Developments in Australian refugee law and policy 2007–10
Labor’s first term in office

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Law and Bills Digest Section

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Introduction

‘...the past two years has seen the most positive and far-reaching change in Australian history to policies relating to asylum seekers’. ¹

On 24 November 2007, the Australian Labor Party (ALP) won the federal election, defeating the Coalition Government which had been in power for nearly twelve years. Kevin Rudd was sworn in as Australia’s 26th Prime Minister on 3 December 2007. The ALP National Platform, which was formally adopted in April 2007, represented the party’s ‘long-term aspirations for Australia’. ² In relation to immigration, the ALP ambitiously resolved to implement significant changes for asylum seekers and refugees if elected. Most notably, to end the so-called ‘Pacific Solution’; to give permanent, not temporary, protection to all refugees; to limit the detention of asylum seekers for the purposes of conducting initial health, identity and security checks; to subject the length and conditions of detention to review; to vest management of detention centres with the public sector; to retain the excision of Christmas Island, Cocos Islands and Ashmore Reef; and to create a new Refugee Determination Tribunal.³ In the area of refugee policy the key themes of the platform were ‘humanity, fairness, integrity and public confidence’. ⁴

Reflecting on the Government’s first year in power, the then Minister for Immigration and Citizenship, Chris Evans, noted ‘Labor was elected on a platform of change’. ⁵ One of the first things the newly elected Labor Government did upon taking office was to stop processing asylum claims in the small Pacific Island State of Nauru—which the then Minister described as a ‘shameful and wasteful chapter in Australia’s immigration history’. ⁶ However, in retaining the former Coalition Government’s excision policy (which removes the right of asylum seekers to apply for a visa) and use of its purpose built immigration reception and processing centre on Christmas Island, the Government attracted criticism from refugee advocacy groups and academics alike—Adjunct Professor Michael White being of the view that Labor’s new approach ‘did not fundamentally alter Australia’s previous immigration policy and many features of the Pacific Solution remained’. ⁷

³. Ibid., paragraphs 151–161.
⁵. Ibid.
In 2008, the Government took a bold and decisive stand with regard to abolishing temporary protection visas and granting refugees’ permanent residency—a significant regulatory change which appeared to largely go under the radar as it occurred. It also introduced a new policy with respect to immigration detention—seven values that would ‘guide and drive new detention policy and practice into the future’. Though asylum seekers arriving without documentation would be subject to mandatory detention, they would henceforth receive publicly funded advice and assistance, access to independent review of unfavourable decisions and external scrutiny by the Commonwealth Ombudsman.

2009 saw the introduction of two Bills that proposed to make important and, in the case of the latter—long-awaited reforms to the Migration Act 1958 (the Migration Act). Firstly, the Migration Amendment (Immigration Detention Reform) Bill 2009 which would support the implementation of the Government’s new detention policy and formally introduce discretionary detention into the Migration Act. Secondly, the Migration Amendment (Complementary Protection) Bill 2009 which would introduce a formal statutory regime for processing asylum claims that may engage Australia’s non-refoulement (non-return) obligations under various international human rights treaties. However, neither of these Bills had been debated before Parliament was prorogued in July for the 2010 Federal election and have accordingly now lapsed.

2010 was a significant year of controversial refugee policy reform for the Government. In April it announced the immediate suspension of processing new asylum claims from Afghanistan and Sri Lanka due to the changing circumstances in both countries. Following a change in leadership in July, newly appointed Prime Minister Gillard also announced plans to establish a regional processing centre for asylum seekers. However, the extent to which this initiative will ultimately be successful may largely depend (amongst other things) on the ability of the current Government to meaningfully and effectively distance itself from the former Government’s ‘Pacific Solution’ which it has consistently and vehemently criticised throughout its first term in office.

This Background note provides a snap-shot of significant developments in Australian refugee law and policy under Labor’s first term in office. It begins by providing a chronology of key events from November 2007, when the ALP won the 2007 federal election to July 2010, when Parliament was prorogued for the 2010 federal election. Part I provides an overview of, and links to legislation (including proposed legislation and noteworthy regulatory change). Part II outlines significant policy reforms and other commitments, while Part III contains a brief overview of significant High Court judgments delivered during the period.

9. Ibid.
In order to understand these legal and policy developments in context, Appendix I and II are included which together provide an overview of federal parliamentary inquiries and other independent reports that were released during this time. For completeness, Appendix III provides a chronological list of key research and publications.
Chronology of key events

2007


• 3 December 2007—Kevin Rudd sworn in as Australia’s 26th Prime Minister.

• 3 December 2007—Senator the Hon Chris Evans sworn-in as Minister for Immigration and Citizenship and Laurie Ferguson MP sworn in as Parliamentary Secretary for Multicultural Affairs and Settlement Services.

• 6 December 2007—Senator the Hon Chris Ellison appointed Shadow Minister for Immigration and Citizenship and Louise Markus MP appointed Shadow Parliamentary Secretary for Immigration under the leadership of Brendan Nelson MP.

2008

• 8 February 2008—last remaining asylum seekers on Nauru arrive in Australia ending the Howard Government’s controversial ‘Pacific Solution’. 11

• 29 July 2008—Minister for Immigration and Citizenship announces ‘New Directions in Detention’ policy. 12

• 13 August 2008—a delegation of agencies including UNHCR, the Australian Human Rights Commission, the Commonwealth Ombudsman, Amnesty International and a number of non-government organisations inspect the newly completed Christmas Island Immigration Detention Centre.

• 23 September 2008—Dr Sharman Stone MP appointed Shadow Minister for Immigration and Citizenship and Senator Concetta Fierravanti-Wells appointed as Shadow Parliamentary Secretary for Immigration under the leadership of Malcolm Turnbull MP.

• 20 December 2008—Christmas Island’s North West Point detention centre opened. 13

2009

• 16 April 2009—explosion aboard SIEV (Suspected Illegal Entry Vessel) 36 killing five asylum seekers and injuring many others. Northern Territory Coroner’s report into the incident (delivered on 17 March 2010) concluded that a group of passengers mistakenly believed they

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12. C Evans, New Directions in Detention, Restoring Integrity to Australia’s Immigration System, op. cit.
were to be returned to Indonesia and thus set fire to the vessel to ensure they could not be returned.\textsuperscript{14}

- 13 August 2009—advisory board appointed to guide the newly established Office of the Migration Agents Registration Authority (MARA). The board will comprise representatives of the Migration Institute of Australia (MIA), the Law Council of Australia, and community and consumer advocates.\textsuperscript{15}

- 9 October 2009—establishment of the Council for Immigration Services and Status Resolution (CISSR) announced to replace the Immigration Detention Advisory Group (IDAG). It will provide independent advice on the implementation of policy initiatives such as the New Directions in Detention and the Community Status Resolution Service.\textsuperscript{16}

- 11 October 2009—a boat reportedly carrying 254 Sri Lankan asylum seekers was intercepted by Indonesian officials en route to Christmas Island following a personal request by Prime Minister Rudd to the Indonesian President. The boat was subsequently taken to the Port of Merak in Indonesia. On 20 April 2010, a six month stand-off came to an end when the last of the passengers agreed to disembark and be processed in Indonesia.

- 18 October 2009—Sri Lankan asylum seekers rescued at sea in the Indonesian search and rescue zone by HMAS Armidale. 56 people refuse to disembark the Australian customs vessel, the Oceanic Viking and go to a detention centre in Tanjung Pinang on Bintan Island in Indonesia. The Government reportedly offers those found to be refugees will be resettled within four weeks. On 18 November 2009, the remaining asylum seekers agree to disembark, ending a four week stand-off.

- 13 November 2009—Coalition announces core principles of its border protection policy, including a non-permanent safe haven visa for asylum-seekers that arrive without authorisation, and offshore processing at Christmas Island.\textsuperscript{17}

- 25 November 2009—Government announces that since September 2008, there have been 23 persons convicted of people smuggling offences in Australia bringing the total number of people


\textsuperscript{17} M Turnbull (then Leader of the Opposition), Coalition’s strong stand on border protection, media release, 13 November 2009, viewed 13 September 2010, http://archive.malcolmturnbull.com.au/Media/MediaReleases/tabid/90/articleType/ArticleView/articleId/669/Coalitions-Strong-Stand-on-Border-Protection.aspx
charged by the Australian Federal Police (AFP) with people smuggling offences since September 2008 to 63.  

- 8 December 2009—Scott Morrison MP appointed Shadow Minister for Immigration and Citizenship and Senator Gary Humphries appointed Shadow Parliamentary Secretary for Citizenship under the leadership of Tony Abbott MP.

2010

- 3 April 2010—The Hon Tony Bourke MP appointed Australia's first Minister for Population. This position was renamed Minister for Sustainable Population on 28 June 2010.

- 9 April 2010—the Government announces an immediate suspension on the processing of all new applications from asylum seekers from Sri Lanka and Afghanistan due to the changing circumstances in both countries. The suspension on processing asylum claims from Sri Lanka was lifted on 6 July 2010 and Afghanistan on 30 September 2010.

- 18 April 2010—Minister for Immigration and Citizenship announces that the Curtin Air force base in Western Australia will be used to accommodate single males who are subject to the Government's decision to suspend the processing of asylum applications from Sri Lanka and Afghanistan.

- 27 May 2010—Coalition announces that it would turn back boats and/or their passengers to their point of departure or an alternative third country where circumstances permit, enter into negotiations with other countries for processing centres to be established offshore if Christmas Island is beyond its capacity, restore temporary protection visas, require access to benefits to be subject to satisfying mutual obligation requirements, and restore the ‘45 day rule’.

- 24 June 2010—Julia Gillard sworn in as Australia’s 27th Prime Minister.

