Developments in Australian refugee law and policy 2010–2011

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Law and Bills Digest Section

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Introduction

On 14 September 2010, Julia Gillard was re-sworn in as Australia’s 27th Prime Minister following the 21 August 2010 federal election. When the Australian Labor Party (ALP) commenced its second term in office it did so amidst increasing numbers of asylum seekers arriving by boat (also known as irregular maritime arrivals (IMAs)), increasing levels of unrest in its existing immigration detention network, and a looming High Court challenge to its proposed offshore processing regime.

By the end of 2011, Australia’s immigration detention network had been significantly expanded; the alternative processing regime used for IMAs had effectively been abandoned; plans to enliven third-country processing in the region had been put on hold following a successful High Court challenge and subsequent political impasse; increasing numbers of convicted people smuggling crews had been incarcerated; onshore processing for all asylum seekers had begun; and the Government had decided that eligible IMAs could have their asylum claims assessed while they resided in the community on bridging visas—putting them on the same footing as most other onshore asylum seekers.1

However, amidst this flux, some things remained the same, for example, Australia’s refugee and humanitarian intake quota, retention of the policy of mandatory detention and excision under the Migration Act, and the steady flow of asylum seekers arriving by boat to seek Australia’s protection.2 Sadly, the injury and deaths of asylum seekers attempting to arrive by sea and in immigration detention centres also continued to feature throughout the year.

This Background Note provides a snap-shot of significant developments in refugee law and policy during the period September 2010 to the end of December 2011. In doing so, it builds upon a previous Parliamentary Library publication entitled Developments in Australian refugee law and policy 2007–10: Labor’s first term in office.3 Part I provides a chronology of significant events which includes a section dedicated to commentary provided by former politicians, bureaucrats, and prominent Australians. Part II traces each Bill that was introduced by the ALP as well as privately proposed Bills by the Australian Greens. Part III examines parliamentary inquiries on refugee matters conducted during the period, while Part IV contains a brief overview of two significant High Court

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1. The agreement of a State or Territory is not required to commence a prosecution in that jurisdiction for Commonwealth offences with extraterritorial application, such as people smuggling. As at February 2011, people smuggling cases were being conducted in New South Wales, Victoria, Queensland, Western Australia and the Northern Territory: Attorney-General’s Department, Senate Standing Committee on Legal and Constitutional Affairs, Additional Estimates, 22 February 2011, Answer to a question on notice, question number 96 (Questioner: Senator Trood).


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judgments—the offshore processing test case and the challenge to the Government’s ‘Malaysia arrangement’.

The reader is also directed to other new Parliamentary Library publications published on this topic during the period:

- E Karlsen, *Refugee resettlement to Australia: what are the facts?*, 6 December 2011
- E Karlsen, *Should Parliament ultimately decide whether asylum seekers may be sent to a foreign country?*, 19 August 2011

**PART I—CHRONOLOGY OF SIGNIFICANT EVENTS**

**2010**

- 14 September—Julia Gillard re-sworn in as Australia’s Prime Minister following the 21 August 2010 federal election.

- 14 September—Chris Bowen sworn in as Minister for Immigration and Citizenship and Senator the Hon Kate Lundy sworn in as Parliamentary Secretary for Immigration and Citizenship.

- 14 September—Scott Morrison re-appointed Shadow Minister for Immigration and Citizenship, Senator Michaelia Cash appointed Shadow Parliamentary Secretary for Immigration, and Teresa Gambaro appointed Shadow Parliamentary Secretary for Citizenship and Settlement.

- 17 September—Minister Bowen announces additional immigration detention accommodation will be prepared for families and unaccompanied minors in Melbourne and for single adult men in northern Queensland and in Western Australia.4

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• 30 September—Minister Bowen revokes Direction No. 46 ‘Order for considering and disposing of protection visa applications’ which was made with respect to applications lodged by Sri Lankan and Afghan nationals. On 9 April 2010, the Government had announced that it was implementing an immediate suspension on the processing of all new applications from asylum seekers from Sri Lanka and Afghanistan due to evolving circumstances in both countries. The suspension was subsequently lifted for Sri Lankan applications on 6 July 2010 and for Afghan applications on 30 September 2010.

• 8 October—Minister Bowen delivers first significant address as Minister for Immigration and Citizenship to Migration Institute of Australia (MIA) conference in Sydney.

• 14 October—Keith Hamburger AM produces a report entitled Assessment of the current immigration detention arrangements at Christmas Island which predicts riots by asylum seekers on Christmas Island. The report was not made publicly available until it was submitted by DIAC to the Joint Select Committee on Australia’s Immigration Detention Network on 23 March 2012 (in response to question 306).

• 15 October—Minister Bowen announces that the last remaining 17 refugees rescued by the Oceanic Viking in October 2009 awaiting resolution of their cases in a United Nations High Commissioner for Refugees (UNHCR) transit centre in Romania will be resettled in Australia subject to meeting standard health, security and character requirements.

• 18 October—Prime Minister Gillard and Minister Bowen announce that children and vulnerable families will be moved into community-based accommodation and the commissioning of two new detention facilities at Northam in Western Australia and Inverbrackie in South Australia to help relieve pressures on existing facilities.

• 29 October—The Australian Human Rights Commission releases a report entitled Immigration detention on Christmas Island 2010. The Commission notes that since 2009 ‘there has been a substantial increase in the number of people detained there. While there have been some

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improvements in the operation of the detention facilities, the increase in numbers has led to overcrowding and a significant deterioration in conditions for many people’.  

- 3 November—New Department of Immigration and Citizenship (DIAC) Country Guidance notes for Sri Lanka and Afghanistan used by decision-makers are made publicly available.

- 9 November—Minister Bowen announces a reintegration assistance program for irregular maritime arrivals who choose to return to their country of origin.

- 11 November—The High Court of Australia delivers its judgment in the offshore processing test case (Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia (2010) 272 ALR 14). The Government announces that all asylum seekers who had received a negative independent merits review before judgment date will be offered a second review by a different reviewer.

- 30 November—The Shadow Minister for Immigration, Scott Morrison delivers an address to the Lowy Institute entitled ‘A real solution: An international, regional and domestic approach to asylum’.

- 1 December—Minister Bowen announces the Government is introducing biometrics collection of all protection visa applicants’ data lodged in Australia and selected overseas locations. Biometrics data acquisition is already used in some immigration and citizenship processes but has now been expanded to include all onshore protection visa applicants. Biometrics collection involves the capture of a digital facial image as well as a 10-digit fingerprint scan.

- 14 December—The Australian Human Rights Commission releases a report entitled Immigration detention in Darwin. The Commission raises concerns about the high numbers of families with


10. Ibid.


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children and unaccompanied minors being held for longer periods of time in immigration detention facilities in Darwin and the impacts prolonged detention is having on the health, education and psychological needs of children.  

• 15 December—A maritime vessel, later known as Suspected Irregular Entry Vessel (SIEV) 221 washes onto the shoreline at Christmas Island in rough seas. The incident causes a significant loss of life (exact number unknown) and only 41 survivors are recovered from the water.

• 17 December—UNHCR releases new Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan.

2011

• 1 January—DIAC’s ‘Refugee Status Assessment Manual’ used to assess asylum claims made by an ‘offshore entry person’ is made publicly available on DIAC’s LEGENDcom database.

• 7 January—Minister Bowen announces response to High Court offshore processing test case. A new ‘protection obligations determination’ process is to come into effect on 1 March 2011. It will involve a new streamlined primary assessment process by a departmental officer and fast-tracking of adverse decisions directly to an independent assessor for final determination (independent protection assessment).

• 17 January—Memorandum of Understanding (MOU) is signed between the Government of Australia, the Government of the Islamic Republic of Afghanistan and UNHCR on migration and humanitarian cooperation. The MOU relevantly provides in article 9 that the Afghan Government would readmit its nationals who are in Australia (including immediate family members of such nationals) who are found not to be in need of international protection and not entitled to remain in Australia. Under article 5, UNHCR agreed to engage, as necessary, in ad hoc monitoring of the return of Afghans from Australia to Afghanistan, with particular attention to persons with specific humanitarian needs.


