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## Developments in Australian refugee law and policy (2012 to August 2013)

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## Introduction

This Research paper provides a snap-shot of significant developments in refugee law and policy during the period 2012 to August 2013 when the 43rd Parliament was prorogued and the House of Representatives dissolved for a general election.

The commencement of 2012 saw the Government and Coalition remain at an impasse on offshore processing following the successful 2011 High Court challenge to the Government's proposed Malaysia Arrangement. In the absence of bi-partisan support to implement statutory amendments to facilitate offshore processing, the Government began implementing a single visa processing framework for all asylum seekers which saw irregular maritime arrivals being processed in the same way as onshore protection visa applicants. That is, both began to be assessed under a statutory process with independent merits review by the Refugee Review Tribunal (RRT) and have equal access to judicial review of negative decisions.

However, by mid-2012, the report of the Expert Panel on Asylum Seekers had been released and without delay, the Government begun implementing key recommendations, including the introduction of legislation to support the transfer of asylum seekers to regional processing countries, and creating capacity in Nauru and Papua New Guinea (PNG) to process asylum claims. The Government had also increased its Humanitarian Program to 20,000 places per year (with a minimum of 12,000 places being allocated for refugees), and it had removed family reunion concessions for proposers who had arrived through irregular maritime voyages.

By the end of 2012, the Government had also begun implementing the Expert Panel's ill-defined 'no advantage' principle to prevent boat arrivals benefitting from circumventing regular migration arrangements. It implemented this principle by selecting and transferring some boat arrivals to the regional processing centres in PNG and Nauru. The principle was also applied to an increasing number of asylum seekers released into the community on the mainland on bridging visas by denying them the opportunity to work and offering them only limited financial support. Significantly, these boat arrivals also remained ineligible for the grant of protection visas 'until such time that they would have been resettled in Australia after being processed in our region'.<sup>1</sup> However, the Government never clarified the number of years it envisaged these asylum seekers would wait for final resolution of their status, nor did it rule out the possibility of sending them offshore at a later date. The Government subsequently estimated that some 19,000 asylum seekers living in the community were subject to the 'no advantage' principle.<sup>2</sup>

Two months before the 2013 federal election and in the wake of growing support for the Opposition's tougher border protection policies, newly appointed Prime Minister, Kevin Rudd made a surprise announcement on 19 July 2013 that Australia had entered into a Regional Resettlement Arrangement with PNG. Under the Arrangement, all asylum seekers that henceforth arrive by boat would be liable for transfer to PNG for processing and resettlement in PNG and in any other participating regional State.<sup>3</sup> He subsequently makes a similar Memorandum of Understanding (MOU) with Nauru.<sup>4</sup> Notwithstanding the Government's policy shift, the Australian Labor Party was unable to secure another term in office and on 7 September 2013, the Liberal and National parties were voted in to form a Coalition Government, led by Tony Abbott. This paper provides a brief chronology of these and other significant events during the reporting period.<sup>5</sup> It also outlines key legal developments by examining significant Federal and High Court judgments and provides a brief overview of the Bills that were introduced. The paper also briefly examines key policy developments and provides an overview of significant reports and parliamentary inquiries finalised during the reporting period. In doing so, this paper builds upon previous Parliamentary Library publications, [Developments in Australian refugee law and policy 2010–2011](#) and [Developments in Australian refugee law and policy 2007–10: Labor's first term in office](#).<sup>6</sup>

1. C Bowen (Minister for Immigration and Citizenship), [No advantage test for boat arrivals](#), media release, 21 November 2012, accessed 4 August 2014.
2. Senate Legal and Constitutional Affairs Legislation Committee, [Official committee Hansard](#), 27 May 2014, p. 52., accessed 31 July 2014.
3. K Rudd (Prime Minister) and P O'Neill (Prime Minister of Papua New Guinea), [Regional Settlement Arrangement](#), transcript, 19 July 2013, accessed 29 July 2014.
4. T Burke (Minister for Immigration and Citizenship), [New arrangement with Nauru Government](#), media release, 3 August 2013, accessed 30 July 2014.
5. The authors acknowledge the kind assistance of Tyler Fox in referencing this chronology.
6. E Karlsen, [Developments in Australian refugee law and policy 2010–2011](#), Background note, Parliamentary Library, Canberra, 12 April 2012, accessed 30 July 2014; E Karlsen, [Developments in Australian refugee law and policy 2007–10: Labor's first term in office](#), Background note, Parliamentary Library, Canberra, 18 October 2010, accessed 30 July 2014.