- 6 July 2010—Prime Minister Gillard announces in her first major policy speech that the Government has begun having discussions with regional neighbours about the possibility of


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establishing a regional processing centre for the purpose of receiving and processing irregular entrants to the region.\(^{22}\)

- 6 July 2010—Coalition announces that it would create a presumption against awarding refugee status if an asylum seeker has discarded their identity papers, it would abolish the merits review panel and give the Minister power to directly intervene in the decision-making process on Christmas Island. It would also increase the number of refugee resettlement places each year by 1500 persons (but retain the total number of places under the Refugee and Humanitarian Program at 13 750 places) and trial a refugee sponsorship program to enable groups in Australia to privately sponsor refugees (above the regular intake).\(^{23}\)


PART I—LEGISLATION

Migration Legislation Amendment Act (No.1) 2008

On 25 June 2008, the Migration Legislation Amendment Bill (No.1) 2008 was introduced into Parliament.\(^{24}\) The purpose of this omnibus Bill was to clarify and improve the effectiveness of migration and citizenship legislation relating to judicial and merits review, border protection, visa integrity, citizenship, and other miscellaneous matters. Of particular relevance to the current context, its purpose was to:

- streamline the procedures for notifying parties of a decision of the Migration Review Tribunal and the Refugee Review Tribunal (RRT) by, amongst other things, removing the requirement for the tribunals to ‘hand down’ their decisions
- give greater certainty to the immigration status and immigration clearance of non-citizen children born in Australia
- ensure that a security may be imposed for compliance with visa conditions before grant and a range of other amendments to clarify the operation of certain provisions relating to bridging visas
- more effectively harmonise a number of people smuggling offences with the Criminal Code
- provide that subject to certain requirements the Minister is not obliged to give documents to an authorised recipient if the authorised recipient is not a registered migration agent, and

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The Bills Digest examines the Bill in further detail.26 The Bill was passed (with minor amendments moved on behalf of the Government) on 4 September 2008 and became Act No. 85, 2008.27

Migration Amendment Regulations 2008 (No. 5)

On 9 August 2008, the Migration Amendment Regulations 2008 (No. 5) SLI 2008 No. 168 came into force.28 No motions of disallowance were moved. The purpose of the amendment (amongst other things) was to abolish temporary protection visas, secondary movement visas and remove the ‘7 day rule’.29 As explained in the accompanying Explanatory Statement:

The Regulations ensure that a person to whom the Minister is satisfied Australia owes protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (the Refugees Convention), is eligible for grant of a permanent protection visa in the form of a Subclass 866 (Protection) visa, regardless of their mode of arrival in Australia or whether they have previously held a visa. The Regulations also remove the ‘7 day rule’ from permanent protection and permanent humanitarian visas which requires that since last leaving their home country, applicants must not have resided for a continuous period of 7 days or more in a country in which they could have sought and obtained effective protection. Finally, the Regulations allow for the holders of temporary protection and temporary humanitarian visas and in some instances the former holders of these visas, to have their status permanently resolved through the grant of a new permanent visa without the need for a reassessment of whether Australia owes that person protection obligations under the Refugees Convention.30

29. Subclass 447 (Secondary Movement Offshore Entry (Temporary)) and Subclass 451 (Secondary Movement Relocation (Temporary)) visas were previously granted to asylum seekers processed on Nauru.
**Migration Amendment (Notification Review) Act 2008**

On 4 September 2008, the *Migration Amendment (Notification Review) Bill 2008* was introduced into Parliament. The purpose of the Bill was to amend the Migration Act to provide greater clarity and certainty to some of the notification procedures contained therein. In particular:

- Provide that substantial compliance with the required contents of a notification document is sufficient unless the recipient is able to show the error or omission in the document causes them substantial prejudice; and

- Provide the deemed time of notification provisions will operate despite non-compliance with a procedural requirement for giving a document to an individual where the individual has actually received the document unless the individual is able to show they received the document at a later date in which case they will be taken to have received the document at that date.

The *Bills Digest* explains the Bill in further detail. The Bill was passed on 14 October 2008 (with amendments moved on behalf of the Government) and became *Act No. 112, 2008*.

**Migration Legislation Amendment Act (No.1) 2009**

On 3 December 2008, the *Migration Legislation Amendment Bill (No.2) 2008* was introduced into Parliament. The purpose of the Bill was to amend provisions of the Migration Act that relate to the way in which the Migration and Refugee Review Tribunals conduct their merits review and the time limit for lodging applications for judicial review of migration decisions. In particular:

- clarify that the Migration Review Tribunal and the Refugee Review Tribunal may invite a person to give information, either orally (including by telephone) or in writing,

- reinstate effective and uniform time limits for applying for judicial review of a migration decision in the Federal Magistrates Court, Federal Court and High Court, and

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32. Explanatory Memorandum, Migration Amendment (Notification Review) Bill 2008, p. 3.


• limit appeals against judgments by the Federal Magistrates Court and the Federal Court that make an order or refuse to make an order to extend time to apply for judicial review of migration decisions.  

The Bills Digest explains the Bill in further detail. The Bill was passed on 12 February 2009 and became Act No. 10, 2009.

Migration Amendment (Abolishing Detention Debt) Act 2009

On 17 June 2009, the Migration Amendment (Abolishing Detention Debt) Bill 2009 was introduced into Parliament. The purpose of the Bill was to amend the Migration Act to remove the requirement that certain persons held in immigration detention in Australia be liable for the costs of their detention. The Bill would also extinguish all immigration detention debts outstanding at the time of commencement of the legislation.

In the present context it is worth noting that it was Departmental policy to write-off the detention debt of a person held in detention and subsequently found to be a refugee:

The department recognises the Refugee Convention of 1951 not to penalise asylum seekers, including those holding visas such as Temporary Protection, Protection or Special Global Humanitarian. In these instances, the department records the debt but does not issue an invoice or pursue the debt. These debts are written off.

The Bills Digest explains the Bill in further detail. The Bill was passed on 8 September 2009 and became Act No. 85, 2009.

Migration Amendment (Protection of Identifying Information) Act 2009

On 27 May 2009, the Migration Amendment (Protection of Identifying Information) Bill 2009 was introduced into Parliament. The purpose of the Bill was to amend the Migration Act to ensure that all personal identity information obtained by the Department of Immigration and Citizenship is subject to the access, use and disclosure regime in Part 4A of the Act.

The Bills Digest examines the Bill in further detail. The Bill was passed on 25 June 2009 and became Act No. 69, 2009.

Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Act 2009

On 25 June 2009, the Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009 was introduced into Parliament. The purpose of the Bill was to amend the Australian Citizenship Act 2007 to (amongst other things) make it easier for persons who have a physical or mental incapacity as a result of suffering torture or trauma before coming to Australia to be eligible to apply for citizenship.

The Bills Digest examines the Bill in further detail. The Bill was passed on 17 September 2009 (with significant amendments moved on behalf of the Government discussed in the Bills Digest) and became Act No. 90, 2009.

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Migration Amendment Regulations 2009 (No.6)

On 1 July 2009, the Migration Amendment Regulations 2009 (No.6) S1I 2009 No. 143 came into force. A motion to disallow by the Coalition was negatived on 8 September 2009. The purpose of the amendment was to abolish what is termed ‘the 45-day rule’. An explanation of the way in which this rule operates is provided in the Explanatory Statement:

No work rights are currently available to people who are applying for a protection visa and who have been in Australia for 45 days or more in the 12 months before their application is made. The purpose of the Regulations is to amend the Migration Regulations 1994 to abolish the 45-day rule for certain Bridging visa subclasses and provide for new provisions in relation to permission to work for certain applicants. The amendments replace the 45-day rule with a fairer process recognising that people who have complied with migration legislation should not be deprived of permission to work based on the application of the 45-day time limit.

Anti-People Smuggling and Other Measures Act 2010

On 24 February 2010 the Anti-People Smuggling and Other Measures Bill 2010 was introduced into Parliament. The purpose of the Bill was to amend Australia’s anti-people smuggling legislative framework. In particular, it sought to harmonise existing offences between Acts, create new people smuggling offences (including supporting the offence of people smuggling), enhance investigative tools, and extend the application of mandatory minimum penalties for aggravated people smuggling offences.

The Bills Digest examines the Bill in further detail. The Bill was passed on 13 May 2010 and became Act No. 50, 2010.

Proposed Legislation

Neither of the following two Bills had been debated in Parliament when the House of Representatives was prorogued on 19 July 2010 for the federal election. These Bills have now accordingly lapsed.

Migration Amendment (Immigration Detention Reform) Bill 2009

On 25 June 2009, the Migration Amendment (Immigration Detention Reform) Bill 2009 was introduced into Parliament. The purpose of the Bill was to amend the Migration Act to create more flexibility in managing the detention of ‘unlawful non-citizens’, to support the implementation of the Government’s New Directions in Detention policy, announced in July 2008. Explicitly, it proposed to restrict mandatory detention to a specific category of people, introduce express discretionary detention for other ‘unlawful non-citizens’, create temporary community access permissions (TCAPs) and remove the requirement that only the Minister for Immigration and Citizenship can personally grant residency determinations. It also sought to affirm in legislation the principle that a non-citizen must only be detained in a detention centre as a measure of last resort and for the shortest practicable time.

The Bills Digest examines the Bill in further detail, including the findings of the Senate Legal and Constitutional Affairs Legislation Committee inquiry.

Migration Amendment (Complementary Protection) Bill 2009

On 9 September 2009, the Migration Amendment (Complementary Protection) Bill 2009 was introduced into Parliament. The purpose of the Bill was to amend 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 protection. The Bill proposed to assess such claims under a ‘single integrated protection visa application process’ which meant applicants that were found not to be refugees but owed protection on complementary protection grounds would be granted permanent protection visas with the same conditions and entitlements as refugees. In turn, unsuccessful applicants (that is, applicants found not to be owed protection) would have the same administrative and judicial review rights as persons seeking protection under the 1951 Convention relating to the Status of Refugees.

(read in conjunction with the 1967 Protocol relating to the Status of Refugees) (together they form the 1951 Refugee Convention).

The Bills Digest examines the Bill in further detail, including the findings of the Senate Legal and Constitutional Affairs Legislation Committee inquiry.57

PART II—POLICY REFORM AND OTHER COMMITMENTS

Cessation of extra-territorial processing of asylum claims

In late 2001 legislative changes were made to the Migration Act to excise parts of Australian territory for some purposes of the Migration Act. The creation of ‘excised’ territory effectively meant asylum seekers arriving by boat to these areas could not make valid visa applications under the Migration Act. Instead, ‘offshore entry persons’, as they became known under the Act, were taken to a ‘declared country’ such as Nauru or Papua New Guinea to have their asylum claims assessed using a non-statutory process. Refugees would then await resettlement to Australia or another country participating in the UNHCR resettlement programme. These legislative changes became widely known as Australia’s ‘Pacific Solution’.

