allows the Minister to make a written determination that section 198AD does not apply to a particular offshore entry person, meaning that person will not be removed to Nauru or Manus Island for processing.

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29. Section 198AD of the Act provides for the taking of offshore entry persons to regional processing countries, of which there are currently two: Nauru and Papua New Guinea.

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Determinations made under section 198AE(1) are not subject to the rules of natural justice, meaning that offshore entry persons who desire exemption from the operation of section 198AD (which are likely to be all of them) do not have any right to make representations to the Minister or to be provided with information before the Minister makes his or her decision. Nor are they entitled to be provided with the reasons for the decision.

The Bill proposes that the new variation and revocation power in proposed subsection 198AE(1A) will also not be subject to the rules of natural justice. The Committee noted that the Explanatory Memorandum did not provide any justification for this approach. The Committee sought advice from the Minister as to the rationale for excluding the rules of natural justice in this context. Pending receipt of the Minister’s advice, the Committee drew the attention of the Senate to these provisions which may be considered to trespass unduly on personal rights and liberties.

Parliamentary Joint Committee on Human Rights

In its Seventh Report of 2012, dated 28 November 2012, this Committee noted that this Bill forms part of a legislative package which raises the issue of compatibility with Human Rights. The Committee decided to consider this Bill in the context of other amendments arising from the Migration Legislation (Regional Processing and Other Measures) Act 2012. To date the Committee does not appear to have commented on that Act.

It must be noted here that the Parliamentary Joint Committee on Human Rights operates under the Human Rights (Parliamentary Scrutiny) Act 2011. This Act defines Human Rights by reference to seven specific treaties. The Refugee Convention is not included in this list. At the time of the Act’s passage there was disquiet about the selection of instruments, however, as the second reading speech of that Act outlined, these are matters which the Committee itself might choose to review and make recommendations regarding. This issue is discussed further below.

Policy position of non-government parties/independents

The Coalition parties support the Bill, although two of their members of the House of Representatives did cross the floor to vote against it on 27 November 2012. The Australian Greens oppose the Bill, as do independents Mr Andrew Wilkie and Mr Craig Thomson.

Position of major interest groups

While, at the time of writing this Digest, the Senate Legal and Constitutional Affairs Legislation Committee had not yet issued its report, the various submissions received by it are available. Of

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30. Section 198AE(3).
32. They were Mr Broadbent and Mrs Moylan.
the 36 submissions received, only those from the Department of Immigration and Citizenship and the Australian Customs and Border Protection Service did not oppose the Bill, and even those submissions were descriptive rather than supportive of it.

Those opposed to the Bill who have made their concerns clear to the Committee include academics, community groups and NGOs, and other individuals. Certain professional bodies have also set out their opposition to the Bill. These are the Law Council of Australia, the Migration Institute of Australia, the Law Institute of Victoria and the Law Society of the Northern Territory. The Australian Human Rights Commission, the Western Australian Commissioner for Children and Young People, and the South Australian Commissioner for Equal Opportunity also oppose the Bill.

Most of the objections focus on the human rights of the individuals seeking asylum and argue that they should not be treated inhumanely in order to deter other asylum seekers. There is also a concern regarding the long-term welfare of these asylum seekers and the damage prolonged detention could cause.

Financial implications

The financial impact of this Bill has been assessed to be low and will be met from within the existing resources of the Department of Immigration and Citizenship. There is no discussion of whether the costs of sending asylum seekers to regional processing countries for lengthy stays would be significant, or whether onshore processing would be more economic.

Human Rights issues

The Statement of Compatibility with Human Rights (‘the Statement’) can be found at Attachment A to the revised Explanatory Memorandum to the Bill. As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011, the Government has assessed the Bill’s compatibility with the Human Rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible, although some submitters to the Senate Legal and Constitutional Affairs Legislation Committee questioned whether this is so.