• 24 January—Customs and Border Protection Service releases an internal review of the agency’s response to the SIEV 221 tragedy finding that it did not have any intelligence that would indicate that the vessel had departed Indonesia or was likely to arrive at Christmas Island around the time it did. The Review also noted that all personnel acted appropriately and exercised good judgment.22

• 27 January—Australia participates in its first Universal Periodic Review before the United Nations Human Rights Council in Geneva.23 A number of delegations made recommendations with respect to Australia’s management of asylum seekers.

• 2 February—the Commonwealth Ombudsman releases a report entitled Christmas Island immigration detention facilities: Report on the Commonwealth and Immigration Ombudsman’s Oversight of Immigration Processes on Christmas Island October 2008 to September 2010.24 According to the Commonwealth Ombudsman, Allan Asher, the underlying message in the report is that ‘there are too many people being detained at the Christmas Island immigration detention facilities and the current scale of operations on the geographically remote island are not sustainable’. 25

• 3 February—A confidential Australian Government paper entitled the ‘Regional Assessment Centre Concept’ of November 2010, provided to the Government of East Timor in December 2010, is leaked to the media and made publicly available online.

• 15 February—the Australian Human Rights Commission releases a report entitled 2011 Immigration detention in Leonora in which the Commission expresses concern about the impact of the mandatory detention system on the human rights, wellbeing and mental health of detainees. It also expresses concern about the mandatory detention of children and the increasing length of time for which many people are being held in immigration detention.26

• 17 February—Minister Bowen unveils new multiculturalism policy at a speech delivered to the Sydney Institute.\(^{27}\) He announces (amongst other things) that the Government will be introducing a new independent advisory body, the Australian Multicultural Council, with broader terms of reference, to succeed the current Advisory Council and that it will be establishing a *National Anti-Racism Partnership and Strategy* to bring together existing expertise on anti-racism and multicultural matters from government departments, the Australian Human Rights Commission and the Australian Multicultural Advisory Council.

• 21 February—Kate Lundy re-sworn in as Parliamentary Secretary for Immigration and Multicultural Affairs (formerly, Parliamentary Secretary for Immigration and Citizenship).

• 21 February—Scott Morrison in a Private Member’s Motion before Parliament calls for the capping of the number of visas available in the refugee and humanitarian program as follows: 6000 visas for refugees referred from UNHCR; 3750 onshore protection visas including ‘irregular maritime arrivals’; and 4000 visas for those entering under the Special Humanitarian Program (SHP) and subclasses 201, 203 and 204.

• 1 March—New ‘Protection Obligation Determination’ (POD) process is implemented to replace the existing ‘Refugee Status Assessment’ (RSA) process for IMAs. It is introduced in response to the High Court decision delivered on 11 November 2010. It involves a new streamlined primary assessment process by a departmental officer and fast-tracking of adverse decisions directly to an independent assessor for final determination (independent protection assessment).

• 2 March—Joint Select Committee on the Christmas Island tragedy of 15 December 2010 appointed.\(^{28}\)

• 3 March—Minister Bowen announces (amongst other things) that a new 1500-bed detention centre to accommodate single adult men will be established at Wickham Point in Darwin. Capacity at the Darwin Airport Lodge (DAL) facility will also be expanded by up to 400 beds. The Scherger RAAF Base near Weipa in Queensland will continue to be used as detention accommodation for a further 12 months while the previously announced contingency option of expanding the Melbourne Immigration Transit Accommodation to accommodate more families and unaccompanied minors would not be proceeding.\(^{29}\)

• 11-14 March—Up to 70 detainees breach the perimeter fence of the North West Point facility on Christmas Island on 11 March. On 12 March, another group of approximately 100 people breach the perimeter of the fence to stage a peaceful protest near Christmas Island Airport. On 13 March

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about 300 detainees inside the centre engage in more protest action. Damage is done to facilities including fencing, some accommodation and door locks. The Australian Federal Police (AFP) uses tear gas and ‘beanbag bullets’ to quell this protest. On 14 March 2011 further protest action is taken by about 100 to 200 detainees. There is damage to some buildings and some CCTV equipment.30

• 17 March—More violent protests at the North West Point detention centre on Christmas Island involving a group of around 200 protesters. Buildings are damaged, fires are lit, and there are violent approaches to the AFP. Numerous protesters carry improvised weapons—including accelerant-based weapons, poles, bricks, pavers, concrete rocks and so forth.31

• 17 March—DIAC confirms a 20-year old Afghan man died at the Scherger Immigration Detention Centre. The deceased was an irregular maritime arrival.32

• 18 March—Minister Bowen announces the terms of reference for a review into incidents of unrest at the Christmas Island Immigration Detention Centre by Ms Helen Williams AO, former Secretary of the Department of Human Services, and Dr Allan Hawke AC, former Secretary of the Department of Defence. On 21 April 2011 the terms of reference for this review were extended to cover the incident at Villawood on the same day. The review will investigate and report on a range of issues associated with the management and security of the detention centres.33

• 28 March—DIAC confirms a 20-year old Afghan man was found dead at the Curtin Immigration Detention Centre. The deceased was an irregular maritime arrival.34

• 28 March—UNHCR releases its 2010 statistical overview of asylum applications in 44 industrialised countries.35

• 29-30 March—Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime (also known as the Bali Process) held. At the

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conference, participating Ministers agree 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’. Participating Ministers also agree that ‘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’. 36

• 5 April—Minister Bowen announces that a Defence facility in Pontville, Tasmania, will be the site of a temporary new detention centre to accommodate up to 400 single adult men. The Pontville site is a short-term response while work is completed on detention accommodation at Wickham Point in Darwin, and Northam in Western Australia. The Pontville detention centre is expected to be operational until October 2011. 37

• 11 April—Indonesian Parliament secures passage of legislation that criminalises people smuggling. Under Indonesia’s new laws, convicted people smugglers will face a minimum of five years imprisonment. 38

• 14 April—Commonwealth Ombudsman announces his decision to conduct an ‘own motion’ investigation into the use of force by the AFP and the Government’s immigration detention service provider, SERCO, on Christmas Island in March 2011. 39

• 21 April—Major disturbance at Villawood Immigration Detention Centre in Sydney involving about 100 detainees. Nine buildings within the Fowler complex are set alight, including a medical centre, kitchen, laundry and computer room. Twenty-two people are subsequently taken to Silverwater correctional facility and six have charges laid against them. In addition, three asylum seekers who have been determined not to be refugees stage a rooftop protest which, for two of them, lasted 11 days. 40

• 26 April—Minister Bowen announces that he intends to introduce legislation to make amendments to the Migration Act so that a person will fail the character test should they be

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convicted of any offence committed while in immigration detention; and the maximum penalty for the manufacture, possession, use or distribution of weapons by immigration detainees will increase from three to five years’ imprisonment. He also announces that (where possible) he intends to use the full extent of his powers to prevent people who have been involved in criminal, violent or destructive behaviour, from being allowed to apply for a permanent protection visa.41

- 29 April—Report entitled Settlement Outcomes of New Arrivals is released.42 DIAC commissioned this study, undertaken by the Australian Survey Research Group, to obtain a better understanding of how Humanitarian Program entrants are faring during their first five years in Australia and to help identify what factors contribute to their successful settlement. The study surveyed humanitarian entrants who arrived in Australia between February 2005 and January 2009.

- 7 May—Joint statement issued by the Prime Ministers of Australia and Malaysia announcing they have agreed to enter into a bilateral agreement fully funded by Australia that will include 800 IMAs who arrive in Australia being transferred to Malaysia for refugee status determination; while over four years Australia will resettle 4000 refugees already residing in Malaysia.43

- 7 May—Prime Minister Gillard announces that the Government has abandoned its plans to build a regional processing centre in East Timor and is investigating alternative options including Papua New Guinea. If it proceeds, ‘it is the Government’s expectation that Australia would maintain the centre but that it would be the first step towards a regional processing centre’.44

- 9 May—Minister Bowen announces that the capacity of the Northam Immigration Detention Centre will be reduced to 600 single adult males from the 1,500 originally announced in October 2010. The Minister links the reconfiguration to Australia’s engagement with regional partners, including the proposed transfer agreement with Malaysia.45

- 10 May—In the 2011–12 Budget the Government announces an additional 4000 places in the Refugee Program over four consecutive years commencing 2011–12. This increase is linked to the Malaysia transfer deal as announced on 7 May 2011.46 In October 2011, the Prime Minister

subsequently announced that though the Government would honour the commitment to resettle 4000 refugees from Malaysia, the additional 4000 places would come out of the existing quota. That is, there would not be an increase to the annual humanitarian program quota.  