## Chronology of significant events

### 2012

- 27 January 2012—The Immigration Department’s submission to the Minister on the infrastructure report on Nauru is released. It details the measures that would be required to make the old sites operational again and the expected timeframe in which this could occur.<sup>7</sup>
- 13 February 2012—Independent MP, Rob Oakeshott introduces his Migration Legislation Amendment (The Bali Process) Bill 2012 into the House of Representatives.<sup>8</sup>
- 14 February 2012—António Guterres (United Nations High Commissioner for Refugees) delivers an address entitled ‘the changing face of global displacement: responses and responsibilities’ to the Lowy Institute for International Policy in Sydney. He expresses appreciation for the role that Australia plays in supporting development and humanitarian efforts in the Asia Pacific region and worldwide, and to the crucial contribution to burden-sharing Australia makes by resettling large numbers of refugees from across the world, noting that on a per-capita basis, Australia is the biggest resettlement country for the UN High Commissioner for Refugees (UNHCR). However, he also notes that the debate about boat arrivals and the possibility of ‘off-shore processing’ and the proposed transfer arrangement with Malaysia has been very politicized out of proportion in relation to the real dimension of the issue, as the numbers of people coming to Australia are small by global standards.<sup>9</sup>
- 23 February 2012—The West Australian Coroner delivers his report into the deaths of fifty people (mostly from Iran and Iraq) who were on board SIEV 221 which sank off Christmas Island on 15 December 2010. The coroner noted that this was the largest loss of life in a maritime incident in Australian territorial waters during peace time in 115 years. The Coroner made a number of recommendations to enhance surveillance to the north of Christmas Island, improve the capability for an emergency at sea response from Christmas Island and reduce the risk for naval personnel involved in rescue operations.<sup>10</sup>
- 24 March 2012—The Department implements a single visa processing framework for all asylum seekers, as previously announced by Minister Bowen on 25 November 2011. This means that irregular maritime arrivals will be processed in the same way as onshore protection visa applicants. That is, both will be assessed under a statutory process with independent merits review by the Refugee Review Tribunal (RRT) and access to judicial review.<sup>11</sup>
- 12 April 2012—Joint Select Committee on Australia’s Immigration Detention Network report released.<sup>12</sup>
- 27 April 2012—Leader of the Opposition, Tony Abbott delivers an address entitled ‘The Coalition’s plan for more secure borders’ to the Institute of Public Affairs in Melbourne. He states that if elected Prime Minister, he will: firstly reopen the Nauru detention centre; secondly, travel to Indonesia to renew cooperation against people smuggling; and thirdly ‘give new orders to the navy that, where it is safe to do so, under the usual chain-of-command procedures, based on the advice of commanders-on-the spot, Indonesian flagged, Indonesian crewed and Indonesian home-ported vessels without lawful reason to be headed to Australia would be turned around and escorted back to Indonesian waters’.<sup>13</sup> In addition, temporary visas for boat arrivals will be re-introduced, by legislation if necessary.

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7. Department of Immigration and Citizenship (DIAC), Infrastructure report on Nauru, 25 January 2012 ([Submission to the Minister](#)), tabled in the Senate Legal and Constitutional Affairs Committee Additional Estimates 2011–12, 13 February 2012, accessed 30 July 2014. See also C Bowen, [Department of Immigration and Citizenship to the Minister on the infrastructure report on Nauru](#), media release, 27 January 2012, accessed 30 July 2014.

8. Parliament of Australia, [‘Migration Legislation Amendment \(The Bali Process\) Bill 2012 homepage’](#), Australian Parliament website, accessed 29 July 2014.

9. A Guterres, [The changing face of global displacement: responses and responsibilities](#), address to the Lowy Institute, Sydney, 14 February 2012, accessed 29 July 2014.

10. A Hope, State Coroner of Western Australia, [Inquest into the deaths of SIEV 221 Christmas Island](#), Coroners Court of Western Australia, 23 February 2012, accessed 30 July 2014.

11. C Bowen (Minister for Immigration and Citizenship), [New single protection visa process set to commence](#), media release, 19 March 2012, accessed 30 July 2014.

12. Joint Select Committee on Australia’s Immigration Detention Network, [Final report](#), Canberra, 12 April 2012; and [Government response to recommendations by the Joint Select Committee on Australia’s Immigration Detention Network](#), November 2012, accessed 31 July 2014.

13. T Abbott (Leader of the Opposition), [Landmark speech, The Coalition’s plan for more secure borders](#), speech, 27 April 2012, accessed 29 July 2014.