The impact of the Bill will be to deny the right to apply for a protection visa to asylum seekers arriving by boat anywhere in Australia (rather than just to those who arrive at offshore excised

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places). They will instead be liable to be sent to regional processing countries to have their claims assessed. They may be in detention for several years. In this context, it is arguable that the Bill raises several human rights concerns that are not addressed in the Statement.

The Statement does refer to Article 12 of the *International Covenant on Civil and Political Rights* (ICCPR). This Article provides that persons lawfully within the territory of a contracting state shall have freedom of movement. The Statement asserts that article 12 does not apply because unauthorised maritime arrivals are not lawfully in Australia.

The Statement then refers to Article 13 of the ICCPR, which provides that aliens lawfully within the territory of a signatory state shall be expelled from the territory only in accordance with law, and shall (subject to requirements of national security) be allowed to make submissions against expulsion, to be represented and to have the decision reviewed. The Statement asserts that unauthorised maritime arrivals would not be lawfully in Australia, so Article 13 will not apply.

The Statement then refers to the right not to be arbitrarily detained, contained in Article 9 of the ICCPR. The Statement, rather than discussing the detention of unauthorised maritime arrivals, either in Australia or in regional processing countries, simply refers to the proposed discretionary immigration detention powers over certain citizens of Papua New Guinea in the Torres Strait. This replaces the current mandatory detention provisions for such citizens (i.e. those who are not traditional inhabitants of the Protected Zone under the *Torres Strait Treaty*). The detention of such persons will continue to be lawful under the proposed amendment to section 189. The Statement’s analysis of section 189 is undeniably true, however the failure to discuss other relevant detentions is a curious omission.

The Statement notes that the Refugee Convention is not a treaty listed in the Human Rights (Parliamentary Scrutiny) Act, the implication being that the Refugee Convention is not required to be considered in the Statement. While indeed it is not listed, there appears to be no impediment to the Refugee Convention being addressed as a relevant source of law in a ‘Statement of Compatibility with Human Rights’ of a Bill which deals with refugees. It is noteworthy that during passage of the Human Rights (Parliamentary Scrutiny) Act there were acknowledgements that the seven treaty list need not constrain the Committee in its consideration of Bills, and as such, it need not limit the scope of Statements of Compatibility either.

The Statement notes Australia’s obligation not to send people to countries where there is a real risk of the death penalty, arbitrary deprivation of life, torture or cruel, inhuman or degrading punishment (Articles 6 and 7 of the ICCPR, and Article 3 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (‘CAT’)). Rather than addressing these issues, the Statement simply notes that removal arrangements already exist under the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (‘the Regional Processing Act’). The Statement argues that as the removal measures already exist in the Act, the Bill’s extension of these measures to a wider group of people does not affect the substantive current operation of the Act. Against this assertion it might be argued firstly that any provision that may reasonably be considered a breach of human rights should be examined in the Statement, even if it only amounts to an extension of an existing controversial provision. Secondly, it may be argued that
the extension of the excision regime to a new group (in this case, maritime arrivals on the mainland) does alter the substantive operation of the Act. On this view, the Statement should have been more detailed.

In a similar manner, rights relating to children and families (contained in Articles 17 and 25 of the ICCPR and Article 3 of the Convention on the Rights of the Child) are referred to but not discussed, on the basis that the excision and removal arrangements are already in place for offshore entry persons and so the Bill’s extension of these arrangements to mainland arrivals does not change anything. Again, it might be argued that the impact of the excision and removal measures on rights relating to children and families within the relevant demographic should at least have been addressed in the Statement.

The Australian Human Rights Commission (AHRC) in its submission to the Senate Legal and Constitutional Affairs Legislation Committee dated 17 December 2012, has identified a number of human rights concerns not addressed in the Statement.

Firstly, there are the rights to the equal protection of the law and non-discrimination contained in Article 26 of the ICCPR. The Bill will radically differentiate between persons arriving by boat without authorisation, and other asylum seeker arrivals, chiefly those arriving by air. One group will be liable to be sent to regional processing countries, possibly for many years. The others will be able to apply for protection visas in Australia. It is arguable this is an infringement of Article 26.