In its 2007 National Platform, the ALP pledged to ‘end the so-called ‘Pacific Solution with its huge cost to Australian taxpayers’. Subsequently, on 8 February 2008, the Minister for Immigration and Citizenship announced the arrival in Australia of the last refugees from Nauru:

21 Sri Lankans are the final members of a group of 82 refugees detained on Nauru that have been resettled in Australia as part of the humanitarian resettlement program. The Australian Government has initiated discussions with the Nauruan Government over the closure of the centre... The Department of Immigration and Citizenship expended $289 million between September 2001 and June 2007 to run the Nauru and Manus OPCs [offshore processing centres]. A total of 1637 people were detained in the Nauru and Manus facilities, of whom 1153 (or 70 per cent) were ultimately resettled from the OPCs to Australia or other countries. Of those who were resettled, around 61 per cent (705 people) were resettled in Australia.58

However, section 198A of the Migration Act has not been repealed.59 This provision provides the statutory basis for ‘offshore entry persons’ to be taken to a ‘declared country’ for processing. A declared country is simply a country in respect of which a declaration has been made under

58. C Evans, Last Refugees Leave Nauru, op. cit.
59. Subclass 447 (Secondary Movement Offshore Entry (Temporary)) and Subclass 451 (Secondary Movement Relocation (Temporary)) visas were repealed from the Migration Regulations 1994 on 9 August 2008. This means these visas can no longer be granted: Migration Amendment Regulations 2008 (No. 5), Comlaw website, viewed 19 January 2010, http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/O/7E510868F06E4F74CA25749D0009087D?OpenDocument
subsection 198A(3) of the Act. A declaration is made by the Minister and it states that a particular ‘declared country’:

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

A declaration was made with respect to Nauru by the former Coalition Government on 2 October 2001 and renewed 25 November 2002. A declaration was also made with respect to Papua New Guinea on 12 October 2001. According to DIAC, ‘there are no limits in the legislation for the period in which a declaration under subsection 198A(3) can be made...The declaration will remain in force for the period specified or until revoked under paragraph 198A(3)(b)’.  

It is not known whether the Government has revoked these declarations or whether they remain in force but simply lie dormant.

**Immigration detention**

On 29 July 2008 the Minister for Immigration and Citizenship made a speech at the Australian National University (ANU) entitled ‘New Directions in Detention, Restoring Integrity to Australia’s immigration System’. In this speech, the Minister listed seven ‘key immigration detention values’ which would ‘inform all aspects of the Department’s immigration detention services’. They included:

1. Mandatory detention is an essential component of strong border control.

2. To support the integrity of Australia’s immigration program three groups will be subject to mandatory detention:
   - all unauthorised arrivals, for management of health, identity and security risks to the community;
   - unlawful non-citizens who present unacceptable risks to the community; and
   - unlawful non-citizens who have repeatedly refused to comply with their visa conditions;

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61. C Evans, New Directions in Detention, op. cit.
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3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC);

4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, will be subject to regular review;

5. Detention in IDCs is only to be used as a last resort and for the shortest practicable time;

6. People in detention will be treated fairly and reasonably within the law; and

7. Conditions of detention will ensure the inherent dignity of the human person.62

According to the Minister:

The values commit us to detention as a last resort; to detention for the shortest practicable period; to the rejection of indefinite or otherwise arbitrary detention. In other words, the current model of immigration detention is fundamentally overturned’.63

Administrative implementation of the Government’s detention values progressively began in July 2008.64

The Minister was of the view that taken cumulatively, the detention values ‘embrace’ a risk-based approach to the management of ‘the immigration population’.65 Some of the key features of this risk-based approach to detention were identified in the Minister’s speech:

• people will be detained only if the need is established

• the key determinant of the need to detain a person in an immigration detention centre will be risk to the community

• the presumption will be that persons will remain in the community while their immigration status is resolved

• the Department will have to justify a decision to detain – not presume detention, and

• once [health, identity and security] checks have been successfully completed, continued detention while immigration status is resolved is unwarranted.66


64. DIAC, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009, 31 July 2009, p. 7. Specific details are at Appendix 4 of the Committee’s report. Insert a link

65. C Evans, New Directions in Detention, op. cit., p. 3.

66. Ibid., p. 3.
The Migration Amendment (Immigration Detention Reform) Bill 2009, introduced into Parliament on 25 June 2009, would amend the Migration Act to (amongst other things) support the implementation of the Government’s New Directions in Detention policy. However this Bill lapsed in July 2010 when the House of Representatives was prorogued for the 2010 federal election. This Bill is discussed in more detail above under the heading ‘Proposed legislation’.

Commentary

- P Georgiou, ‘Protection should be paramount’, The Age, 31 July 2008
- G Williams, ‘New solution needs legal help’, Canberra Times, 2 August 2008

Excision and offshore processing on Christmas Island

In its 2007 National Platform, Labor pledged to continue ‘the excision of Christmas Island, Cocos (Keeling) Islands and Ashmore Reef from Australia’s migration zone’.67 This meant asylum seekers intercepted en route to Australia and taken to Christmas Island would continue to be legally barred from making a valid visa application by virtue of section 46A of the Migration Act, unless the Minister personally considered it to be in the public interest to permit it. In his speech outlining the Government’s ‘New Directions in Detention policy’, the Minister announced that though ‘an architecture of excision of offshore islands’ would remain, no decision had been taken on the boundaries of the current excision zone.68

The Migration Act does not require or obligate officers to detain asylum seekers taken to Christmas Island (‘offshore entry person’ as they are known in the Act).69 Rather, the Government’s detention values confirmed that as a matter of policy, all unauthorised arrivals would be subject to mandatory detention.70

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68. C Evans, New Directions in Detention, op. cit.
69. Existing subsection 189(3) creates a discretionary power (reflected in the use of the term ‘may’) to detain ‘unlawful non-citizens’ and those reasonably suspected of being so in an ‘excised offshore place’ such as Christmas Island.
70. See also: DIAC, PAM3 Migration Act, Detention Services Manual, Chapter 2 Client Placement: Discretion to Detain Unauthorised Arrivals at Christmas Island which states ‘as a matter of policy, it is intended, as a general rule, that all unauthorised air and sea arrivals at Christmas Island will initially be taken into immigration detention to enable processing, initial interviews and health checks to take place’.
In his speech, the Minister also confirmed that asylum seekers arriving by boat would be processed on Christmas Island and the non-statutory processing of their claims would remain.71 The Australian Human Rights Commission (AHRC) explains the refugee status assessment (RSA) process as follows:

The non-statutory RSA process is governed by draft policy guidelines. The guidelines are neither legally binding nor publicly available. Decision-makers are not bound by the Migration Act, the Migration Regulations or Australian case law regarding the definition of a refugee.72

Nonetheless, under the Government’s new detention values, as a matter of policy only—asylum seekers would begin to receive publicly funded advice and assistance, access to independent review of unfavourable decisions73 and external scrutiny by the Immigration Ombudsman.74

Though the Government has occasionally transferred asylum seekers that have arrived by boat to the Australian mainland—such as unaccompanied minors, people in need of medical treatment, or people who are to be removed from Australia—the Government has consistently claimed that their legal status, that of ‘offshore entry person’, remains.75 In contrast, the Coalition has asserted that their legal status on the mainland is unclear under the Act.76

This question, and many others surrounding the basis for offshore processing may soon be put beyond doubt in what has been described as a ‘test case’ brought to the full bench of the High Court by some Sri Lankan asylum seekers that were among 89 men transferred to Sydney’s Villawood detention centre in late April 2010 after being notified that they did not satisfy the refugee definition.77 Their applications were filed in the original jurisdiction of the High Court. The High Court is expected to consider (amongst other things):

73. Independent merits review of unsuccessful protection visa applications occurs at the Refugee Review Tribunal or the Administrative Appeals Tribunal (depending upon the basis for refusal). In contrast, independent merits review (IMR) of Refugee Status Assessments at Christmas Island appears to be done by former administrative tribunal members of the RRT (and other agencies) as employees of a recruitment agency, Wizard People Pty Ltd. Reviews are conducted in accordance with a contract between the Commonwealth and Wizard People and by reference to a procedural manual developed by DIAC: High Court of Australia, ‘Short particulars of cases: Plaintiff M61/2010E v Commonwealth of Australia & Ors and Plaintiff M69/2010E v Commonwealth of Australia & Ors, viewed 14 September 2010, http://www.hcourt.gov.au/registry/matters/24-08-10SP.pdf
74. C Evans, New Directions in Detention, op. cit. The Ombudsman reviews the circumstances of a person’s detention where they have been in detention for longer than six months but these reviews are not tabled in Parliament—rather they are provided to the Immigration Department’s Secretary.
76. The Coalition, ‘Restoring sovereignty and control to our borders: Policy directions statement’, op.cit.
Developments in Australian refugee law and policy 2007–2010

- whether the non-statutory Refugee Status Assessment (RSA) is supported by the Constitution
- whether the independent review of the RSA is valid
- to what extent decisions made under RSA (including review decisions) are reviewable by High Court in exercise of its original jurisdiction
- whether relevant and/or irrelevant considerations were taken into account under the RSA, and
- whether the plaintiffs were denied procedural fairness.

These cases were heard together on 24 and 25 August 2010 but the High Court has reserved its judgment.

Commentary

- M Gordon, ‘Challenge to asylum system’, The Age, 1 May 2010
- P Maley, ‘Asylum-seekers ask High Court for local appeal’, The Australian, 25 August 2010
- L Wilson, ‘Judges question asylum loophole’, The Australian, 26 August 2010

Suspension of processing Afghan and Sri Lankan asylum seekers

On 9 April 2010, in a joint press conference, the then Ministers for Immigration and Citizenship, Foreign Affairs, and Home Affairs announced that the Government was implementing an immediate suspension on the processing of all new applications from asylum seekers from Sri Lanka and Afghanistan. The basis for the suspension was the ‘evolving circumstances’ in both countries which, when coupled with the suspension would mean that ‘in the future, more asylum claims from Sri Lanka and Afghanistan will be refused’.  