- 29 April 2012—the Gillard Government announces the creation of a National Children’s Commissioner within the Australian Human Rights Commission. The Commissioner will focus on promoting the rights, wellbeing and development of children and young people in Australia at the national level.<sup>14</sup> Currently, legal guardianship of unaccompanied minors seeking asylum is vested in the Immigration Minister.
- 2 May 2012—Attorney-General Nicola Roxon announces that the Attorney-General’s Department will conduct a review of 24 cases of Indonesian nationals convicted of people smuggling, following concerns raised by the Australian Human Rights Commission that some individuals sentenced to Australian gaols may be minors.<sup>15</sup>
- 10 May 2012—the Senate refers the detention of Indonesian minors in Australia to the Legal and Constitutional Affairs Committees for inquiry and report.<sup>16</sup> The Committee subsequently delivers its report on 4 October 2012. Further information on this inquiry is available below.
- 28 June 2012—Migration Legislation Amendment (The Bali Process) Bill 2012 introduced into the House of Representatives by Independent MP, Rob Oakeshott on 13 February 2012 passes through the House on 27 June 2012 but is subsequently negated in the Senate.
- 28 June 2012—Prime Minister Gillard announces that the Government has invited the former chief of Australia’s defence force, Air Chief Marshal Angus Houston, to lead an Expert panel to provide a report on the best way forward to prevent asylum seekers risking their lives on dangerous boat journeys to Australia. The Panel also comprises Professor Michael L’Estrange and Paris Aristotle.<sup>17</sup>
- 29 June 2012—Report by Professor Michael Lavarch on the Increased Workload of the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) is released. Lavarch notes that the demand for the Tribunal’s services has increased significantly since the implementation of single protection visa processing for all asylum seekers and that the Tribunal’s resources primarily and, to a lesser extent, its practices, have not matched the increased demand. He notes significant increases in case lodgements had led to a large backlog of cases, particularly in matters before the MRT. Amongst the recommendations by Lavarch are ways by which the backlog of Tribunal cases could be reduced including ‘one off’ measures to get the numbers down and systemic changes in resources, practices, and structures, to produce a higher rate of decision making capable of matching demand over time.<sup>18</sup>
- 13 August 2012—The Report of the Expert Panel on Asylum Seekers is released containing 22 recommendations to Government. The recommendations constitute an integrated set of proposals which include: that legislation to support the transfer of people to regional processing arrangements be introduced into Parliament; capacity be established in Nauru and PNG to process the claims of boat arrivals; the Humanitarian Program be increased to 20,000 places per annum with a minimum of 12,000 places being allocated for refugees; family reunion concessions in the Special Humanitarian Program (SHP) be removed for proposers who arrive through irregular maritime voyages; that the 2011 Arrangement with Malaysia be built on further rather than being discarded; and that the ‘no advantage’ principle be applied so that boat arrivals do not benefit by circumventing regular migration arrangements.<sup>19</sup>
- 18 August 2012—The *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* comes into operation.<sup>20</sup> In response to the High Court’s decision on 31 August 2011 in the Malaysian

14. N Roxon (Attorney-General), J Macklin (Minister for Families, Community Services and Indigenous Affairs) and J Collins (Minister for Community Services), [Gillard Government to establish National Children’s Commissioner](#), media release, 29 April 2012, accessed 29 July 2014.

15. N Roxon (Attorney-General), [Review of convicted people smuggling crew queried to be minors](#), media release, 2 May 2012, accessed 29 July 2014.

16. Senate Standing Committee on Legal and Constitutional Affairs, [Detention of Indonesian minors in Australia](#), Canberra, October 2012, accessed 29 July 2014.

17. J Gillard (Prime Minister) and C Bowen (Minister for Immigration and Citizenship), *Asylum seeker legislation, Expert advisory panel: Transcript of joint press conference*, 28 June 2012, accessed 29 July 2014.

18. M Lavarch, [Report on the increased workload of the Migration Review Tribunal \(MRT\) and the Refugee Review Tribunal \(RRT\)](#), Department of Immigration, June 2012, accessed 8 July 2014.

19. Expert Panel on Asylum Seekers, [Report of the Expert Panel on Asylum Seekers](#), Canberra, August 2012, accessed 29 July 2014. See also I McCluskey, [‘Report of the Expert Panel on Asylum Seekers and regional processing: legislation before the Senate’](#), FlagPost weblog, August 16 2012, accessed 29 July 2014.

20. [Migration Legislation Amendment \(Regional Processing and Other Measures\) Act 2012](#) (Cth), accessed 29 July 2014.