Secondly, there are concerns as to arbitrary detention and inhumane conditions of detention, particularly in regional processing countries, in breach of Articles 9 and 10 of the ICCPR.

Thirdly, there is a risk of cruel, inhuman or degrading punishment to persons affected by the operation of the Bill. This would contravene Articles 6 and 7 of the ICCPR and Article 3 of CAT.

Fourthly, the AHRC also notes there are significant risks of violation of the rights of children and families.

Fifthly, the AHRC notes Article 31 of the Refugee Convention, which prohibits the penalising of asylum seekers for their unauthorised arrival. The Bill appears to contravene this provision of the Refugee Convention.

Sixthly, and finally, the AHRC refers to the prohibition on expulsion or return (‘refoulement’) of persons to situations where their lives and freedoms would be threatened on account of race, relation, nationality, membership of a social group or political opinion. The AHRC is concerned that under the current arrangements in regional processing countries, there are insufficient safeguards against refoulement.

Most other submissions to the Senate Legal and Constitutional Affairs Legislation Committee, as detailed above, referred to similar human rights concerns.
From a human rights perspective it appears it would be preferable to provide onshore processing for unauthorised asylum seeker arrivals both on the mainland and on excised offshore places given that the regional processing arrangements already impact upon the human rights of asylum seekers.\(^{35}\)

If a human rights compatibility statement is to fulfil its intended function, it must provide a rigorous assessment of any adverse impacts. This then provides the basis for an informed debate about the trade-offs between competing policy objectives being proposed by a Bill.

**Key issues and provisions**

The Bill itself is brief. The key feature is the definition of the new term ‘unauthorised maritime arrival.’ This new term is then integrated into the Act so that the provisions applying to offshore entry persons will apply equally to unauthorised maritime arrivals. This is discussed below, along with some other incidental aspects of the Bill.

**Unauthorised maritime arrival**

‘Unauthorised maritime arrival’ is defined in proposed section 5AA to include a person entering Australia by sea at an excised offshore place\(^{36}\), plus a person entering anywhere in Australia after the commencement of the proposed section.\(^{37}\) It is also a requirement that the person becomes an unlawful non-citizen because of the entry\(^{38}\) and that the person is not an ‘excluded maritime arrival.’\(^{39}\)

Entering Australia ‘by sea’ is broadly defined to include people other than those entering on an aircraft which lands in the migration zone.\(^{40}\) It also includes people who enter Australia, even by aeroplane, after being found on a ship detained under section 245F.\(^{41}\) It also includes people who enter Australia after being rescued at sea.\(^{42}\)

Excluded maritime arrivals are (i) New Zealanders, (ii) residents of Norfolk Island and (iii) people in a prescribed class of persons.

Of the 58 items in Schedule 1, 36 concern replacing reference to ‘offshore entry person’ with ‘unauthorised maritime arrival.’

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35. See for example the submission to the Senate Legal and Constitutional Affairs Legislation Committee prepared by the Refugee Council of Australia, of uncertain date.
36. Proposed subparagraph SAA(1)(a)(i) of the Bill.
37. Proposed subparagraph SAA(1)(a)(ii) of the Bill.
38. Proposed paragraph SAA(1)(b) of the Bill.
39. Proposed paragraph SAA(1)(c) of the Bill.
40. Proposed paragraph SAA(2)(a) of the Bill.
41. Proposed paragraph SAA(2)(b) of the Bill. Section 245F is part of Division 12A of the Migration Act 1958, which concerns chasing and boarding ships and aircraft.
42. Proposed paragraph SAA(2)(c) of the Bill.
As discussed above, the full text of proposed section 5AA is set out in Appendix 1, along with the text of similar amendments in the 2006 Bill (proposed section 5F).

Transitory persons

The current definition of ‘transitory person’ is contained in section 5 of the Act. Put simply, this is an offshore entry person taken to Manus Island or Nauru for processing.43 It does not include persons assessed to be refugees under the Refugee Convention. The Bill will adjust the definition so that it applies to ‘unauthorised maritime arrivals’ rather than just to ‘offshore entry persons’, and it will extend to include persons who have been assessed to be refugees.