The Government undertook to review the situation in Sri Lanka after a period of three months and in Afghanistan, after a period of six months. It emphasised that Sri Lanka was in a period of transition ‘with hopes for further improvement and stabilisation in conditions’. With respect to Afghanistan, it claimed that:

The Taliban’s fall, durable security in parts of the country, and constitutional and legal reform to protect minorities’ rights have improved the circumstances of Afghanistan’s minorities, including Afghan Hazaras.  

Emphasis was also placed on the fact that UNHCR was reviewing the conditions in both countries and related guidelines for refugee status determination.

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78. S Smith (Minister for Foreign Affairs), C Evans (Minister for Immigration and Citizenship), and B O’Conner (Minister for Home Affairs), Changes to Australia’s immigration processing system, op. cit.
79. Ibid.
On 18 April 2010 the Minister for Immigration and Citizenship issued a media release advising that the Royal Australian Air Force (RAAF) Base Curtin facility—located some 40 kilometres out of Derby in Western Australia—would be upgraded to accommodate single males who were subject to the Government’s decision to suspend the processing of asylum applications from Sri Lanka and Afghanistan.  

Though commentators were quick to assert an apparent violation of Article 3 of the 1951 Refugee Convention which prevents discrimination on the basis of a refugee’s country of origin, UNHCR, the UN agency tasked with monitoring adherence to the Convention, was itself comparatively restrained in its criticism of the policy. It simply noted that suspension of processing might be appropriate and in accordance with States’ obligations under the 1951 Refugee Convention in very limited circumstances, such as in mass influx situations or quickly evolving post-conflict situations. It did however, express concern that the affected asylum seekers would be subject to prolonged mandatory detention ‘without clear guidelines or effective judicial oversight’. President of the AHRC, Cathy Branson QC was also of the view that the policy could lead to a violation of Australia’s international human rights obligations:

New asylum seekers from Sri Lanka and Afghanistan are now in a situation of considerable uncertainty, as a review of the suspension in three or six months time does not guarantee the suspension will be lifted. We have real concerns that this policy shift could lead to arbitrary detention and take Australia down a path that is at odds with our international human rights obligations.

On 5 July 2010 the UNHCR released its much anticipated Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka. The guidelines acknowledged an improved human rights and security situation in Sri Lanka following the cessation of armed conflict in May 2009. However, in recognising that a presumption of eligibility for Sri Lankans of Tamil ethnicity originating from the north of the country no longer existed, the UNHCR nonetheless emphasised that:

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All claims by asylum-seekers from Sri Lanka should be considered on their individual merits in fair and efficient refugee status determination procedures and taking into account up-to-date and relevant country of origin information.84

The following day, Prime Minister Gillard announced that the release of UNHCR’s revised eligibility guidelines signified that acceptance rates were likely to decline and accordingly the Government was immediately lifting the processing suspension on asylum seekers from Sri Lanka.85 The processing suspension for Afghan claimants was not lifted at this time—rather, that decision would remain ‘under review’.86 In this context, reference was also made to the recent increase in primary refusal rates:

Although there was a time when large numbers of Afghan asylum seekers were granted refugee status, since April there have more than 500 primary refusal decisions for Afghans. During the past month the primary refusal rate has exceeded 70 per cent. If upheld at review, these increasing rates of refusals will result in many more people being returned to their homelands.87

However, some commentators have subsequently reported that many of the recently rejected Afghan asylum seekers have apparently had their decisions overturned on appeal—though this claim was unable to be substantiated because no figures were released during the election campaign.88 As at 30 July 2010, there were some 2237 Afghan and 692 Sri Lankan nationals in immigration detention in Australia (including at Christmas Island Immigration Detention Centre). During this same period, 459 people remained in detention at Curtin Immigration Detention Centre.89

Commentary

- J McAdam & K Murphy, ‘Refugee processing freeze breaches international law’, The Australian, 14 April 2010
- S Taylor, ‘The asylum freeze and international law’, Inside Story, 14 April 2010
- A Bartlett, ‘Refugee claim freeze: is Rudd a law unto himself’, Crikey, 14 April 2010
- D Mortimer, C Horan & K Foley, ‘Joint opinion: In the matter of Changes to Australia’s Immigration Processing System – Suspension of Processing of Asylum Applications from Sri Lanka and Afghanistan’ 19 May 2010

84. Ibid., p. 3.
86. On 30 September 2010 the Government subsequently announced that it was lifting the processing freeze on new Afghan asylum claims.
87. Ibid.
Proposal for a regional processing centre

On 6 July 2010, in what has been described as her first major policy speech, Prime Minister Gillard announced that she had recently discussed with President Ramos Horta of East Timor ‘the possibility of establishing a regional processing centre for the purpose of receiving and processing of the irregular entrants to the region’. Though very little detail about the proposal was provided, the Prime Minister emphasised that it would not be a new ‘Pacific Solution’, rather a ‘sustainable, effective regional protection framework’. Though the Prime Minister appeared to envisage the participation of the UNHCR and had discussed the initiative with the High Commissioner, Mr António Guterres, his reaction to the proposal was not disclosed. In a recent newspaper article Erika Feller, Assistant High Commissioner for Protection with UNHCR emphasised that though closer co-operation on asylum issues in the region is a positive development, regional processing centres are not the solution in themselves and that arrangements that deflect burdens and responsibilities could in turn heighten tensions and increase people smuggling activities:

Experience shows that an approach built simply around controlling borders and preventing movement is not the answer. If we are to discourage people from moving then we need to find ways of stabilising their situations, making them feel safer and offering them solutions that are humane and workable.

For this to work, people must be given protection and a sense of security so they do not feel their only option is to put their lives into the hands of people smugglers; they need confidence that their claims will be fairly assessed and a solution found within a reasonable time.

In this regard, it is positive that the door is open, with closer co-operation on asylum issues and refugee protection now on the table in the region. Establishing refugee processing centres in this region could be part of this, but it must be embedded in a broadly constituted and co-operative, multilateral framework that engages refugee-hosting and resettlement countries alike.

Regional processing centres, like refugee status determination, are not the solution in themselves. They are just tools to identify those who need protection and what the appropriate solutions are.

Any co-operative framework must include processes to return those who do not need or deserve protection to their homes and to assist those - like trafficked women or unaccompanied children - who are particularly vulnerable. Such arrangements have to be carefully negotiated and approved.

Regional co-operation also means providing social support and safe living conditions for those who have claimed asylum until their claims are properly adjudicated. Detention is not the answer, especially for women, children and families. There must be decent and humane conditions of reception, which serve as a genuine alternative to detention.

Finally, in UNHCR’s experience, the key to the success of regional arrangements is a genuine engagement and sharing of burdens and responsibilities among affected states. Arrangements
that deflect burdens and responsibilities rather than properly apportioning them stand a good chance of heightening tensions, creating fertile ground for people smuggling.90

Refugee Review Tribunal

Merit-based appointments

On 1 August 2008, the Minister for Immigration and Citizenship announced that the Rudd Government would ‘undertake a transparent, merit-based selection process to recruit five senior members for the independent refugee and migration review tribunals instead of just re-appointing existing members’.91

Subsequently, on 5 December 2008, the Minister announced the appointment of two new Senior Members and the re-appointment of three new Senior Members to the Tribunals—Mr Giles Short, Dr Irene O’Connell, Ms Amanda MacDonald, Ms Linda Kirk and Mr Peter Murphy for a five year term (1 January 2009 to 31 December 2013).92

On 10 June 2009 the Minister announced the appointment of 12 new Members and the re-appointment of 31 existing Members to the Tribunals for a five year term (1 July 2009 to 30 June 2014). Five Members unsuccessfully sought re-appointment.93 According to the RRT:

Of the 5 Members who unsuccessfully applied for a further term of appointment in 2009, 3 had a set aside rate higher than the overall RRT aside rate and 2 had a set aside rate lower than the overall RRT set aside rate in the 3 years to 30 June 2009.94

On 4 June 2010 the Minister announced the appointment of 18 new Members and the re-appointment of 25 existing Members to the Tribunals for a five year term (1 July 2010 to 30 June 2015). Eighteen Members unsuccessfully sought re-appointment.95

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Commentary

- ‘RRT urged to be soft’, Australian Financial Review, Hearsay, 7 May 2010
- A Bolt, ‘Open-door policy gets a boost’, Herald Sun, 26 May 2010
- A Bolt, ‘Rudd to benefit from silent purge that will usher in asylum seekers’, Herald Sun, 11 June 2010
- ‘Refugee bias feared’, Australian Financial Review, Hearsay, 11 June 2010

Publication of country of origin research

On 17 February 2009, the Minister announced that the RRT would publish its country of origin research to provide greater transparency in its decision making. He stated:

This is an important development in demonstrating the openness and accountability of the tribunal and its decision making processes. The publication of the Refugee Review Tribunal’s country of origin research will provide greater access to justice to protection visa applicants, migration advisers and the public.96

The information published online includes ‘general background information, commissioned research and opinions from academics and experts as well as responses researched in answer to specific questions posed by RRT members in relation to particular reviews’.