- **12 May**—AFP confirms that a 40-year-old Iran born Australian citizen has been charged for allegedly facilitating people smuggling ventures including the Christmas Island tragedy on 15 December 2010. The AFP has charged the man with four charges of aggravated people smuggling (involving a group of five or more) contrary to section 233C of the Migration Act 1958. The AFP also charged the man with eighty-five counts of people smuggling (involving individuals) contrary to section 233A of the Migration Act. Thirty five of those charges relate to passengers aboard SIEV 221.

- **14 May**—Minister for Home Affairs, Brendan O’Connor announces that HMAS Ararat intercepted a suspected irregular entry vessel believed to be carrying 32 passengers and one crew member. This group are the first among some 500 people to arrive in Australia before finalisation of the Malaysia agreement that are told they will be transferred to Christmas Island pending removal ‘to another country’.

- **18 May**—Coronial inquest (in Western Australia) begins into the Christmas Island tragedy of 15 December 2010.

- **23 May**—Minister Bowen announces that DIAC will publicly release for the first time, a new biannual publication, *Asylum Statistics - Australia 2010-11*. It will be posted online along with quarterly statistical updates of asylum claims, including the processing of applications at various stages, the number of grants and applications per country of origin, overturn and affirmation rates, and final visa decisions.

- **26 May**—the Australian Human Rights Commission releases a report entitled *Immigration detention at Villawood*. Upon releasing the report Commission President, Catherine Branson said the uncertainty caused by indefinite detention and delays in refugee processing and security assessments were triggering serious mental health issues among the 400 people detained there.

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Sixty per cent of those in detention had been detained for longer than six months, and forty five per cent had been detained for more than a year.\textsuperscript{52}

- 27 May—\textit{The Age} newspaper reports that ‘security checks on most asylum seekers are no longer being directly carried out by ASIO staff, with the bulk of cases now delegated to immigration staff. And the Immigration Department says it will further speed up the new system to introduce a ‘same-day service’ for security checks. The new procedure meant only 17 per cent, or 200 refugee cases, were referred to ASIO for further scrutiny between March and April ... The federal government has been under pressure to fix a huge bottleneck in security processing that led to more than 1000 people already found to be genuine refugees stuck in detention for months and up to a year waiting for ASIO clearance’.\textsuperscript{53}

- 28 May—Australian Medical Association Northern Territory president, Dr Paul Bauert, reportedly states that ‘we’re having some terrible cases that we’re needing to treat in Darwin [immigration detention centre] of children as young as four and five being part of hunger strikes. We’re having children under the age of 10 self-harming, attempted suicides’.\textsuperscript{54}

- 14 June—AFP issues a media release advising that a total of 18 charges have been laid against 18 people following their investigation into the series of incidents at Christmas Island in March 2011.\textsuperscript{55}

- 16 June—The Australian Greens secure passage of a motion in both houses of Parliament ‘condemning the Gillard Government’s deal with Malaysia that would see 800 asylum seekers intercepted in Australian waters and sent to Malaysia; and calls on the Government to immediately abandon this proposal’.

- 16 June—Parliament establishes the Joint Select Committee on Australia’s Immigration Detention Network.\textsuperscript{56}

- 17 June—Minister Bowen releases a new report by Professor Graeme Hugo entitled \textit{Economic, Social And Civic Contributions of First And Second Generation Humanitarian Entrants} that shows

\begin{itemize}
  \item \textsuperscript{52} AHRC, \textit{Self-harm and suicides in immigration detention are major concerns}, media release, 26 May 2011, AHRC website, viewed 27 May 2011, \url{http://www.hreoc.gov.au/about/media/media_releases/2011/44_11.html}.
  \item \textsuperscript{53} K Needham, ‘Security checks on asylum seekers fast-tracked’, \textit{The Age}, 27 May 2011, viewed 1 June 2011, \url{http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=id%3A%22media%2Fpressclp%2F793727%22}.
  \item \textsuperscript{56} Joint Select Committee on Australia’s Immigration Detention Network, APH website, viewed 15 August 2011, \url{http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=immigration_detention_ctte/immigration_detention/index.htm}.
\end{itemize}
refugees in Australia are likely to embrace work opportunities in regional areas, display entrepreneurial qualities and undertake volunteer work as part of a significant contribution to society. The report is the first comprehensive study that looks at second-generation refugees in Australia.


- 29 June—Minister Bowen announces that further to the Prime Minister’s announcement on 18 October 2010, some 62 per cent of children in immigration detention will be accommodated in community–based arrangements in the coming days.

- 19 July—Between 30 and 40, possibly up to 100 people engage in violent activity at Christmas Island IDC. Damage is done to some buildings, some computers, and there is damage to some kitchen areas. The AFP uses tear gas, beanbag rounds and ‘other force options’ to bring the situation under control.

- 21 July—A group of 40 or 50 people engage in violent activity at Christmas Island IDC.

- 25 July—The Governments of Australia and Malaysia sign the bilateral Arrangement announced on 7 May 2011. The Arrangement comes into effect on 26 July 2011. The Prime Minister also announces that the 500 or so asylum seekers that were intercepted in Australian waters during the period 7 May to 25 July 2011 will have their protection claims assessed in Australia.

- 29 July—The Commonwealth Ombudsman announces he will investigate the current immigration detention policies in Australia for asylum-seekers and immigration detainees, and the challenges

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associated with immigration detention.\textsuperscript{62} He also confirms his office will undertake an investigation into suicide and self-harm in Australian immigration detention facilities.\textsuperscript{63}

- 31 July—HMAS \textit{Ararat} intercepts a suspected irregular entry vessel carrying 54 passengers and two crew members. The vessel is the first to arrive in Australia since the signing of the Malaysia Arrangement. According to the Government, the passengers ‘will be taken to Christmas Island for pre-transfer assessments, pending removal to Malaysia’.\textsuperscript{64}

- 7 & 8 August—Proceedings commence in the High Court of Australia to seek an interim injunction restraining the removal of 16 people who are scheduled to be flown to Malaysia from Christmas Island on 8 August 2011. This was to be the first group of asylum seekers transferred to Malaysia under the bilateral Arrangement signed on 25 July 2011. Justice Hayne grants the plaintiffs interlocutory relief on the basis that there is a sufficiently serious question to be tried about the proper construction of section 198A of the Migration Act.\textsuperscript{65}

- 11 August—Papua New Guinea Prime Minister Peter O’Neill reportedly states that his newly formed Cabinet has approved a proposal put forth by Prime Minister Gillard the previous week for the reopening of processing facilities on Manus Province in Papua New Guinea.\textsuperscript{66}

- 16 August—Secretary of the Department of Immigration and Citizenship, Andrew Metcalfe, makes an opening statement to the Joint Select Committee on Australia’s Immigration Detention Network in which he acknowledges that most irregular maritime arrivals arrive without identity documents, expect to spend time in immigration detention, and based on recent experience, the majority are found to be refugees. He also poses a number of questions or ‘policy conundrums’ for the Committee to consider, such as ‘can we manage different cohorts with different success rates or security or risk features in different ways? ...Is immigration detention a deterrent? Does immigration detention facilitate case resolution? What range of facilities should be utilised? For how long is an immigration arrival and status determination process in a detention centre environment required?’.\textsuperscript{67}

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\end{itemize}
• 19 August—Minister Bowen announces that the governments of Australia and Papua New Guinea have signed a Memorandum of Understanding for the establishment of an assessment or relocation centre in Manus Province.68

• 26 August—Minister Bowen announces that statistical information relating to Ministerial Intervention in individual immigration cases will be made publicly available online and will be published every six months.69

• 26 August—Tenth anniversary of the beginning of what became known as the ‘Tampa incident’ where 433 asylum seekers were rescued from an Indonesian fishing boat by a Norwegian container ship—the MV Tampa.70

• 31 August—The High Court of Australia by majority (6:1) holds invalid Minister Bowen’s declaration of Malaysia as a country to which asylum seekers who entered Australia at Christmas Island can be taken for processing of their asylum claims.71

• 21 September 2011—The Government introduces Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011. The primary purpose of this Bill is to replace the existing framework in the Migration Act for taking IMAs to another country to circumvent the High Court ruling made on 31 August. The Bill failed to secure the support of enough independents and the Opposition.