Section 198B provides that transitory persons may be brought to Australia for temporary purposes by the Department. If such persons are in Australia for a continuous period of six months, section 198C allows them to apply to the Refugee Review Tribunal (RRT) for a determination of refugee status under Australian domestic law.

The Bill proposes to expand the definition of transitory persons to include persons assessed to come within the Refugee Convention.44 The Bill also proposes to repeal section 198C.45 This means transitory persons in Australia for over six months will be unable to apply to the RRT. This appears to go beyond Recommendation 14 in the Export Panel’s report, which simply recommended that irregular maritime arrivals be treated the same whether they arrive elsewhere in Australia or at an excised offshore place. The present definition of ‘transitory person’, as well as the definition proposed by the Bill, are both set out at Appendix 2, below.

The provisions in the Act presently providing for the removal of offshore entry persons to regional processing countries do apply to certain transitory persons as well.46 Those transitory persons brought to Australia for a temporary purpose can be taken back to a regional processing country. There is presently a limited exception for a transitory person who has made an application under section 198C.47 Such persons can remain in Australia until the RRT determination process (including appeals to the courts) has been finalised, unless the Secretary of the Department of Immigration and Citizenship has issued a certificate under section 198D stating that the person has engaged in uncooperative conduct. With the removal of section 198C, this exception is also removed.

Proposed subsection 198AH(2), inserted by item 47 of Schedule 1 of the Bill, states that the powers to remove a transitory person to a regional processing country will extend to persons who have been found to come within the Refugee Convention. This is not the case at present. This means it will be possible to remove a person to a regional processing country even after he or she has been assessed as coming within the scope of the Refugee Convention and comes within the definition of

43. It also includes persons taken to places outside Australia under paragraph 245F(9)(b).
44. Item 6 in Schedule 1 to the Bill.
45. Item 48 of Schedule 1 to the Bill.
46. Section 198AH.
47. Subsection 198AH(e).
transitory person. Again, this appears to go beyond Recommendation 14 in the Export Panel’s report.

The Oakeshott amendment

Proposed section 198AI will require the Minister to present a report to the Parliament each year outlining activities in connection with the Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime (the Bali Process).

Adjustment to detention powers in section 189

Section 189 provides for the detention of unlawful non-citizens. For ease of reference, section 189 is set out in full in Appendix 2, below. Subsection 189(2) applies to persons in Australia but outside the migration zone.48 If a departmental officer reasonably suspects that such persons are seeking to enter the migration zone and that they would be unlawful non-citizens if they did, it is presently mandatory that such persons be detained.49 This Bill proposes that this detention power becomes discretionary (‘the officer may detain’).50 This adjustment to the section 189 detention power is likely to be uncontroversial, providing, as it does, greater flexibility for departmental management.

The Bill also introduces a discretionary detention power in relation to Papua New Guinea citizens who are unlawful non-citizens in the Torres Strait.51 Many such persons are covered by mandatory detention provisions at present.52 While this new detention power is beneficial to the demographic affected, it is completely unrelated to Recommendation 14 in the Export Panel’s report.

The power to vary or revoke a determination under section 198AE

Proposed subsection 198AE(1A) seeks to allow the Minister to vary or revoke determinations made under subsection 198AE(1) that a particular person be exempted from the regional processing provisions contained in the Act. The effect of a variation or revocation would be that the person previously exempted would be liable to be sent offshore for regional processing. The Senate Standing Committee for the Scrutiny of Bills was concerned that the rules of natural justice would not apply to these provisions. Revocation and variation decisions and their impact on the persons involved are significant. It could be argued, therefore, that the rules of natural justice should apply.