For further information see the RRT’s ‘Country advice’ webpage.97

Publication of decisions

On 17 February 2009, the Minister also announced that the RRT and the MRT would double the number of decisions published online so that 40 per cent of all decisions made by the tribunals would be publicly available’.98 It was envisaged that this initiative would increase the transparency of the decision-making process. Tribunal decisions are published on the AustLII website.99 During the period December 2008 to June 2009 more than 46% (1861) of all decisions made in the period were published on AustLII. However, of these only 681 were RRT decisions.100

98. C Evans (Minister for Immigration and Citizenship), Greater transparency for refugee and migration tribunals, op. cit.
During the 2008—09 financial year the RRT overturned 468 Department decisions and affirmed or agreed with the Department’s primary decision in 1787 cases. In comparison, under the previous Coalition Government, during the 2006—07 financial year 649 Department decisions were overturned and 2202 cases were affirmed.101

Multi-year resettlement planning

Decisions on the size, composition and regional focus of Australia’s Humanitarian Program are decided by the government annually. However, such an approach has been criticised on the basis that it makes ‘it very difficult for Australia to make a longer term commitment to resettling from a particular refugee camp where resettlement needs to take place over several years’.102 On 17 November 2008, the Minister for Immigration and Citizenship expressed interest in multi-year planning for Australia’s humanitarian program:

Multi-year planning for the humanitarian program is one reform that I am particularly interested in. I think we can do better than running an ongoing program year to year – we need a more strategic focus to planning. Bringing Australia into line with this international best practice would enable us to play a more active and effective role in working with UNHCR and the international community to find solutions over time to protracted situations. It would also allow us greater flexibility to respond to emerging international developments as they arise.103

By 12 May 2009 it was announced that a four-year planning framework would be implemented in 2009—10:

Our move this year to a four-year planning framework will give us greater flexibility in responding to emerging humanitarian situations as they arise. It will also allow Australia to make a longer-term commitment to the resettlement of refugees in protracted situations, many of whom have been languishing in camps for years.104

The intake and composition will still go to Cabinet annually. For further information see the Department’s fact sheet entitled Australia’s Refugee and Humanitarian Program.105

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101. In 2006-07 there were 2,835 cases lodged with the tribunal, compared to 2,538 cases lodged in 2008-09: Ibid., pp.33, 38.
103. C Evans, Refugee Policy under the Rudd Government—the first year, op. cit.
Commonwealth budget commitments

2008—09 financial year

On 13 May 2008, the Rudd Government handed down its first federal budget. In relation to measures specifically affecting asylum seekers and refugees, the Government committed (amongst other things):

- $4.2 million over five years to implement legislative and administrative arrangements by 1 October 2008 to abolish the Temporary Protection visa and the Temporary Humanitarian visa.
- a one-off increase to the 2008—09 Humanitarian migration program by an additional 500 refugee places for Iraqis at an estimated cost of $35.3 million over four years
- increase the Special Humanitarian Program by an additional 750 places from 2009—10 onwards (13,750 places per year from 2009—10 onwards) at an estimated cost of $85.1 million over four years
- $42.2 million over four years to provide up to 600 additional permanent visa places to allow resettlement in Australia of specifically designated locally engaged Iraqi employees and their families, who are potentially at risk because of their involvement with the Australian Government in Iraq
- $5.6 million in 2008—09 to continue the case management and community care pilot until 30 June 2009. The case management and community care pilot targets vulnerable immigration clients including unaccompanied minors, the elderly, and people with a disability. The pilot provides a range of services including case management, community assistance, immigration information, advice and counselling, and visa application assistance.  

For analysis of some of these measures see the Parliamentary Library’s Budget Review. See also the Refugee Council of Australia’s 2008—09 budget brief ‘What it means for refugees and those requiring humanitarian protection’.  

2009—10 financial year

On 12 May 2009, the Rudd Government handed down its second federal budget. In relation to measures specifically affecting asylum seekers and refugees, the Government committed (amongst other things):

• $4.8 million (including capital of $0.2 million for information technology changes) over four years to implement a system of complementary protection for people to whom Australia has non-refoulement (non-return) obligations under international human rights treaties, other than the 1951 Convention Relating to the Status of Refugees

• $77.4 million over four years from 2009—10 for ongoing implementation of the new immigration detention values. This measure will include a national Assisted Voluntary Return Service and a Community Status Resolution Service, to actively manage clients to resolve their immigration status

• $5.4 million over four years to abolish the 45 Day Rule which denies work rights and Medicare access to Protection Visa applicants who do not lodge an application for a protection visa within 45 days of arrival in Australia

• $186.7 million over five years to redevelop the Villawood Immigration Detention Centre

• $24.4 million over four years to establish a new body to regulate migration agents. From 1 July 2009, the Migration Agents Registration Authority (MARA) function will be moved from the Migration Institute of Australia to the new Office of the MARA in the Department of Immigration and Citizenship, and

• $654 million whole-of-government strategy to combat people smuggling and address the problem of unauthorised boat arrivals.109

For analysis of some of these measures see the Parliamentary Library’s Budget Review.110 See also the Refugee Council of Australia’s 2009–10 budget brief ‘What it means for refugees and those requiring humanitarian protection’.111

2010—11 financial year

On 11 May 2010, the Rudd Government handed down its third federal budget. In relation to measures specifically affecting asylum seekers and refugees, the Government committed (amongst other things):

• $32.9 million over four years to enhance Indonesia’s capacity to manage irregular migration flows in the region. The measure includes additional funding to the International Organisation for Migration to support the Indonesian Government in upgrading a number of immigration detention facilities and extra funding to the United Nations High Commissioner for Refugees for the processing of refugee status determinations.


• $202.0 million over five years (including $183.3 million in capital funding, and $18.7 million in related expenses) to ensure appropriate accommodation for asylum seekers. The measure provides for funding of $143.8 million for increased capacity at immigration detention facilities. The measure also provides capital funding for a number of upgrades and enhancements to essential amenities and security at existing facilities, consisting of $22.0 million for Christmas Island, $15.0 million for the Northern Immigration Detention Centre in Darwin, $1.5 million for Villawood in Sydney and $1.0 million to upgrade existing residential facilities at Port Augusta (South Australia) for unaccompanied minors.

• $5.8 million over two years to deploy two officers from the Department of Immigration and Citizenship to Kabul, Afghanistan. The officers will liaise with the Afghan Government and relevant international organisations to assist with the appropriate settlement and re-integration of returned Afghan nationals.\textsuperscript{112}

For analysis of some of these measures see the Parliamentary Library’s \textit{Budget Review}.\textsuperscript{113} See also the Refugee Council of Australia’s \textit{2010—11 budget brief} ‘What it means for refugees and those requiring humanitarian protection’\textsuperscript{114}

\textbf{PART III—CASE LAW}

The High Court of Australia delivered numerous judgments relating to applications for protection visas during Labor’s first term in office. These are chronologically listed below. Some of these cases (either prior to being heard by the High Court or thereafter) influenced legislative reform.\textsuperscript{115}

\textit{MZXOT v Minister for Immigration and Citizenship} (2008) 233 CLR 601

In this case, the High Court considered whether it could remit a matter for constitutional relief to the Federal Magistrates Court. In summary the High Court found that:

Rermitting MZXOT’s application for constitutional relief to the FMC was not possible under the legislation. ... section 476B of the \textit{Migration Act} states that the Court must not remit migration matters unless the FMC had jurisdiction under section 476. Section 476 provides that the FMC has the same original jurisdiction under section 75(v) as the High Court, but it has no jurisdiction in relation to “primary decisions” about protection visas that had been reviewed by the RRT if applications were not made within the specified time. ... The FMC lacked authority to deal with

\begin{itemize}
\item[$\textsuperscript{115}$] For example, \textit{SZKTI v Minister for Immigration and Citizenship} (2008) FCAFC 83 in which the Full Federal Court held that the RRT was not able to obtain information orally from the applicant under section 424 of the Migration Act. This outcome was subsequently addressed by amendments contained in \textit{Migration Legislation Amendment Act (No.1) 2009}.  
\end{itemize}
the subject matter and accordingly the High Court lacked the authority to remit the matter to the FMC.\textsuperscript{116}

\textit{Minister for Immigration and Citizenship v SZKTI (2009) 238 CLR 489; Minister for Immigration and Citizenship v SZLFX (2009) 238 CLR 507}

In these cases (heard together) the High Court considered whether the RRT may, under subsection 424(1) of the Migration Act get information it considers relevant to a review, by telephone without first sending a written invitation to provide the information. In summary the majority found in both cases that the RRT had not breached its obligations in relation to the way it obtains information because:

\begin{itemize}
  \item ... section 424(1) of the Act empowered the RRT to “get any information” that it considered relevant without limiting the ways in which the RRT might get the information. Section 424(2) was concerned with how information should be obtained in the specific circumstance when a person was “invited ... to give additional information”.\textsuperscript{117}
\end{itemize}

\textit{Minister for Immigration and Citizenship v SZIZO (2009) 238 CLR 627}

In this case, the High Court considered whether the RRT’s failure to comply with the notification requirements under section 441G of the Migration Act meant the decision was invalid. In summary the majority found that:

In the circumstances of this case, where SZIZO and his family were aware of the hearing date, were able to present witnesses in support of their case and were able to provide written submissions after the oral hearing had concluded, the RRT’s failure to notify SZIZO’s authorised recipient of the hearing date did not result in a denial of natural justice to SZIZO or an unfair hearing, a fact acknowledged by SZIZO’s legal representative. In other circumstances the RRT’s failure to give a hearing notice to an authorised recipient may result in an applicant not receiving a fair hearing but this was not such a case.\textsuperscript{118}

\textit{Minister for Immigration and Citizenship v SZIAI (2009) 259 ALR 429}

In this case, the High Court considered whether the RRT had committed jurisdictional error by not making its own inquiries into the authenticity of certificates relied on by the applicant and whether he should have been invited to attend a further hearing to respond to claims that the documents were forgeries. In summary the majority found that:

\begin{itemize}
  \item \textsuperscript{116} High Court of Australia, \textit{MZXOT v Minister for Immigration and Citizenship}, 18 June 2008, viewed 18 March 2010, \url{http://www.hcourt.gov.au/media/MZXOT_v_Minister_for_Immigration.pdf}
  \item \textsuperscript{117} High Court of Australia, Minister for Immigration and Citizenship v SZKTI & Anor [2009] HCA 30; Minister for Immigration and Citizenship v SZLFX & Anor [2009] HCA 31, media release, 26 August 2009, viewed 18 March 2010, \url{http://www.hcourt.gov.au/media/MIAC_v_SZKTI_and_SZLFX.pdf}
  \item \textsuperscript{118} High Court of Australia, \textit{Minister For Immigration And Citizenship v SZIZO & Ors [2009] HCA 37}, media release, 23 September 2009, viewed 18 March 2010, \url{http://www.hcourt.gov.au/media/MIAC_v_SZIZO.pdf}
\end{itemize}
... a failure on the part of the RRT to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could in some circumstances be sufficient to constitute a failure by the RRT to undertake its core function, which is to review decisions. However, the High Court found that it was not necessary to explore that principle in this case, for two reasons. First, none of the information available to the RRT indicated that any further inquiry into the authenticity of the certificates would yield a useful result. Secondly, the response from SZAIs’s solicitors indicated that SZAIs could add nothing beyond a bare denial of the assertions in the National Ameer’s letter. There was no factual basis to conclude that the RRT’s failure to inquire meant it had failed to exercise its jurisdiction or committed jurisdictional error.119