• 29 September—the Australian Human Rights Commission releases a report entitled 2011 Immigration detention at Curtin.72 Upon releasing the report, Commission President Catherine Branson QC said the Commission is worried about high rates of self-harm at the centre, which now holds the highest number of detainees. At the time of the visit, more than three-quarters of people detained there had been detained for longer than six months and more than one-third had been detained for longer than a year. Ms Branson said the extremely remote location, the

16 August 2011, viewed 17 August 2011,
http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommjnt%2F436be6e-b751-4b78-8ad6-96ef3ca0280f%2F0000%22. For commentary on this opening statement see for example: A Probyn, ‘Few home truths on boat people’, West Australian, 19 August 2011, viewed 15 September 2011,
http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F1013505%22.

68. C Bowen, Australia and Papua New Guinea Sign MOU, media release, 19 August 2011, viewed 15 December 2011,

69. DIAC, ‘Ministerial Intervention Statistics - Australia 2010-11’, DIAC website, viewed 29 August 2011,

70. For further information see: J Phillips, ‘Tampa: ten years on’, 22 August 2011, Flagpost Blog, Parliamentary Library, Canberra, viewed 12 December 2011,


72. AHRC, ‘2011 Immigration detention at Curtin’, September 2011, AHRC website, viewed 1 October 2011,
harsh physical environment, crowded dormitories and limited access to communication facilities had exacerbated frustration levels at the centre.  

- 13 October—Prime Minister Gillard and Minister Bowen announce that it will continue to be the Government’s policy that the Malaysian Arrangement should be implemented, with an associated processing centre in Papua New Guinea. Until they secure support for statutory change Government policy will be to maintain mandatory detention for health, identity and security checks but to use existing tools to manage pressure on the detention network. This might include community detention and Bridging visas for irregular maritime arrivals.

- 19 October—Tenth anniversary of the sinking of SIEV X, which led to the deaths of 353 asylum seekers headed for Australia.

- 20 October—Commonwealth Ombudsman, Allan Asher announces his resignation as a result of his communications with Australian Greens Senator, Sarah Hanson-Young prior to his appearance at the May 2011 Budget Estimates hearing, which he acknowledged ‘caused many in the community and the Parliament to call into question the impartiality of my office’.

- 26 October—Minister Bowen confirms that a Sri Lankan refugee was found dead at the Sydney Immigration Residential Housing (IRH). He was awaiting ASIO clearance and had been considered for community placement, but this was not pursued following consultation with the relevant security agencies.

- 1 November—A vessel carrying approximately 70 people headed for Australia sinks off the coast of Indonesia, killing approximately eight people with many more missing.

- 14 & 15 November—Fourth meeting of the Malaysia-Australia Working Group on People Smuggling and Trafficking in Persons is held. Minister for Home Affairs Brendan O’Connor said the meeting had been ‘fruitful and productive, setting out future cooperative activities in a range of

areas, including border management, legal cooperation, maritime surveillance and interdiction, law enforcement and intelligence sharing’.78

- 25 November—Minister Bowen announces that, in the coming days, the first group of IMAs will be placed in the community on bridging visas while their asylum claims are assessed. They will have reporting conditions but will have the right to work and access to necessary health services. The Minister expects at least 100 IMAs will eventually be released every month. Initial priority would be given to those who have spent the greatest time in detention. The Minister also announces that though the Government would maintain the excision architecture, it would move to implement a single visa processing system for all asylum seekers (boat and plane arrivals), including independent merits review at the Refugee Review Tribunal (RRT).79

- 25 November—Minister Bowen releases a report into the efficiency of judicial review of irregular maritime arrivals (IMA) cases by former Commonwealth Ombudsman, Professor John McMillan entitled Regulating migration litigation after Plaintiff M61.80 The report was commissioned by the Government following the High Court of Australia’s judgment in November 2010. In brief, Professor McMillan did not recommend that Parliament enact a direction to the courts to resolve such cases expeditiously, nor did he recommend the removal of the right of appeal from the Federal Magistrates Court to the Federal Court, nor the implementation of a new scheme of legal assistance, advice or representation. Rather, he recommended (amongst other things) that DIAC provide guidance and assistance to IMAs concerning the initiation of judicial review proceedings.

- 29 November—Report by Dr Allan Hawke and Ms Helen Williams entitled Independent review of the incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre released.81 In making 48 recommendations to facilitate the management of good order in the immigration detention centre network, the authors note that what distinguished the current situation from prior IMA surges was the significant build up of detainees on negative pathways (in other words, detainees who had received adverse decisions). They also note that the arrival of IMAs without identification coupled with the various stages of

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refugee assessment and review meant people were being detained for extended periods of time.\footnote{Ibid.}

- 2-4 December—\textsuperscript{46}ALP National conference held in Sydney, NSW. Minister Bowen succeeds in passing a resolution to see the party’s platform clearly embrace offshore processing in return for an increase in the refugee intake.\footnote{F Kelly, ‘ALP National Conference: Chris Bowen on refugees’, \textit{ABC Radio National}, 5 December 2011, viewed 6 December 2011, \url{http://www.abc.net.au/radionational/programs/breakfast/2011-12-05/3712446}.}


- 14 December—Jason Clare is appointed as the Minister for Home Affairs on 12 December 2011 and sworn in on 14 December 2011. He replaced Brendan O’Connor who had been the Minister for Home Affairs since 9 June 2009.

- 15 December—First anniversary of the sinking of Suspected Irregular Entry Vessel (SIEV) 221 off the shoreline at Christmas Island.\footnote{For commentary of this incident one year on see: D Marr, ‘The sinking of a refugee boat off Christmas Island with the loss of 50 lives riveted a shocked nation. Almost a year later David Marr sifts the wreckage’, \textit{Sydney Morning Herald}, 3 December 2011, viewed 7 December 2011, \url{http://parlinfo.aph.gov.au/parlinfo/search/display/display.w3p;query=Id%3A%22media%2Fpresseclp%2F1272881%22}.}

- 17 December—The media report that ‘a heavily overloaded boat packed with about 250 Iranians and Afghans seeking new lives in Australia sank off Indonesia, with bad weather and high seas hampering rescue efforts. The vessel was following a well-worn, and occasionally disastrous, route from the southern coast of Java to the remote Australian territory of Christmas Island when it sank on Saturday, officials said’.\footnote{A Arshad, ‘Boat sink off Java with 250 aboard’, \textit{Sydney Morning Herald}, 18 December 2011, viewed 21 December 2011, \url{http://news.smh.com.au/breaking-news-world/boat-sinks-off-java-with-250-aboard-20111218-1p0ep.html}.}

- 19 December—NSW State Coroner, Magistrate M Jerram delivers her findings in the inquests into the deaths (suicides) of three male immigration detainees who died at Villawood Immigration Detention Centre in a three month period in late 2010. Two of these were asylum seekers from

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Fiji and Iraq. In her findings the Coroner relevantly noted ‘in all three deaths, some of the actions of some staff were careless, ignorant or both, and communications were sadly lacking. SASH [Suicide and Self Harm risk assessment] procedures were not followed by DIAC or Serco personnel, DIAC failed to ensure that Serco and IHMS [International Health and Medical Services] were fulfilling the terms of the contract between them and there were startling examples of mismanagement on the part of DIAC, Serco, and IHMS ... IHMS must be said to have failed in its duty of care to Ahmed Al Akabi...Neither DIAC nor Serco fulfilled their duty of care to JR or DS’. 88

• 20 December—Minister Bowen releases a series of letters between Prime Minister Gillard, Acting Prime Minister (Wayne Swan) and the Leader of the Opposition (Tony Abbott) in relation to prospective negotiations on securing passage of the Government’s offshore processing legislation. 89

• 23 December—Minister Bowen and then Foreign Minister, Kevin Rudd meet with Scott Morrison (Shadow Minister for Immigration) and Julie Bishop (Shadow Minister for Foreign Affairs) to discuss possible offshore processing destinations for IMAs. The Government indicates its preparedness to accept Nauru as a complement to Malaysia but ultimately agreement on a way forward is not reached. 90

Commentary by former politicians and bureaucrats

In April 2011, John Hewson (former leader of the Liberal Party of Australia) expressed the view that the Government should be focussing on developing a humane solution to what is a very complex problem, calling for both substantive regional and domestic responses:

The regional response is not so much about detention centres, as workable agreements with source countries, and encouraging transition countries such as Indonesia to ensure that people smuggling is an enforced criminal offence, with substantial penalties.