Concluding comments

This Bill seeks to extend the excision regime governing unauthorised seaborne asylum seekers. The current regime applies only to those who arrive at offshore excised places. This Bill will extend the

48. This includes persons at offshore excised places.
49. Subsection 189(2).
50. See item 15 in Schedule 1 to the Bill.
51. See item 16. There is already a discretionary detention power for unlawful non-citizens who are residents of the ‘protected zone’ established under the Torres Strait Treaty.
52. Unlawful non-citizens from areas of Papua New Guinea other than the protected zone established under the Torres Strait Treaty are presently covered by mandatory detention requirements set out in section 189.
application of these rules to persons arriving anywhere in Australia. The Bill does not refer to any excision of Australia from its own migration zone. In context however, this description seems not unreasonable. In terms of seaborne asylum seeker arrivals, it could be said that the Bill seeks to incorporate the Australian mainland into Christmas Island.

This Bill’s Digest might usefully be read in conjunction with the report of the Senate Legal and Constitutional Affairs Legislation Committee.

The Bill implements Recommendation 14 of the report of the Export Panel on Asylum Seekers. This recommendation was that the existing excision provisions be extended to the whole country so that unauthorised maritime arrivals on the mainland gain no advantage over those arriving at offshore excised places such as Christmas Island. Both groups are to be liable to be sent to regional processing countries for the assessment of their asylum claims. The rationale for this is the need to discourage dangerous ocean voyages in unseaworthy vessels. One wonders whether the greater rationale is the desire to address the concerns of persons in the Australian community who oppose the entry of asylum seekers.

The Bill is identical in effect to the Howard Government’s Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, which sought to extend the 2001 excision regime to the whole country. That Bill was opposed by the Australian Labor Party (ALP) together with certain Coalition members who crossed the floor. While that Bill was passed by the House of Representatives, it was never debated in the Senate following the Senate Legal and Constitutional Legislation Committee’s recommendation that the Bill not proceed.

Whether or not a person supports Recommendation 14 ought to determine whether or not to support this Bill. Should unauthorised asylum seeker arrivals by sea be sent offshore for regional processing? There are clearly major human rights concerns but as against this it may be argued that deterring dangerous ocean crossings to Australia by way of this Bill and other legislation is, on balance, a more humane outcome. If such voyages are not deterred it seems inevitable there will be further deaths.

For those who may support Recommendation 14 and hence be in favour of the Bill, it should be noted that there are provisions in it concerning transitory persons and Papua New Guinean citizens which appear to be beyond the scope of the recommendation itself. While the provisions affected Papua New Guinean citizens are beneficial in nature, those affecting transitory persons are not. As such, some may wish to oppose them. Further, it may be argued that it is desirable that the rules of natural justice might apply in situations where the Minister is contemplating the variation or revocation of a determination made under subsection 198AE(1). These points are discussed in the Digest.
Appendix 1: Designated Unauthorised Arrival’s vs Unauthorised Maritime Arrivals

The 2006 Bill proposed the insertion of a new section 5F:

5F Meaning of designated unauthorised arrival

(1) For the purposes of this Act, a person is a designated unauthorised arrival if the person:

(a) is not an exempt person (see subsection (2)); and

(b) became an unlawful non-citizen because the person:

(i) entered Australia at an excised offshore place after the excision time for that offshore place; or

(ii) entered Australia by sea (see subsection (8)) on or after 13 April 2006; and

(c) has not, after that entry:

(i) become the holder of a substantive visa; or

(ii) left Australia (see subsection (10)), other than as a result of being taken under subsection 198A(1) from Australia to a country in respect of which a declaration is in force under subsection 198A(3); or

(iii) left a country (see subsection (11)), in respect of which a declaration is in force under subsection 198A(3), to travel to a country other than Australia.

(2) For the purposes of this section, a person is an exempt person if the person:

(a) is a New Zealand citizen who holds and produces a New Zealand passport that is in force; or

(b) is a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or

(c) was brought to the migration zone, pursuant to subsection 185(3A) of the Customs Act 1901 as a result of being found on a ship detained under section 185 of that Act, and no officer reasonably suspected that the person:

(i) was seeking to enter the migration zone; and

(ii) would, if in the migration zone, be an unlawful non-citizen; or

(d) is in a class of persons declared by the Minister, under subsection (3), to be exempt; or

(e) is declared by the Minister, under subsection (6), to be exempt.
Declarations—specified class of persons

(3) The Minister may, for the purposes of paragraph (2)(d), declare, in writing, a specified class of persons to be exempt.