Declaration case,<sup>21</sup> this Act replaces the existing statutory framework for taking boat people to another country for assessment of their refugee claims.

- 23 August 2012—Prime Minister Gillard and Minister Bowen announce that the Government will increase Australia’s refugee and humanitarian program from 13,750 to 20,000 places in the 2012–13 financial year, in line with the recommendation of the Expert Panel on Asylum Seekers. They also announce that the Government will allocate \$10 million for regional capacity building projects with a special emphasis on UNHCR and that as an immediate measure, an additional 400 refugees will be resettled from Indonesia.<sup>22</sup>
- 29 August 2012—Prime Minister Gillard and Minister Bowen announce that Australia and Nauru have signed an MOU for the establishment of a regional processing centre in Nauru, in line with the recommendation of the Expert Panel on Asylum Seekers.<sup>23</sup> Nauru is subsequently designated as a regional processing country under the Migration Act on 10 September 2012.
- 8 September 2012—Prime Minister Gillard and Minister Bowen announce that Australia and PNG have entered into a new MOU in relation to regional processing arrangements on Manus Island. The MOU builds upon the previous agreement of 19 August 2011.<sup>24</sup> PNG is subsequently designated as a regional processing country under the Migration Act on 9 October 2012.
- 10 September 2012—Official launch of the Regional Support Office (RSO) in Bangkok, Thailand which arose out of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process). The purpose of the RSO is to facilitate the operationalisation of the Regional Cooperation Framework (RCF) to reduce irregular migration in the Asia and Pacific region. The RSO aims to support and strengthen practical cooperation on refugee protection and international migration, including human trafficking and smuggling, and other components of migration management in the region.<sup>25</sup> The Australian Government committed \$5.2 million over four years to fund the set-up and ongoing operation of the RSO, as well as \$2.7 million in funding for projects to be run through the office.<sup>26</sup> The RSO will operate under the oversight and direction of the Co-Chairs of the Bali Process (Australia and Indonesia) and in consultation with UNHCR and the International Organization for Migration (IOM).
- 14 September 2012—The first plane load of asylum seekers (30 single adult males of Sri Lankan origin) are transferred to Nauru.<sup>27</sup>
- 22 September 2012—Minister Bowen announces changes to the SHP in line with the recommendations of the Expert Panel on Asylum Seekers. From 28 September 2012, people who arrived by boat on or after 13 August 2012, would not be eligible to propose their family under the Humanitarian Program. Permanent Protection visa holders (including those who arrived before 13 August 2012) will remain eligible to propose family members under the SHP, however decision-makers must take into consideration whether there are compelling reasons (such as the degree of persecution or discrimination to which the applicant is subject in their home country) for giving special consideration to the grant of a visa. Applicants proposed by unaccompanied minor refugees who arrived before 13 August 2012 will still be eligible for SHP visas on the strength of their family relationship alone. Immediate family members of humanitarian visa holders may also

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21. Plaintiff M70 / 2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship (2011) 244 CLR 144, [\[2011\] HCA 32](#), accessed 29 July 2014.

22. J Gillard (Prime Minister) and C Bowen (Minister for Immigration and Citizenship), [Refugee Program increased to 20 000 places](#), media release, 23 August 2012, accessed 30 July 2014.

23. J Gillard (Prime Minister) and C Bowen (Minister for Immigration and Citizenship), [Australia signs Memorandum of Understanding with Nauru](#), media release, 29 August 2012, accessed 30 July 2014. The MOU is available at Department of Immigration and Citizenship (DIAC), [Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessments of persons in Nauru, and related issues](#), 2012, accessed 30 July 2014.

24. J Gillard (Prime Minister) and C Bowen (Minister for Immigration and Citizenship), [Australia and Papua New Guinea sign updated memorandum of understanding](#), media release, 8 September 2012, accessed 30 July 2014. The MOU is available at Department of Immigration and Citizenship (DIAC), [Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to and assessment of persons in Papua New Guinea, and related issues](#), 2012, accessed 30 July 2014.

25. For further information see Regional Support Office, [The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime](#), accessed 29 July 2014.

26. C Bowen (Minister for Immigration and Citizenship), [Australia welcomes establishment of regional support office](#), media release, 10 September 2012, accessed 30 July 2014.