The domestic response should be twofold: firstly, to educate the broader community about the orders of magnitude involved and the benefits that the majority of these people will bring to a skills-deficient society, and secondly, to commit the resources to improve their treatment and accelerate their processing.


The artificiality of the distinction between "onshore" versus "offshore" processing needs to be abandoned and the process of "excising" part of Australia for this purpose needs to be reversed.\(^91\)

In May 2011, **Amanda Vanstone** (former Minister for Immigration under the previous Coalition Government) expressed the view that the Government needs to ‘bite the bullet and recognise that the people in camps who come in the front door are deserving of priority. That’s what’s fair’. In her opinion:

> Things have changed, so the policy needs to change. Permanent protection should be saved for the most deserving those who have spent years in refugee camps with little hope, or those for whom we are the country of first asylum.

> For those who force our hand and come in the back door through other countries, we should offer protection but temporary protection only. No visas to travel the world, and no family reunion.\(^92\)

Also in May 2011, **John Menadue** (former Secretary of the Department of Immigration) expressed the view in relation to the Government’s policy of mandatory detention that:

> Very few asylum seekers have committed any crime. They are imprisoned and humiliated because we mistakenly believe they are a threat. It is also good politics to act tough. The riots and burnings are a symptom of the problem. The problem is inhumane and expensive Government policies and a cynical Opposition barking at the Government’s heels.

> Hundreds of millions of dollars could be saved through ending mandatory detention and allocating funds to community detention by supporting NGOs such as the Red Cross and others. Such a policy still requires mandatory processing to establish identity and conduct health and security checks. But once those checks are conducted most asylum seekers should be released into the community. Community alternatives are more humane and can be tailored to the security needs of each person.\(^93\)

In June 2011, **Sev Ozdowski** (former Human Rights Commissioner) expressed the view that it was time the Government considered a return to the Pacific Solution because though it was far from perfect, compared with the Malaysia solution, it was easily the lesser of two evils. In his opinion:

> It is obvious Australia’s asylum-seeker policies of the past four years have failed. Labor tried to humanise the system by dismantling the Pacific Solution but created pull factors for asylum-seekers and more pain for more people in detention.

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If the government had wanted to be truly humane, it would have removed mandatory detention when it dismantled the Pacific Solution. Instead, it calculated that mandatory detention alone would be a good deterrent, but we know now this is not the case. The Immigration Department says there is early evidence the Malaysian solution will put off new voyages, but there is also plenty of evidence that asylum-seekers now under our care will face brutal conditions in Malaysia.\(^{94}\)

Also in June 2011, **Alexander Downer** (former Minister for Foreign Affairs under the previous Coalition Government) reportedly expressed the view that Australia has jeopardised Australia’s dealings with Malaysia by dumping the controversial issue of asylum seekers on them:

> Mr Downer said much work had been done rehabilitating Australia’s relationship with Malaysia after the retirement of Malaysia’s long-serving Prime Minister, Mahathir Mohamad, who was famously antagonistic towards Canberra. "We managed to get the relationship with Malaysia into a good place, which led to them agreeing to Australian membership of the East Asia summit in 2006...Now all there is of the relationship is this incredibly controversial issue of asylum-seekers, which has the potential to derail the whole relations. It creates the impression in Malaysia that Australia is very difficult to deal with".\(^{95}\)

In August 2011, **Malcolm Fraser** (former Prime Minister) expressed the view that ‘what has been forgotten in this debate is that desperate people will go to any lengths to get to a country that they believe to be safe and that they know will give them, and more particularly their children, a future’. In his opinion:

> ... people get on boats because they flee terror at home and believe the many years' long wait in UNHCR camps is not a valid option, especially if they have children in their care.

> After the Vietnam War, Australia took a larger humanitarian intake than in any other period in our history. The Australian community accepted that. They were told why we needed to do it, and why it was the only ethical decent policy that a wealthy advanced country should adopt.

> So if we want to stop boat people coming here, the humane option is a global campaign to empty out refugee camps around the world by having recipient countries taking many, many more people. Stopping the boats will also require better international policies, with a more effective UN that would do more to overcome the conditions in individual countries that give rise to refugee flows.

> There are alternative policies available to Australian governments. They have not taken them because neither party is willing to lift substantially the humanitarian intake. By substantially I mean at least doubling or even trebling it, especially if other countries could be persuaded to act likewise.

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Meanwhile, our political leaders continue to demean Australia, to portray us as a narrow, wealthy, selfish community by the debates they conduct between themselves. Thinking that this is only an Australian matter of no consequence to anyone else is false. It certainly affects the way other countries view Australia. Our policies set Australia apart from our own region and apart from the world at large.96

In September 2011, Stewart West (Immigration Minister in the Hawke Government) expressed the view that the Government should not resuscitate the Malaysia option by legislating to strike down what he described as ‘an enlightened High Court decision’. In his opinion:

Australia should say "no" to offshore processing in places such as Malaysia, Manus Island and Nauru. We should evaluate those already on Christmas Island, and resolve to evaluate onshore all future asylum seekers who reach Australia. Processing centres should be located close to population areas, so that asylum seekers have access to community facilities. After health and identity checks, asylum seekers should be permitted outside - with an obligation to return daily and in the knowledge that failure to report in would mean loss of evaluation rights. Successful applicants should receive permanent resident visas, while unsuccessful applicants would face return to their homeland...It's not so hard. A humane refugee policy is possible. It was achieved under Fraser and Hawke. Wake up, Prime Minister - it really is time to "move forward".97

In October 2011, Natasha Stott Despoja (former leader of the Australian Democrats) expressed the view that the Government’s asylum seekers policy ‘has been shambolic: failed attempts to open regional centres on Manus Island, in East Timor and Malaysia and a successful High Court challenge’. In her opinion:

There is now greater understanding of asylum seekers in our community. But the ALP is still being wedged on the issue: losing votes from progressive constituents, and alienating some Labor traditionalists who consider the Government weak on the issue. Last week's failure to reach a deal with the Opposition on off-shore processing will see electoral benefits go to the Coalition and the Greens, but still no solution.

The hard-hearted policies of 10 years ago and today may have won votes, but they have cost people time, opportunity, their mental and physical health and, particularly for children, precious years. There is still untold hurt via policy crafted out of ignorance at best, malevolence at worst. Prime Minister Julia Gillard had her chance to demonstrate a different approach. And the Opposition's compassion for those heading to Malaysia contrasts with its Pacific Solution support. They say a week's a long time in politics. Ten years seems like yesterday.98

96. M Fraser, 'End the appeal to meanness', The Age, 22 August 2011, viewed 15 December 2011, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F1020664%22
In October 2011, Peter Reith (former deputy leader of the Liberal Party and senior Cabinet Minister of the previous Coalition Government) expressed the view that ‘Labor’s policy has crisscrossed the road like a young footballer on the way home from the local pub having won the grand final’. In his opinion:

> It is ludicrous for a Government to announce that its policy is offshore processing and then say it can’t be implemented. This is as much nonsense as its earlier excuses; like the push factors that were later dropped and pull factors substituted. Then we were told Nauru could not be used because Nauru had not signed up to the UN convention. That was Labor’s first reason for not using Nauru. Of course the real reason then was that it could not be admitted for ‘political’ reasons, namely because it was John Howard’s policy.