(4) A class of persons may be specified in a declaration made under subsection (3) even if ascertaining the membership of the class relies on a discretion being exercised or a particular opinion being held.

(5) A declaration made under subsection (3) is a legislative instrument.

Declarations—specified person

(6) The Minister may, for the purposes of paragraph (2)(e), declare, in writing, a specified person to be exempt if:

(a) regulations made for the purposes of this subsection specify criteria that a person must satisfy before the person may be declared, under this subsection, to be exempt; and

(b) the Minister is satisfied that the person satisfies those criteria.

(7) A declaration made under subsection (6) is not a legislative instrument.

Interpretation

(8) For the purposes of this section, a person is taken to have entered Australia by sea if the person has:

(a) travelled to Australia by sea and entered the migration zone (whether or not by sea); or

(b) entered the migration zone by air (see subsection (9)) pursuant to subsection 245F(9) as a result of being found on a ship detained under section 245F; or

(c) entered the migration zone by air (see subsection (9)) after being rescued at sea.

(9) For the purposes of subsection (8), a person who enters Australia on an aircraft is taken to have entered the migration zone by air only if that aircraft lands in the migration zone.

(10) For the purposes of this section, a person is taken not to have left Australia if the person has:

(a) been removed under section 198 to another country but has been refused entry by that country; and

(b) returned to Australia as a result of that refusal.

(11) For the purposes of this section, a person is taken not to have left a country if:
(a) the person has:

(i) departed the country to travel to one or more other countries; and

(ii) been refused entry by each of those other countries; and

(iii) returned to the first-mentioned country as a result of the refusal or refusals; or

(b) the person has:

(i) departed the country for medical treatment in one or more other countries; and

(ii) returned to the first-mentioned country after receiving medical treatment

The current Bill proposes a new section 5AA:

5AA Meaning of unauthorised maritime arrival

(1) For the purposes of this Act, a person is an unauthorised maritime arrival if:

(a) the person entered Australia by sea:

(i) at an excised offshore place at any time after the excision time for that place; or

(ii) at any other place at any time on or after the commencement of this section; and

(b) the person became an unlawful non-citizen because of that entry; and

(c) the person is not an excluded maritime arrival.

Entered Australia by sea

(2) A person entered Australia by sea if:

(a) the person entered the migration zone except on an aircraft that landed in the migration zone; or

(b) the person entered the migration zone as a result of being found on a ship detained under section 245F and being dealt with under paragraph 245F(9)(a); or

(c) the person entered the migration zone after being rescued at sea.

Excluded maritime arrival

(3) A person is an excluded maritime arrival if the person:

(a) is a New Zealand citizen who holds and produces a New Zealand passport that is in force; or
(b) is a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or

(c) is included in a prescribed class of persons.

Definitions

(4) In this section:

- **aircraft** has the same meaning as in section 245A.

- **ship** has the meaning given by section 245A.
Appendix 2: Selected provisions in the Migration Act 1958 referred to in the Digest

1. The current excision provisions

Section 5 of the Migration Act 1958 provides in part:

*excised offshore place* means any of the following:

(a) the Territory of Christmas Island;

(b) the Territory of Ashmore and Cartier Islands;

(c) the Territory of Cocos (Keeling) Islands;

(d) any other external Territory that is prescribed by the regulations for the purposes of this paragraph;

(e) any island that forms part of a state or territory and is prescribed for the purposes of this paragraph;

(f) an Australian sea installation;

(g) an Australian resources installation.

Note: The effect of this definition is to excise the listed places and installations from the migration zone for the purposes of limiting the ability of offshore entry persons to make valid visa applications.