**Minister for Immigration and Citizenship v SZIGV; Minister for Immigration and Citizenship v SZIXO (2009) 238 CLR 642**

In these cases (heard together) the High Court considered the operation of subsection 91R(3) of the Migration Act which requires decision-makers to disregard conduct in Australia by an applicant for a protection visa if the conduct is engaged in for the purpose of strengthening their claim to be a refugee. In summary, the majority found that:

...the Full Court of the Federal Court had misconstrued section 91R(3) of the Migration Act. The legislative purpose of section 91R(3) was to overcome the perceived anomaly that a refugee applicant could engage in conduct outside of his or her country of nationality for the sole purpose of creating or strengthening a claim to have a well-founded fear of persecution should that person be returned to his or her country of nationality. The majority concluded, on the basis of textual and contextual analyses of section 91R(3), that the only conduct which is to be disregarded in accordance with that section is conduct which would strengthen a person’s claim to be a refugee within the meaning of the Refugees Convention. If the conduct does not strengthen a person’s claim to be a refugee, then the conduct may be taken into account. The High Court determined by majority that the RRT had not erred in either matter.120

**Minister for Immigration and Citizenship v SZMDS (2010) 266 ALR 367**

In this case, the High Court considered whether the RRT had committed jurisdictional error when it found it was not satisfied that the applicant was a homosexual who feared persecution for two key reasons. The first was his return to Pakistan for three weeks in 2007 and the second was his failure to seek asylum when he briefly visited the United Kingdom in 2006. The Migration Act requires the Minister, their delegate, or the Tribunal upon review of a decision, to either refuse or to grant a visa depending on whether or not they are ‘satisfied’ that the conditions for that visa are met. On appeal, the Federal Court found that the Tribunal’s reasoning was illogical and irrational. However, the appeal by the Minister to the High Court was successful. In summary, the majority found that:

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...it was open to the Tribunal to reject the first respondent’s claimed fear of persecution on the grounds that it did. Even though reasonable minds may differ as to whether the first respondent’s conduct was such as to be inconsistent with his claimed fear, this alone was not enough to suggest that the reasoning of the Tribunal was so illogical or irrational as to amount to a jurisdictional error.121

Commentary

• M Pelly, High Court reveals power shift in way refugee claims handled, The Australian, 27 November 2009

• D Hume, Asylum and the High Court, Australian Policy Online, 30 July 2010

Appendix I—Federal Parliamentary Inquiries

A number of significant federal parliamentary inquiries were undertaken or completed during Labor’s first term in office:

Joint Standing Committee on Migration

Immigration detention in Australia

On 5 June 2008, the Joint Standing Committee on Migration (JSCM) commenced an inquiry into immigration detention in Australia. There were 461 people in immigration detention in Australia at this time.122 The Committee issued a media statement in which the Committee chairperson, Michael Danby MP stated:

A humanitarian approach that treats all people with dignity needs to be integrated into Australian policy on overseas arrivals...This inquiry is an important initiative in setting Australia’s immigration detention policies and exploring options for the future. I encourage all those who have had experience of immigration detention to contribute to this inquiry and help shape both a fairer and more efficient system.123

Significantly, the Minister’s ‘New directions in detention’ policy announcement was made part way through the Joint Standing Committee on Migration’s inquiry into immigration detention in Australia. The Committee chairperson noted that ‘Minister Evans’ announcements signalled a paradigm shift in Australian policy’ and the Committee welcomed the announcement of the

123. Ibid.
In light of the Government’s announcement, the Committee recognised its objective was to:

...set open and transparent guidelines that would enable the implementation of the new values of the Australian Government... The Committee has sought to identify what we believe to be the issues for implementation arising from the release criteria outlined in the Minister’s statement of values.  

First report: Criteria for release from detention

On 1 December 2008, the Committee tabled its first report entitled *Immigration detention in Australia: A new beginning - Criteria for release from detention.* This report addressed the Committee’s first two terms of reference:

- the criteria that should be applied in determining how long a person should be held in immigration detention
- the criteria that should be applied in determining when a person should be released from immigration detention following health and security checks

The Committee made 18 recommendations including:

- 5 day time frames for health checks
- up to 90 days for the completion of security and identity checks, after which consideration must be given to release onto a bridging visa
- a maximum time limit of 12 months’ detention for all except those who are demonstrated to be a significant and ongoing risk to the community, and
- amendment of the Migration Act to enshrine in legislation the reforms to immigration detention policy announced by the Minister for Immigration and Citizenship on 29 July 2008.

A joint dissenting report by former Liberal Party MP, Petro Georgiou, Liberal Party Senator Dr Alan Eggleston and Australian Greens Senator, Sarah Hanson-Young was also issued in which they expressed the view that public servants should not have the unfettered power to detain a person for 12 months without independent external scrutiny. In their opinion if the detention criteria are

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125. Ibid.
126. Ibid.
127. Ibid., p. ix.
enshrined in law as recommended, the proposed maximum 12 month time period is ‘grossly excessive’.  

Commentary

- S Smiles, ‘Call for end to billing of detainees’, The Age, 2 December 2008
- Australian Associated Press (AAP), ‘MPs want visas for detained arrivals’, The Australian, 2 December 2008

Second report: Community-based alternatives to detention

On 25 May 2009, the Committee tabled its second report entitled Immigration detention in Australia: Community-based alternatives to detention. This report addressed the Committee’s last term of reference:

- options for additional community-based alternatives to immigration detention by
  - inquiring into international experience;
  - considering the manner in which such alternatives may be utilised in Australia to broaden the options available within the current immigration detention framework;
  - comparing the cost effectiveness of these alternatives with current options

The Committee made 12 recommendations including:

- reform the bridging visa framework to comprehensively support those released into the community, with appropriate reporting or surety requirements, and

- utilise the reformed bridging visa framework in lieu of community detention until a person’s immigration status is resolved.

A dissenting report was issued by former Liberal Party MP, Petro Georgiou in which he expressed the view that:

130. Ibid., p. xi.
While the Committee’s recommendation to shift to a model of release by bridging visa is a move in the right direction, it fails the transparency test because the crucial decision of whether to grant a bridging visa is subject to no independent external judicial scrutiny.  

A minority report was also issued by then Shadow Minister for Immigration and Citizenship, the Hon. Dr Sharman Stone MP in which she expressed the view that she did not support the proposed new bridging visa framework:

In my considered opinion the proposed new bridging visa framework does not comprehensively meet the agreed considerations and criteria, nor does it help to deter people smugglers from targeting Australia as a preferred destination...A better alternative for those unlawful non-citizens currently in detention as they seek a resolution to their asylum seeker status is for DIAC to commit every possible resource to resolving the individual’s status, with additional resources committed to do this work if required. If their claim is rejected, the individual should continue to be detained in one of the excellent transit facilities until swiftly deported. If they choose to appeal, they should remain in detention until the appeal is resolved.

Commentary


Third report: Facilities, services and transparency

On 18 August 2009, the Committee tabled its third report entitled ‘Immigration detention in Australia: Facilities, services and transparency’. This report addressed the Committee’s remaining terms of reference:

- options to expand the transparency and visibility of immigration detention centres
- the preferred infrastructure options for contemporary immigration detention
- options for the provision of detention services and detention health services across the range of current detention facilities, including Immigration Detention Centres (IDCs), Immigration Residential Housing, Immigration Transit Accommodation (ITA) and community detention

The Committee made 11 recommendations including:

• reconstruction of Stage 1 at Villawood remains urgent and a priority of the Committee

• the upgrade of the Perth immigration detention centre proceed as proposed and the Australian Government examine long term options with the intent to establish a purpose built long-term facility

• all caged walkways, perspex barriers, and electrified fencing be removed from the North West Point immigration detention centre and replaced with more appropriate security infrastructure, and

• all razor/barbed wire fencing is removed from all immigration detention centres and replaced with more appropriate fencing.

A dissenting report was issued by former Liberal Party MP, Petro Georgiou in which he records a number of concerns regarding the Committee’s report:

The first is in relation to the detention of children at immigration detention facilities both on and offshore, and the Committee’s repeated failure to adequately address this issue in its reports. The second is the third report’s lack of recommendation regarding the establishment of an Immigration Detention Health Review Commission. The third is that the Committee’s recommendations on improving transparency in this and its other reports are inadequate in that the only reliable mechanism for ensuring independent oversight of detention decisions is through independent, judicial review.134

A dissenting report was also issued by Australian Greens’ Senator, Sarah Hanson-Young in which she noted concerns that the Committee’s report ‘fails to include appropriate and detailed recommendations regarding infrastructure; security features of Immigration Residential Housing (IRH) and Immigration Transit Accommodation (ITA); immigration detention contracts; health care services; and transparency’.135 To this end, the Australian Greens proposed 20 additional recommendations.

Then Shadow Minister for Immigration and Citizenship, the Hon. Dr Sharman Stone MP also issued a brief minority report in which she expressed the view that she was precluded from supporting the Committee’s recommendations on the basis that she had joined the Committee ‘after most of the evidence and inspections that form the basis of all three reports had been taken’.136

At time of writing, the Government had not yet issued a response to any of the Joint Standing Committee’s three reports.

134. P Georgiou, ‘Dissenting report by Mr Petro Georgiou MP’, Immigration detention in Australia—Facilities, services and transparency, the Senate, Canberra, August 2009.
135. S Hanson-Young, ‘Dissenting report by Senator Sarah Hanson-Young’, Immigration detention in Australia—Facilities, services and transparency, the Senate, Canberra, August 2009.
136. S Stone, ‘Minority report by the Hon. Dr Sharman Stone MP’, Immigration detention in Australia—Facilities, services and transparency, the Senate, Canberra, August 2009.
Inquiry into migration treatment of disability

On 26 November 2008, the Minister for Immigration and Citizenship and the Parliamentary Secretary for Disabilities and Children’s Services announced that the Joint Standing Committee on Migration would undertake an inquiry into the health requirement in the Migration Act and how it impacts on people with a disability. The Committee noted that the inquiry was set up ‘following several cases in recent years of individuals and families refused visas on the basis of their own or a family member’s disability’.