Labor’s latest answer, after Nauru signed the convention, is that it won’t work now because the circumstances have changed but again, that is only said as an answer to the fact that Nauru worked under the Coalition.

The issue will not go away. After four years in office, this is Labor’s legacy, a policy they say they cannot make happen. Blaming the Opposition will only rile the public more.

And by Christmas there will be a lot more boats. The Gillard non-policy is an invitation to come by boat. Her position is that this is undesirable but her only response is to blame the Opposition. This non-policy is not tenable. Governments are elected to govern. If a government can’t govern, then it should resign or call an election.99

**PART II—LEGISLATION**

**Government initiated legislation**

**Combating the Financing of People Smuggling and Other Measures Bill 2011**

On 9 February 2011 the Combating the Financing of People Smuggling and Other Measures Bill 2011 was introduced into Parliament.100 The purpose of the Bill was to strengthen Australia’s anti-money laundering and counter-terrorism funding (AML/CTF) regime by enhancing the regulation of the remittance sector. Alternative remittance systems are financial services, traditionally operating outside the conventional financial sector, where value or funds are moved from one geographic location to another.101 When introducing the Bill, Minister for Home Affairs, Brendan O’Connor stated ‘we need to make sure that remittance dealers are not misused to give people smugglers the


funds they need to organise illegal smuggling ventures, or to support other forms of criminal activity...these initiatives build upon the legislative changes made in 2010 as part of the *Anti-People Smuggling and Other Measures Act*.

The Bill also introduced measures for the Australian intelligence community to share financial intelligence prepared by AUSTRAC and allow businesses regulated under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to use personal information held on an individual’s credit information file for electronic verification of identity.

The *Bills Digest* examines the Bill in further detail. The Bill was passed on 22 June 2011 and became Act no. 60 of 2011.

## Migration Amendment (Complementary Protection) Bill 2011

On 24 February 2011 the *Migration Amendment (Complementary Protection) Bill 2011* was introduced into Parliament. An earlier version of this Bill was first introduced into the House of Representatives on 9 September 2009 during the term of the 42nd Parliament. However, that Bill was not subsequently debated and lapsed on 19 July 2010 when Parliament was prorogued for the 2010 federal election. The current Bill was re-introduced into the 43rd Parliament and ‘incorporates certain changes to address matters raised in the 2009 report of the Senate Legal and Constitutional Affairs Committee’.

The purpose of the Bill was to amend the *Migration Act 1958* (the Migration Act) to introduce a statutory regime for assessing claims that may engage Australia’s *non-refoulement* (non-return) obligations under various international human rights treaties otherwise known as ‘complementary...
The Bill proposed to assess such claims under a ‘single protection visa application process’ which means applicants who are found not to be refugees but owed protection on complementary protection grounds, will be entitled to be granted protection visas with the same conditions and entitlements as refugees. In turn, unsuccessful applicants (that is, applicants found not to be owed protection) will have equivalent administrative review rights as persons seeking protection under the 1951 Convention relating to the Status of Refugees (and accompanying Protocol).

The Bills Digest examines the Bill in further detail. The Bill was passed on 19 September 2011 and became Act no. 121 of 2011.

**Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011**

On 11 May 2011 the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 was introduced into Parliament. The purpose of the Bill was to amend the Migration Act to permit a non-citizen’s application for a visa to be refused or an existing visa to be cancelled if they are convicted of an offence while in immigration detention, during an escape from immigration detention, following an escape from immigration detention, or for escaping from immigration detention. It also proposed to increase the maximum penalty for the manufacture, possession, use or distribution of a weapon by immigration detainees. The stated policy intent underpinning these proposed amendments was to punish and deter criminal behaviour in immigration detention centres.

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108. Broadly speaking, the term ‘complementary protection’ means the legal obligation on States to protect people from *refoulement* under such international human rights instruments as the Convention Against Torture and the International Covenant on Civil and Political Rights. This is an alternative basis to be assessed for protection, to that offered by the 1951 Refugee Convention.


The Bills Digest examines the Bill in further detail. The Bill was passed on 4 July 2011 and became Act no. 81 of 2011.

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

On 21 September 2011 the Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 was introduced into Parliament. The purpose of the Bill was to amend 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.

The Bills Digest examines the Bill in further detail. The Bill was debated in the House of Representatives on 22 September 2011 but did not proceed to a vote.

Deterring People Smuggling Bill 2011

On 1 November 2011 the Deterring People Smuggling Bill 2011 was introduced into Parliament. The purpose of the Bill was to amend the Migration Act to clarify the meaning of the phrase ‘no lawful right to come to Australia’. The Bill inserts a provision with retrospective application that sets out the circumstances in which an unlawful non-citizen has no lawful right to come to Australia for the purposes of Subdivision A (people smuggling and related offences). Essentially, these circumstances are if the person does not hold a visa that is in effect or does not fall within any of the existing exceptions contained in section 42 of the Migration Act. The provision also clarifies that reference to a non-citizen includes a non-citizen who is seeking protection or asylum whether or not Australia has, or may owe them, protection obligations.

The Bills Digest examines the Bill in further detail. The Bill was passed on 25 November 2011 and became Act no. 135 of 2011.

Privately sponsored legislation

Commonwealth Commissioner for Children and Young People Bill 2010

On 29 September 2010 Senator Sarah Hanson-Young of the Australian Greens re-introduced the Commonwealth Commissioner for Children and Young People Bill 2010 into Parliament. An earlier version of this Bill was first introduced into the Senate on 12 May 2010 during the term of the 42nd Parliament. However, that Bill was not subsequently debated and lapsed immediately before the commencement of the 43rd Parliament. The stated purpose of the Bill is to:

...establish an independent statutory office of Commonwealth Commissioner for Children and Young People, to advocate at a national level for the needs, rights and views of people below the age of eighteen. Along with promoting the rights of children and young people, the Commission would monitor and review laws, policies and practices which impact on service provision. The establishment of a Commonwealth Commissioner for children and young people will also help move the approach beyond a narrow focus only on neglect and abuse to encompass broader concepts of overall safety and wellbeing for children and young people.

The Bill was referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 12 May 2011. The Committee received 93 submissions and held two public hearings in Canberra. For present purposes it is sufficient to note that the provision in the Bill for the Commonwealth Commissioner to act as the legal guardian of unaccompanied children and young people who arrive in Australia without authority (such as refugees) elicited a great deal of comment (see chapter four). In its report, the Committee noted the evidence it received pointed to a range of concerns with the provisions of the Bill and ultimately came to the view that the Bill should not be passed. However, the Committee recognised that the establishment of a Commonwealth Commissioner should be further considered and the matters raised during the inquiry should be given full consideration in the Government’s own consideration of the role of a National Children’s Commissioner under the National Framework for Protecting Australia’s Children.

In their dissenting report, the Australian Greens recommend (amongst other things) the Bill should proceed for debate and passed into law. The Bill was not debated before year’s end.

**Migration Amendment (Detention of Minors) Bill 2010**

On 28 October 2010 Senator Sarah Hanson-Young of the Australian Greens introduced the [Migration Amendment (Detention of Minors) Bill 2010](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/commissioner_for_childrenandyoungpeople/index.htm). This Bill proposes to amend the Migration Act to provide that the Minister must determine that a detained minor reside within the community and appoint a person to act as guardian to the minor within 12 days of being detained.

The Bill was not referred to a Committee for inquiry.

**Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010**

On 18 November 2010 Senator Hanson-Young introduced the [Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs807%22). The Bill seeks to amend the way in which the Migration Act currently operates, by ending offshore processing and the excision policy; ensuring that detention is only used as a last resort; ending indefinite and long-term detention; and introducing a system of judicial review of detention beyond 30 days.

The Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 16 August 2011. The Committee received 32 submissions and held one public hearing in Canberra.

In recommending that the Senate not pass the Bill, the Committee expressed the view that:

> [The Bill’s] effect would be to seriously erode the executive’s ability to manage immigration matters and potentially vest executive power in the judiciary. The drafting of the Bill at present is insufficiently developed for the committee to recommend that the Senate consider it further. The committee notes that the Explanatory Memorandum was very limited in its explanation of the Bill’s function, and the impact it would have on Australia’s migration policies. Of particular concern to the committee is the fate of asylum seekers released into the community without a valid visa or access to accommodation, healthcare and other services.