Section 5 also provides in part:

*offshore entry person* means a person who:

(a) entered Australia at an excised offshore place after the excision time for that offshore place; and

(b) became an unlawful non-citizen because of that entry.

and

*excision time*, for an excised offshore place, means:

(a) for the Territory of Christmas Island—2 pm on 8 September 2001 by legal time in the Australian Capital Territory; or

(b) for the Territory of Ashmore and Cartier Islands—2 pm on 8 September 2001 by legal time in the Australian Capital Territory; or
(c) for the Territory of Cocos (Keeling) Islands—12 noon on 17 September 2001 by legal time in the Australian Capital Territory; or

(d) for any other external Territory that is prescribed by the regulations for the purposes of the definition of excised offshore place—the time when the regulations commence; or

(e) for any island that forms part of a state or territory and is prescribed by the regulations for the purposes of the definition of excised offshore place—the time when the regulations commence; or

(f) for an Australian sea installation—the commencement of the Migration Amendment (Excision from Migration Zone) Act 2001; or

(g) for an Australian resources installation—the commencement of the Migration Amendment (Excision from Migration Zone) Act 2001.

Section 46A provides:

46A Visa applications by offshore entry persons

(1) An application for a visa is not a valid application if it is made by an offshore entry person who:

(a) is in Australia; and

(b) is an unlawful non-citizen.

(2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.

(3) The power under subsection (2) may only be exercised by the Minister personally.

(4) If the Minister makes a determination under subsection (2), the Minister must cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister’s reasons for thinking that the Minister’s actions are in the public interest.

(5) A statement under subsection (4) must not include:

(a) the name of the offshore entry person; or

(b) any information that may identify the offshore entry person; or
(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) must be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any offshore entry person whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances.

At the risk of oversimplification, these provisions mean that persons with no visa arriving at excised offshore places are unable to apply for a visa, unless the Immigration Minister decides it is in the public interest that they can do so (section 46A(2)).

2. Transitory person provisions

Current definition in section 5

**transitory person** means:

(a) an offshore entry person who was taken to another country under repealed section 198A; or

(aa) an offshore entry person who was taken to a regional processing country under section 198AD; or

(b) a person who was taken to a place outside Australia under paragraph 245F(9)(b); or

(c) a person who, while a non-citizen and during the period from 27 August 2001 to 6 October 2001:

(i) was transferred to the ship **HMAS Manoora** from the ship **Aceng** or the ship **MV Tampa**; and

(ii) was then taken by **HMAS Manoora** to another country; and

(iii) disembarked in that other country;

but does not include a person who has been assessed to be a refugee for the purposes of the Refugees Convention as amended by the Refugees Protocol.

Proposed definition following passage of the Bill.
**transitory person** means:

(a) a person who was taken to another country under repealed section 198A; or

(aa) a person who was taken to a regional processing country under section 198AD; or

(b) a person who was taken to a place outside Australia under paragraph 245F(9)(b); or

(c) a person who, while a non-citizen and during the period from 27 August 2001 to 6 October 2001:

(i) was transferred to the ship *HMAS Manoora* from the ship *Aceng* or the ship *MV Tampa*; and

(ii) was then taken by *HMAS Manoora* to another country; and

(iii) disembarked in that other country.

3. **Regional processing provisions**

198AD **Taking offshore entry persons to a regional processing country**

(1) Subject to sections 198AE, 198AF and 198AG, this section applies to an offshore entry person who is detained under section 189.

Note: For when this section applies to a transitory person, see section 198AH.

(2) An officer must, as soon as reasonably practicable, take an offshore entry person to whom this section applies from Australia to a regional processing country.

**Powers of an officer**

(3) For the purposes of subsection (2) and without limiting that subsection, an officer may do any or all of the following things within or outside Australia:

(a) place the offshore entry person on a vehicle or vessel;

(b) restrain the offshore entry person on a vehicle or vessel;

(c) remove the offshore entry person from:

(i) the place at which the person is detained; or

(ii) a vehicle or vessel;

(d) use such force as is necessary and reasonable.
(4) If, in the course of taking an offshore entry person to a regional processing country, an officer considers that it is necessary to return the person to Australia:

(a) subsection (3) applies until the person is returned to Australia; and

(b) section 42 does not apply in relation to the person’s return to Australia.