The Committee’s terms of reference were as follows:

- Report on the options to properly assess the economic and social contribution of people with a disability and their families seeking to migrate Australia
- Report on the impact on funding for, and availability of, community services for people with a disability moving to Australia either temporarily or permanently
- Report on whether the balance between the economic and social benefits of the entry and stay of an individual with a disability, and the costs and use of services by that individual, should be a factor in a visa decision
- Report on how the balance between costs and benefits might be determined and the appropriate criteria for making a decision based on that assessment, and
- Report on a comparative analysis of similar migrant receiving countries.

On 21 June 2010 the Committee tabled its report entitled *Enabling Australia: Inquiry into the Migration Treatment of Disability*. Chapter five evaluates amongst other things, the experience of refugee families that have been negatively affected by Australia’s migration health requirement. In recognising that refugee and humanitarian visa applicants with disabled relatives are one of a number of category of families affected by the operation of the Health Requirement, the Committee recommended that ‘the Australian Government review the operation of the ‘one fails, all fails’
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criterion under the Migration Regulations 1994 to remove prejudicial impacts on people with a disability’.141

The Committee also recommended that:

...the Australian Government amend the Migration Regulations 1994 to provide access to consideration of a waiver to offshore refugee visa applicants involving disability or health conditions on compelling and compassionate grounds. Consideration should also be given to extended family members for the same treatment in the same circumstances.142

The Committee was of the view that ‘special consideration was needed to assists a class of refugees and their families who have sustained extremes of violence resulting in a disability in their home countries’. Accordingly, it recommended that:

...the Australian Government amend the Migration Regulations 1994 to provide access to consideration of a waiver to offshore refugee visa applicants involving disability or health conditions on compelling and compassionate grounds. Consideration should also be given to extended family members for the same treatment in the same circumstances.143

Commentary


• C Johnson, ‘Policy on migrant disability ‘outmoded’’, Canberra Times, 22 June 2010

• Y Narushima, ‘Call to change disability bias of migration law’, Sydney Morning Herald, 24 June 2010

Joint Standing Committee on Public Works

The Christmas Island Immigration Detention Centre Project

On Monday 22 September 2008, the Joint Standing Committee on Public Works (PWC) tabled its report entitled Update Report: The Christmas Island Immigration Detention Centre Project.144

By way of background to the inquiry, acting Chairperson, Senator Troeth noted:

In December 2003 the Parliamentary Standing Committee on Public Works (PWC) of the 40th Parliament tabled its report into the proposed respecified Christmas Island Immigration Reception and Processing Centre. The total estimated cost of the proposal was $276.2 million,

141. Ibid., p. 125—129.
142. Ibid., p. 134.
143. Ibid.
including $197.7 million from the then Department of Finance and Administration (Finance) to bring the project to completion.

In January 2008 the Committee received a letter from Finance requesting its concurrence for a cost increase for the proposal, renamed the Christmas Island Immigration Detention Centre Project. The cost of the original proposal had grown to $396 million.  

In brief, the Committee concluded that it was not satisfied that the additional costs associated with the planning and construction of the Christmas Island Immigration Detention Centre was justified:

The key factors cited such as the isolation of the location, the high transport costs, competition with the booming mining sector and project design documentation expenses, should have been foreseen...The Committee has expressed its concerns about the project to the Auditor-General, whose agency, the Australian National Audit Office, is currently undertaking an audit of the project in terms of its compliance with the Public Works Committee Act 1969.

Redevelopment of the Villawood immigration detention facility

On 23 November 2009, the Public Works Committee tabled its report on the inquiry into the Villawood Immigration Detention Centre (VIDC) entitled Redevelopment of the Villawood Immigration Detention Facility.  

Section 17 of the Public Works Committee Act 1969 requires that the Committee consider and report on:

- the purpose of the work and its suitability for that purpose
- the need for, or the advisability of, carrying out the work
- whether the money to be expended on the work is being spent in the most cost effective manner
- the amount of revenue the work will generate for the Commonwealth, if that is its purpose, and
- the present and prospective public value of the work.

The Committee received 6 submissions, held public and in-camera hearings and inspected the redeveloped Maribyrnong Detention Facility in Melbourne. It also conducted an inspection of the VIDC and conducted private informal discussions with some detainees to gain insight as to their experiences and their views of the proposal.


The Committee observed that:

Overall, the VIDC looks and feels like an antiquated prison, with an oppressive use of high wire fences, little green space and sheltered outdoor areas, no freely accessible indoor areas (other than accommodation blocks), and an almost complete lack of personal privacy and imposing security features. In addition, conditions for staff are inadequate, posing a number of health and safety risks.148

The proposed redevelopment aims to provide new and refurbished facilities for people in detention and staff. The total estimated cost of the redevelopment is $186.7 million. Overall, the Committee was satisfied that the project had merit in terms of need, scope and cost.149

The Committee made 10 recommendations including:

• the facilities known as ‘Stage 1’ be demolished as part of the current program of works
• DIAC provide each person with access to an adequate lockable space in which to secure their personal belongings
• DIAC cease the use of the loudspeaker system to page detainees and implement a method of contacting detainees that respects their right to privacy
• the Department of Finance and Deregulation present the detailed design for the redevelopment of Stage 2 and Stage 3 of the Villawood Immigration Detention Facility to the Committee for examination prior to construction commencing
• the detailed design for the Villawood Immigration Detention Facility address the management plan for potential surge conditions, and
• the House of Representatives resolve that it is expedient to carry out the redevelopment of the Villawood Immigration Detention Facility.

Appendix II—Independent Reports

A number of significant reports by independent agencies were released during Labor’s first term in office:

Australian Human Rights Commission

2007 Immigration detention report

In December 2007, the Australian Human Rights Commission (AHRC) released its 2007 immigration detention report entitled Summary of observations following the inspection of mainland immigration

148. Ibid., p. 9.
149. Ibid., p. 28.
The report was released following visits to seven detention facilities and to people in community detention during the period August to November 2007. The purpose of the visits was to (amongst other things) monitor the conditions of detention for compliance with internationally recognised human rights obligations. In its report, the Commission noted continued improvements in the approach and attitude of detention centre staff, in the physical environment of the centres and the provision of internet facilities. However, it expressed disappointment that there had been no improvements to stage 1 of Villawood Immigration Detention Centre, the scaling back of the external excursions program, and that detainees continued to be held in detention for prolonged periods of time. It subsequently made 26 recommendations for improvement across a range of areas.

Some key recommendations included:

- Australia’s mandatory detention laws should be repealed; ‘while detention may be acceptable for a short period in order to conduct security, identity and health checks, currently mandatory detention laws require detention for more than these purposes, for unlimited periods of time and in the absence of independent review of the need to detain’. In the absence of repealing mandatory detention, there should be greater efforts to promptly (within three months) release or transfer people out of detention centres
- greater efforts should be made to arrange residence determinations for people who are detained in excess of three months, where there are no character concerns or there is no risk of the person absconding
- children and their families should only be detained in Residential Housing for a maximum period of four weeks while unaccompanied children should only be detained for a maximum period of two weeks, and
- stage 1 of Villawood Immigration Detention Centre should be demolished and renovations at Perth Immigration Detention Centre should take place promptly.

DIAC and the private contractors involved in detention centre services issued separate responses to the report—available on the Commission’s website. In addition, the Minister issued a media statement stating that he welcomed the Commission’s report but noted that:

There are a number of immigration and detention matters that need resolving as a consequence of the mishandling and political meddling by a succession of Howard Government ministers... We need to fix these problems.

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151. Ibid., p. 10.
152. Ibid.
2008 Immigration detention report

On 13 January 2009, the Commission released its 2008 immigration detention report entitled *2008 Immigration detention report: Summary of observations following visits to Australia’s immigration detention facilities*. The report was released following visits to detention facilities and to people in community detention, during the period June to September 2008 to monitor the conditions of detention for compliance with internationally recognised human rights obligations. In its report, the Commission expressed concern that:

- some people are still held in detention for prolonged and indefinite periods of time (some up to six years)
- off-shore processing continues on Christmas Island in what it describes as a ‘formidable and high-security facility that should not be used’
- children continue to be held in other closed immigration detention facilities, and
- stage 1 of Villawood Immigration Detention Centre continues to be used despite repeated recommendations that it should be abolished.

It subsequently made 62 recommendations. Some key recommendations included:

- the Migration Act should be amended so that immigration detention occurs only when necessary, the decision to detain is subject to prompt review by a court, and that periodic independent reviews of the ongoing need to detain and a maximum time limit for detention is included
- the minimum standards for conditions and treatment of persons in detention should be codified
- a comprehensive redevelopment of the Villawood and Perth Immigration Detention Centres should be undertaken as a matter of priority
- greater use should be made of the community detention arrangements, and
- a new client placement model should be implemented to reflect the Government’s ‘new directions’ in immigration detention.

DIAC and Australian Fisheries Management Authority (AFMA) issued separate responses to the report, available on the Commission’s website.

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155. Ibid., p. 4.
156. Ibid., pp. 5–13.
157. Ibid.
2009 Immigration detention and offshore processing on Christmas Island

In October 2009, the Commission released a report entitled *2009 Immigration detention and offshore processing on Christmas Island*.\(^{158}\) The report was released following its visit to immigration detention facilities on Christmas Island during July 2009 to monitor the extent to which the detention operations comply with internationally recognised human rights standards.\(^{159}\) In its report, the Commission expressed concern about:

- the effect of excision and offshore processing on asylum seekers (that is, the use of a non-statutory process, no access to the Refugee Review Tribunal, very limited access to Australian courts and dependant upon exercise of a non-compellable and non-reviewable Ministerial discretion to be permitted to apply for a visa)

- the mandatory detention, without judicial oversight of asylum seekers (including children) when the Migration Act does not require it

- the detention of some children (including unaccompanied ones) in a closed immigration detention facility – the ‘construction camp’

- the inappropriateness of detention in a small and remote community which limits asylum seeker’s access to appropriate services, makes it difficult to ensure implementation of the Government’s ‘new directions in detention policy’ (especially with the shortage of community-based accommodation), and makes detention operations less visible and transparent to the Australian public and less accessible by external scrutiny bodies, and

- the inappropriateness of existing detention facilities for detaining asylum seekers, particularly those that have suffered torture or trauma.\(^{160}\)

It subsequently made 22 recommendations. Some key recommendations included:

- repeal provisions of the Migration Act relating to excised offshore places and section 494AA which bars certain legal proceedings from being commenced by ‘offshore entry persons’

- abolish the policies of processing asylum claims through a non-statutory refugee status assessment process and mandatorily detaining all unauthorised boat arrivals

- stop using Christmas Island as a place in which to hold people in immigration detention

- stop detaining children in the ‘construction camp’, the secure compound of the Phosphate Hill facility or the Christmas Island Immigration Detention Centre

- remove all caged walkways, perspex barriers and electrified fencing and replace them with more appropriate security infrastructure, and

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158. AHRC, *2009 Immigration detention and offshore processing on Christmas Island*, op. cit.
159. The Commission conducted a stand-alone visit to Christmas Island on the basis of the significant number of people being held there (733 at the time of the Commission’s visit), the limited access they have to the Australian legal system, and the lack of publicly available information about detention operations on the Island: Ibid., pp. 10–12.
160. Ibid., pp. 4–5.
• ensure that detainees are provided with access to appropriate health and mental health care services equivalent to that provided to detainees on the mainland.  