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125. Migration Amendment (Detention of Minors) Bill 2010, APH website, viewed 11 August 2011, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs802%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs802%22)


Recent High Court cases have highlighted that the privative clauses included in the Act do not prevent cases of genuine jurisdictional error being challenged, but do create a threshold requirement that minimise spurious legal challenges. The detention of detainees is already subject to periodic review by departmental officials and the Commonwealth Ombudsman. In light of this, the committee believes that there are presently sufficient oversight and jurisprudential safeguards in place.\(^\text{128}\)

In her dissenting report, Senator Hanson-Young recommended that the Bill be passed with the four amendments proposed in her dissenting report. These amendments were in response to a number of drafting concerns raised by submitters to the inquiry.\(^\text{129}\)

**Migration Amendment (Declared Countries) Bill (No.2) 2011**

On 5 July 2011 Senator Hanson-Young re-introduced the Migration Amendment (Declared Countries) Bill (No.2) 2011.\(^\text{130}\) The Bills sought to amend the Migration Act to require that a Ministerial declaration made under existing section 198A to transfer ‘offshore entry persons’ to a foreign country for processing is brought before both houses of Parliament as a disallowable instrument. For further information on this Bill see the Parliamentary Library’s publication *Should Parliament ultimately decide whether asylum seekers may be sent to a foreign country?*\(^\text{131}\)

The Bill was not referred to a Committee for inquiry and was not debated before year’s end.

**Crimes Amendment (Fairness for Minors) Bill 2011**

On 23 November 2011 Senator Hanson-Young introduced the Crimes Amendment (Fairness for Minors) Bill 2011.\(^\text{132}\) The Bill seeks to amend the Crimes Act 1914 by defining timeframes and setting up evidentiary procedures for the age determination and prosecution of non-citizens who are

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129. Ibid., pp. 17–19.
130. The Migration Amendment (Declared Countries) Bill 2011 was introduced into the Senate on 16 June 2011 but this Bill was subsequently withdrawn. The Migration Amendment (Declared Countries) Bill (No.2) 2011, APH website, viewed 11 August 2011, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs840%22.
suspected or accused of people smuggling offences under the Migration Act and who may have been under 18 at the time of allegedly committing the offences.\textsuperscript{133}

The Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 22 March 2012. The reporting period was subsequently extended to 4 April 2012. Details of the inquiry are at the inquiry webpage.\textsuperscript{134}

PART III—FEDERAL PARLIAMENTARY INQUIRIES

Inquiry into multiculturalism in Australia

On 17 February 2011, the Joint Standing Committee on Migration launched an inquiry into multiculturalism in Australia today. Some of the key issues to be addressed will be: the role of multiculturalism in the Government’s social inclusion agenda; the effectiveness of settlement programs for new migrants, including refugees; how Australia can better utilise the skills of migrants; and incentives to encourage small business development. Chair of the Committee, Maria Vamvakinou MP, welcomed the inquiry and the opportunity to hear directly from migrant communities, ‘Australia is a diverse society - it is part of who we are as Australians both in the city and the bush. Some European leaders have suggested that multiculturalism has failed in Europe. The lessons from Europe are important, but multiculturalism in Australia and Australian society is quite different’.\textsuperscript{135}

At time of writing, the Committee had not concluded its inquiry.

Joint Select Committee on the Christmas Island Tragedy of 15 December 2010

On 2 March 2011, Parliament established the Joint Select Committee on the Christmas Island Tragedy to inquire into the incident in December 2010 in which an irregular entry vessel foundered on rocks at Rocky Point on Christmas Island. The committee was tasked with examining the Commonwealth’s management of the incident, its operational response, and the adequacy of subsequent support provided to survivors and others. The Committee finalised its report on 29 June


In brief, the Committee concluded that ‘the response to the horrific tragedy that took place on 15 December 2010 was professional, courageous and as effective as it could possibly be under the prevailing weather conditions’. The Committee expressed the following view:

5.3 Responding vessels moved as quickly as they were able to assist SIEV 221, whose location and situation was unclear and very difficult to accurately ascertain. When they reached the wreckage, the crew of the ACV Triton and HMAS Pirie did all they could in terrible conditions to save as many lives as possible, and all but one of the survivors owe their lives to these brave men and women.

5.4 The SIEV’s position near the rocks and prevailing weather conditions meant that no rescue boats of any kind could have been safely launched from the island. The inflatable boats launched from the Triton and Pirie were successful in their endeavours notwithstanding being operated well beyond their specification...

5.6 The committee is of the view that appropriate care and support has been offered to the survivors, the community, and to officers of responding agencies. Acute medical care was of a high order, as was immediate psychological support for all concerned...

Commentary

- ‘Senate committee backs shipwreck response’, ABC News, 29 June 2011

Joint Select Committee on Australia’s Immigration Detention Network

On 16 June 2011, Parliament established the Joint Select Committee on Australia’s Immigration Detention Network. The Committee will inquire into Australia’s Immigration Detention Network, including its management, resourcing, potential expansion, possible alternative solutions, the Government’s detention values, and the effect of detention on detainees. The committee will also inquire into the reasons for and nature of riots and disturbances, their management, and the length of time detainees have been held in the detention network, the reasons for their stay, the processes for assessment of protection claims and any other matters relevant to the terms of reference.

137. Ibid., p. 65.
138. Ibid. Separate additional comments were also submitted by Senators Crossin and Hanson-Young at pp. 67–73.
7 October 2011, the Committee presented an interim report which noted that it had received over 3500 submissions, and requested its reporting date be extended to 30 March 2012.

At year’s end, the Committee had not concluded its inquiry.

Commentary

- J Kelly & L Wilson, ‘Detention costs soar to $772m’, *The Australian*, 17 August 2011

Senate Legal and Constitutional Affairs Committee inquiry into Australia’s agreement with Malaysia in relation to asylum seekers

On 17 August 2011 the Senate referred Australia’s agreement with Malaysia in relation to asylum seekers to the Legal and Constitutional Affairs Committee for inquiry and report by 22 September 2011. The Committee was tasked with inquiring into: the consistency of the agreement to transfer asylum seekers to Malaysia with Australia’s international obligations; the extent to which the above agreement complies with Australian human rights standards, as defined by law; and the practical implementation of the agreement.

The Committee received 37 submissions and held one public hearing in Canberra on 23 September 2011. On 11 October 2011, the Committee tabled its report. It noted that ‘all those who provided comment on the arrangement expressed their opposition to it in absolute terms’. The Committee listed some of the key concerns raised during the course of the inquiry as:

- the non-legally binding nature of the arrangement
- problems relating to the practical implementation of the arrangement, including a lack of appropriate oversight and monitoring mechanisms
- the non-compliance of the arrangement with international law obligations and human rights standards

141. Ibid., p. 19.
• inadequate conditions in Malaysia for asylum seekers and refugees
• insufficient protections for unaccompanied minors transferred under the arrangement, and
• the 'swap' aspect of the arrangement that would see 800 asylum seekers going to Malaysia, in exchange for the resettlement in Australia of 4,000 refugees from Malaysia.142

The Committee made only one recommendation—that ‘the Australian Government not proceed with the implementation of the Arrangement between the Government of Australia and the Government of Malaysia on transfer and resettlement, due to the obvious flaws and defects in that arrangement’.143

A dissenting report was also made by Government Senators, Trish Crossin, Mark Furner and Alex Gallacher in which they asserted that ‘the Malaysian Arrangement is essential to combat the irregular movement of asylum seekers within the Asia-Pacific region’.144 In recommending that ‘the Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 be passed by the Parliament as a matter of urgency, in order to facilitate the implementation of the Malaysian Arrangement’, they pointed to the importance of regional cooperation, the deterrent effect of the Malaysian Arrangement, and the protection to be offered to asylum seekers.145

Senator Hanson-Young of the Australian Greens also made additional comments wherein she not only recommended that the Malaysia Arrangement be rejected, but any other deal with a third country.146

PART IV—CASE LAW

The High Court of Australia delivered some significant judgments relating to asylum seekers and refugees during the period September 2010–December 2011. These cases influenced or have the potential to influence legislative or policy reform. Following is an outline of two of the most significant judgments made during the period.

**Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia**

On 11 November 2010 the High Court delivered its much anticipated judgment in the case of **Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia** (2010) 272 ALR 14. The plaintiffs were asylum seekers intercepted and initially detained on Christmas Island. Although subsection 46A(1) of the Migration Act bars visa applications by such
asylum seekers (known as ‘offshore entry persons’ under the Migration Act), the Minister for Immigration and Citizenship has the personal discretion to lift the bar under that provision, or to grant a visa under section 195A, if in the public interest. However, neither section imposes a duty on the Minister to consider exercising the discretion.

This judgment is significant for a number of reasons. Firstly, this was the first time that offshore entry persons had fundamentally challenged the offshore processing regime, introduced in the aftermath of the *Tampa* affair in 2001, in an Australian court. In doing so, the plaintiffs relied on the original jurisdiction of the High Court under section 75 of the Commonwealth Constitution. This avenue of appeal is expressly recognised in the Migration Act but had not previously been tested in this context.

Secondly, the High Court clarified the legal character of the offshore processing regime. In this respect, commentators have heralded the judgment as a victory for the rule of law. Under the regime, which was enhanced following an announcement by the Minister in July 2008, officers of the Department of Immigration and Citizenship conduct what is called a Refugee Status Assessment (RSA) for every offshore entry person to determine whether Australia’s protection obligations are engaged under the 1951 Convention Relating to the Status of Refugees (and accompanying Protocol). If they are, officers prepare a submission to the Minister seeking his/her agreement allowing the offshore entry person to make a valid visa application. If an asylum seeker receives an adverse RSA they can seek an Independent Merits Review (IMR) by an ‘independent contractor’ engaged on behalf of DIAC.

Under these assessment and review processes, both plaintiffs were found not to be persons to whom Australia owed protection obligations. In arguing their cases before the High Court, both claimed a lack of procedural fairness and error of law during the RSA and IMR processes. One also argued that section 46A of the Act was invalid.

The Commonwealth and the Minister argued in response that both the RSA and the IMR were undertaken in exercise of non-statutory executive power under section 61 of the Constitution. Accordingly, there was no obligation to afford procedural fairness in the conduct of those reviews, and it did not matter if those who undertook those inquiries misunderstood or misapplied the law. The High Court strongly disagreed. In a succinct unanimous judgment the full bench of the High Court found that because the Minister decided to consider exercising power under sections 46A and 195A of the Migration Act in every case where an offshore entry person claims to be a person to whom Australia owes protection obligations, the RSA and IMR processes are ‘steps taken under and for the purposes of the Migration Act’. As these inquiries directly impacted on the plaintiffs’ rights and interests to freedom from detention, those making the inquiries were bound to act according to law, affording procedural fairness to the plaintiffs. The High Court found neither of these requirements to have been met.

The High Court found that those who conduct an RSA or an IMR are bound by the Migration Act and the decisions of Australian courts. It was an error of law to treat the Migration Act and decided cases as no more than guides to decision making. Their Honours said that ‘if the legislation and case law were treated as no more than aids to interpretation, the assessment or review would not address the question that the Minister had to consider when deciding to lift the bar under s 46A’. The fundamental question to be determined by the RSA and IMR was essentially whether the criterion for the grant of a protection visa in subsection 36(2) of the Migration Act was met. ‘Necessarily, that question had to be understood by reference to other relevant provisions of the Migration Act, and the decided cases that bear upon those provisions’. This suggests that provisions in the Migration Act such as those defining ‘persecution’ and ‘membership of a particular social group’ etc (as interpreted by Australian courts), must be applied in conducting an RSA or an IMR for an offshore entry person.

The High Court further found that those conducting an RSA or an IMR must afford offshore entry persons procedural fairness. In this case, they found that one plaintiff was denied procedural fairness when the reviewer failed to address one of the claimed bases for the plaintiff’s fear of persecution. Both plaintiffs were also denied procedural fairness when the reviewer in each case failed to put to them the substance of country information adverse to their case and to provide them an opportunity to comment. The High Court pointed out that although review applicants appearing before the Refugee Review Tribunal need not be provided with an opportunity to comment on general country information under paragraph 424A(3)(a) of the Migration Act, that particular limitation did not apply to an IMR.

The third reason this judgment is significant is because the plaintiffs challenge to the validity of section 46A of the Migration Act which, as previously mentioned, precludes an offshore entry person from lodging a valid visa application unless the Minister ‘lifts the bar’, was rejected. The High Court held that the fact that the Minister could not be compelled to exercise his discretion under section 46A did not render the provision invalid. In commenting on this aspect of the decision, Professor George Williams reportedly said ‘on one side there are people who claim this [the High Court decision] is a massive victory—it’s not...it will lead to more claims and it may lead to people succeeding in claims when there is a genuine problem in the way their application is assessed. But it doesn’t lead to anything because the Minister still retains his discretion’. 148 In the immediate aftermath Minister for Immigration and Citizenship, Chris Bowen agreed, noting that ‘they [the High Court] explicitly did not find that my power to lift the bar, to make an application was unconstitutional; they explicitly did not find that the excision was unconstitutional...it was open to them to find that today and they didn’t find that’. 149

Because the High Court found that the Minister could not be compelled to exercise his discretion under section 46A (or section 195A), the High Court held that writs could not be issued to compel the Minister to exercise either power. Therefore, though the two Sri Lankan asylum seekers who

brought these proceedings technically ‘won’, the court issued them only declaratory relief which essentially means the court only resolved a dispute about the law. Nonetheless, their Honours noted that there was no present threat that either plaintiff would be removed from Australia without a further RSA being undertaken in which the law would be correctly applied and procedural fairness afforded. Both plaintiffs could therefore still end up being removed from Australia.

Commentary

K O’Brien, ‘Bowen quizzed on High Court ruling’, 7.30 Report (ABC), 11 November 2010

S Cannane, ‘High Court’s asylum decision allows ‘fair hearings’, Lateline (ABC), 11 November 2010

C Merritt, ‘Despite hue and cry, it’s not a massive win’, The Australian, 12 November 2010


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C Merritt, ‘Bolster courts for asylum appeal rise’, The Australian, 19 November 2010

D Hume, ‘Offshore processing: has the bar been lifted’, Australian Policy Online, 25 November 2010

G Williams, ‘PM would be wise not to play catch-up with High Court’, Sydney Morning Herald, 24 November 2010

C Bowen, ‘Government announces faster, fairer refugee assessment process’, media release, 7 January 2011

J McMillan, Regulating migration litigation after Plaintiff M61, Report to the Minister for Immigration and Citizenship, 2011

Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship

On 31 August 2011 the High Court delivered its judgment in the controversial case of Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship (2011) 122 ALD 237. The court by majority (6:1) held invalid Minister Bowen’s declaration of Malaysia as a country to which IMAs could be taken under subsection 198A of the Migration Act.

The Court held that the Minister cannot validly declare a country for this purpose unless that country is legally bound to meet three criteria. It must be legally bound by international law or its own domestic law to:
• provide access for asylum seekers to effective procedures for assessing their need for protection

• provide protection for asylum seekers pending determination of their refugee status, and

• provide protection for persons given refugee status pending their voluntary return to their country of origin or their resettlement in another country.

In addition the country must meet certain human rights standards in providing that protection. In this respect, the majority stated 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 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 ...

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’. 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’.

The Court also found that the Immigration (Guardianship of Children) Act 1946 (IGOC Act) precluded the Minister from removing the second plaintiff (a 16 year old Afghan citizen) 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"...

151. Ibid., at [162].
152. Ibid., at [163].
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.\footnote{Ibid., at [143] and [146].}

**Commentary**

C Bowen, ‘High Court decision’, Press conference transcript, 31 August 2011

M O’Sullivan, ‘The rule of law prevails’, The Age, 1 September 2011

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‘High Court ruling ‘fits with UNHCR understanding’, ABC Lateline, 1 September 2011

D Ghezelbash & M Crock, ‘Why the High Court said no this time’, new matilda.com, 1 September 2011

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J Kelly, ‘Bench ruling on Malaysian Solution slammed as narrow’, The Australian, 2 September 2011