Ministerial direction

(5) If there are 2 or more regional processing countries, the Minister must, in writing, direct an officer to take an offshore entry person, or a class of offshore entry persons, under subsection (2) to the regional processing country specified by the Minister in the direction.

(6) If the Minister gives an officer a direction under subsection (5), the officer must comply with the direction.

(7) The duty under subsection (5) may only be performed by the Minister personally.

(8) The only condition for the performance of the duty under subsection (5) is that the Minister thinks that it is in the public interest to direct the officer to take an offshore entry person, or a class of offshore entry persons, under subsection (2) to the regional processing country specified by the Minister in the direction.

(9) The rules of natural justice do not apply to the performance of the duty under subsection (5).

(10) A direction under subsection (5) is not a legislative instrument.

Not in immigration detention

(11) An offshore entry person who is being dealt with under subsection (3) is taken not to be in immigration detention (as defined in subsection 5(1)).

Meaning of officer

(12) In this section, officer means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

198AE Ministerial determination that section 198AD does not apply

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, in writing, determine that section 198AD does not apply to an offshore entry person.

Note: For specification by class, see the Acts Interpretation Act 1901.

(2) The power under subsection (1) may only be exercised by the Minister personally.

(3) The rules of natural justice do not apply to an exercise of the power under subsection (1).
(4) If the Minister makes a determination under subsection (1), the Minister must cause to be laid before each House of the Parliament a statement that:

   (a) sets out the determination; and

   (b) sets out the reasons for the determination, referring in particular to the Minister’s reasons for thinking that the Minister’s actions are in the public interest.

(5) A statement under subsection (4) must not include:

   (a) the name of the offshore entry person; or

   (b) any information that may identify the offshore entry person; or

   (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) must be laid before each House of the Parliament within 15 sitting days of that House after:

   (a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

   (b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any offshore entry person, whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances.

(8) A determination under subsection (1) is not a legislative instrument.

198AF No regional processing country

Section 198AD does not apply to an offshore entry person if there is no regional processing country.

198AG Non-acceptance by regional processing country

Section 198AD does not apply to an offshore entry person if the regional processing country, or each regional processing country (if there is more than one such country), has advised an officer, in writing, that the country will not accept the offshore entry person.

Note: For specification by class, see the Acts Interpretation Act 1901.

198AH Application of section 198AD to certain transitory persons

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Section 198AD applies, subject to sections 198AE, 198AF and 198AG, to a transitory person if, and only if:

(a) the person is an offshore entry person who is brought to Australia from a regional processing country under section 198B for a temporary purpose; and

(b) the person is detained under section 189; and

(c) the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved); and

(d) in the case where the person has not made a request under section 198C—an assessment of whether or not the person is covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol was not completed while the person was in the regional processing country; and

(e) in the case where the person has made such a request—a certificate is in force under section 198D in relation to the person.

4. Detention of unlawful non-citizens

189 Detention of unlawful non-citizens

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter the migration zone (other than an excised offshore place); and

(b) would, if in the migration zone, be an unlawful non-citizen; the officer must detain the person.

(3) If an officer knows or reasonably suspects that a person (other than a person referred to in subsection (3A)) in an excised offshore place is an unlawful non-citizen, the officer must detain the person.

(3A) If an officer knows or reasonably suspects that a person in a protected area:

(a) is an allowed inhabitant of the Protected Zone; and

(b) is an unlawful non-citizen; the officer may detain the person.

(4) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter an excised offshore place; and
(b) would, if in the migration zone, be an unlawful non-citizen; the officer may detain the person.

(5) In subsections (3), (3A) and (4) and any other provisions of this Act that relate to those subsections, officer means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

Note: See Subdivision B for the Minister's power to determine that people who are required or permitted by this section to be detained may reside at places not covered by the definition of immigration detention in subsection 5(1).