DIAC issued a response to the report which is available on the Commission’s website.  

Commonwealth Ombudsman  

Notification of decisions and review rights for unsuccessful visa applications  

In December 2007 the Commonwealth Ombudsman released its report entitled Notification of Decisions and Review Rights for Unsuccessful Visa Applications. The report followed an investigation which commenced on 30 June 2006 to assess whether the Department’s advice to applicants that their visa application had been refused complied with the notification requirements in the Migration Act, and demonstrated good practice on communicating with clients of the Australian Government.  

In summary, the Ombudsman found that:  

...DIAC’s overall management of notification of adverse decisions is not coordinated or consistent. There was significant variation in the quality of information presented in notification letters, many of which fell considerably short of best practice standards. In some instances, this limited a visa applicant’s ability to seek review or successfully reapply. In other instances, the information was overly complex, confusing and poorly presented.  

The Ombudsman subsequently made three recommendations, all of which were accepted by the Immigration Department. The Department’s response is set out at the end of the Ombudsman’s report.  

Reporting on people in long-term immigration detention  

Since 2005, the Immigration Department has been required to provide the Ombudsman with information relating to the circumstances of a person’s detention when they have been in detention for a period, or periods, totalling two years. The Ombudsman makes an assessment as to the appropriateness of the detention arrangements and the Minister tables an edited version of the

161. Ibid., pp. 6–9.  
162. Ibid.  
164. Ibid., p. 1.  
165. Ibid., p. 2.  
166. Ibid.  
Ombudsman’s report, along with a response to Parliament within 15 sitting days of receipt.\textsuperscript{168} The Ombudsman may make any recommendations but the Minister is not bound to adopt them.

In addition to the two-year statutory review, since August 2008 the Ombudsman has been reviewing the circumstances of a person’s detention where they have been in detention for longer than six months. These reviews are not tabled in Parliament, rather they are provided to the Immigration Department’s Secretary.

- When Labor won the 2007 federal election (November 2007), there were 487 people in immigration detention—including 85 asylum seekers. 74 people had been in detention for a period in excess of two years

- One year later (November 2008), the immigration detention population had declined to 334—including only 45 asylum seekers. 43 people had been held in detention for a period in excess of two years

- By 27 November 2009, the number of people in immigration detention had increased to 1581—including 937 asylum seekers. 20 people had been held in detention for a period in excess of two years

- By mid 2010, there were 4116 people in immigration detention—including 1606 asylum seekers. 22 people had been held in detention for a period in excess of two years.\textsuperscript{169}

The Ombudsman’s detention review reports on people in long-term immigration detention that have been tabled in Parliament, together with the Minister’s response to the reports, are available on the Ombudsman’s website.\textsuperscript{170}

**Australian National Audit Office**

**Settlement Grants Program**

On 21 May 2009, the Australian National Audit Office (ANAO) tabled its report entitled *Settlement Grants Program* in Parliament.\textsuperscript{171} The Settlement Grants Program (SGP) is a funding program administered by DIAC that assists eligible migrants including humanitarian entrants to become self-reliant and participate equitably in Australian society after arrival. According to the report ‘there have been three annual SGP funding rounds. Just over $30 million has been allocated to SGP projects in each round, amounting to a total of $95.5 million. This has funded 669 grants: 209 in the 2006–07 funding round; 231 in 2007–08; and 230 in 2008–09’.\textsuperscript{172}

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\textsuperscript{168} Section 486O of the *Migration Act 1958*.  
\textsuperscript{172} Ibid., p. 13.
The objective of the audit was to:

...assess the effectiveness of the Department of Immigration and Citizenship’s management of the Settlement Grants Program. The ANAO assessed DIAC’s performance in terms of how effectively it planned for funding rounds, assessed and allocated grants, monitored and evaluated the program, and managed relationships with its stakeholders. In doing so, the ANAO focused on SGP projects that received funding in the 2007–08.173

The audit concluded (amongst other things) that:

Overall, DIAC has developed an effective framework for managing SGP... However, DIAC has not developed or implemented effective performance indicators and a performance management framework that would assist it to measure, monitor and assess the performance of individual projects and the program as a whole... 174

The ANAO subsequently made six recommendations to improve DIAC’s management of the SGP ‘aimed at developing and implementing an effective performance management framework, improving settlement needs information, ensuring key decisions are adequately documented, and evaluating the program’.175

**Construction of the Christmas Island Immigration Detention Centre**

On 23 June 2009, the ANAO tabled its report entitled *Construction of the Christmas Island Immigration Detention Centre* in Parliament.176 The objective of the audit was to assess:

- the adequacy of the planning and delivery processes for the project
- the value-for-money achieved in the delivery of the project, including with regard to the suitability of the centre for its intended purpose, and
- the extent to which the *Public Works Committee Act 1969* (PWC Act) and approved procedures have been complied with.177

The audit concluded that:

The CIIDC [Christmas Island Immigration Detention Centre] was a more difficult construction project than many others undertaken by the Australian Government. It involved numerous challenges and risks including the isolation of Christmas Island, shipping being adversely affected by the swell season (which typically runs for five months from November to March), the absence of a wharf suitable for ships to berth alongside and the facility being constructed on reclaimed mining land that was surrounded by a National Park. In addition, the construction works were of

173. Ibid., p. 13.
175. Ibid., p. 14. For a full list of the recommendations and DIAC responses see: pp. 21—23.
177. Ibid., p. 48.
considerable scale (the CIIDC facility comprises more than 50 buildings and associated landscaping works) with an ambitious design and delivery timetable, and a tight budget.

The CIIDC facility has been completed, has been accepted by DIAC as fit for its purpose and is now operational. However, this result has come at a considerably greater cost than budgeted at the time the project was respecified and over a substantially longer timeframe than had been expected. In this context, the audit has underlined several important messages for agencies to bear in mind when managing future construction projects.  

The ANAO subsequently made six recommendations relating to such things as the advice that needs to be given to the PWC relating to the extent and nature of project uncertainties, and the importance effectively integrating facility construction work with infrastructure works and so forth.  

Commentary


United Nations Human Rights Treaty Bodies

Committee against Torture

The Committee against Torture issued its Concluding Observations on Australia on 15 May 2008. With regard to the present context, the Committee expressed concern ‘at the mandatory detention policy for those persons who enter irregularly the State party’s territory. In this respect, the Committee was especially concerned at the situation of stateless people in immigration detention who cannot be removed to any country and risk to be potentially detained ‘ad infinitum’’. The Committee recommended that Australia:

Consider abolishing its policy of mandatory immigration detention for those entering irregularly the State party’s territory. Detention should be used as a measure of last resort only and a reasonable time limit for detention should be set; furthermore, non-custodial measures and alternatives to detention should be made available to persons in immigration detention, and

Take urgent measures to avoid the indefinite character of detention of stateless persons.  

The Committee also recommended that Australia ‘should end the use of ‘excised’ offshore locations for visa processing purposes in order to allow all asylum-seekers an equal opportunity to apply for a visa...and explicitly incorporate into domestic legislation...the prohibition whereby no State party shall expel, return or extradite a person to another State where there are substantial grounds for

178. Ibid., p. 13.
179. For a full list of recommendations see pp. 34–36.
believing that he/she would be in danger of being subjected to torture (non-refoulement), and implement it in practice.\textsuperscript{181}

**Human Rights Committee**

The Human Rights Committee issued its Concluding Observations on Australia on 7 May 2009. With regard to the present context, the Committee noted Australia’s commitment to use detention in immigration detention centres only in limited circumstances and for the shortest practicable period. However, it remained ‘concerned at its mandatory use in all cases of illegal entry, the retention of the excise zone, as well as at the non-statutory decision-making process for people who arrive by boat to the Australian territory and are taken to Christmas Island’.\textsuperscript{182} It also expressed concern regarding the absence of effective review processes available with respect to detention decisions. It subsequently recommended that Australia should:

- (a) consider abolishing the remaining elements of its mandatory immigration detention policy
- (b) implement the recommendations of the Human Rights and Equality Commission made in its Immigration Detention Report of 2008
- (c) consider closing down the Christmas Island detention centre, and
- (d) enact in legislation a comprehensive immigration framework in compliance with the Covenant.\textsuperscript{183}

The Committee also expressed concern regarding reports of cases in which Australia has not fully ensured respect for the principle of non-refoulement. It subsequently recommended:

> The State party should take urgent and adequate measures, including legislative measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment.\textsuperscript{184}

The Committee also expressed concern regarding the protection of children especially those that can be held in immigration detention facilities, where they are sometimes subject to abuse. Relevantly, it recommended:


\textsuperscript{181} Ibid.

\textsuperscript{182} Human Rights Committee, ‘Concluding observations of the Human Rights Committee: Australia’, 7 May 2009, viewed 12 February 2010, \url{http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm}

\textsuperscript{183} Ibid.

\textsuperscript{184} Ibid.
The State party should implement the recommendations of the Human Rights and Equal Opportunity Commission in this regard. The situation of children in detention should be addressed within the State party’s proposed new child protection framework.\footnote{185} See also Australia’s fourth report under the Convention on the Rights of the Child and initial reports under that Convention’s two Optional Protocols which were tabled in Parliament in June 2009.\footnote{186}

Appendix III—Key Research and Publications

The following list is arranged in chronological order:


Developments in Australian refugee law and policy 2007–2010