27. C Bowen (Minister for Immigration and Citizenship), [Asylum seeker transfer to Nauru, Expert Panel recommendations, ‘no advantage’ principle, Tony Abbott](#), transcript, 14 September 2012, accessed 30 July 2014.

apply for a visa in the Family stream of the Migration Program which will be allocated an additional 4000 places a year to accommodate the resulting increase in demand.<sup>28</sup>

- 16 October 2012—Attorney-General Nicola Roxon announces that the Gillard Government will provide an independent review process for those assessed to be a refugee but not granted a permanent visa as a result of an adverse ASIO security assessment. Under the terms of reference, the reviewer will examine the materials used by ASIO, provide a recommendation to the Director-General of Security and report these findings to the Attorney-General, the Minister for Immigration and Citizenship and the Inspector-General of Intelligence and Security. There will also be a regular 12 month periodic review of adverse security assessments for refugees in immigration detention.<sup>29</sup> On 3 December, former Federal Court Judge, Margaret Stone is appointed as the inaugural Independent Reviewer of Adverse Security Assessments.<sup>30</sup>
- 21 November 2012—The first plane load of asylum seekers (a group of seven families, including 15 adults and four children of Sri Lankan and Iranian nationalities) are transferred to Manus Island in Papua New Guinea.<sup>31</sup>
- 21 November 2012—Minister Bowen announces that onshore boat arrivals who arrive at an excised place such as Christmas Island on or after 13 August will be subject to the ‘no advantage’ principle recommended by the Expert Panel on Asylum Seekers, and remain liable to be transferred offshore for regional processing. Some boat arrivals from this group will be released into the Australian community on bridging visas but they will not be granted a permanent protection visa if found to be a refugee, until such time as they would have been resettled in Australia after being processed in our region. Their bridging visa conditions will not permit them to work.<sup>32</sup>
- 14 December 2012—*UNHCR Mission to the Republic of Nauru: 3 to 5 December 2012* report released.<sup>33</sup> This report is discussed in further detail under the heading ‘Key reports and inquiries’.

## 2013

- 4 February 2013—Brendan O'Connor is sworn in as the Minister for Immigration and Citizenship. He retains this Ministerial appointment until 1 July 2013.
- 4 February 2013—*UNHCR Monitoring Visit to Manus Island, Papua New Guinea: 15–17 January 2013* report released.<sup>34</sup> This report is discussed in further detail under the heading ‘Key reports and inquiries’.
- 9 February 2013—Prime Minister Gillard announces that New Zealand has agreed to resettle 150 refugees who had been subject to Australia’s offshore processing legislation.<sup>35</sup>
- 7 May 2013—Minister O'Connor announces that boat people who are released into the community on bridging visas will receive adequate support, but it will not be so generous that it encourages people to come to Australia by boat. Families on bridging visas will not have access to Centrelink support but may be eligible to receive an appropriate allowance.<sup>36</sup>
- 14 May 2013—Budget 2013—14 commitments in the refugee and asylum policy area include: 20,000 Humanitarian Program places to continue in 2013–14 after the Government agreed to the Expert Panel recommendation to expand the program in August 2012–13; Community Partnership Settlement Pilot to

28. C Bowen (Minister for Immigration and Citizenship), [Government implements Expert Panel’s family reunion recommendation](#), 22 September 2012, accessed 30 July 2014. See also Department of Immigration and Citizenship, [The Special Humanitarian Program](#), accessed 29 July 2014.

29. N Roxon (Attorney-General), [Independent Reviewer for Adverse Security Assessments](#), media release, 16 October 2012, accessed 29 July 2014.

30. N Roxon (Attorney-General), [Commencement of Independent Reviewer of Adverse Security Assessments](#), media release, 3 December 2012, accessed 29 July 2014.

31. C Bowen (Minister for Immigration and Citizenship), [First transfer to Papua New Guinea](#), media release, 21 November 2012, accessed 30 July 2014.

32. C Bowen (Minister for Immigration and Citizenship), [No advantage onshore for boat arrivals](#), media release, 21 November 2012, accessed 30 July 2014.

33. UN High Commissioner for Refugees (UNHCR), [UNHCR Mission to the Republic of Nauru](#), 14 December 2012, accessed 30 July 2014.

34. UN High Commissioner for Refugees (UNHCR), [UNHCR Mission to Manus Island, Papua New Guinea 15–17 January 2013](#), 4 February 2013, accessed 30 July 2014.

35. J Gillard (Prime Minister), [Ties between Australia and New Zealand strengthened at annual leaders talks](#), media release, 9 February 2013, accessed 30 July 2014.

36. B O'Connor (Minister for Immigration and Citizenship), [Families to be considered for bridging visas but ‘no advantage’ principle applies](#), media release, 7 May 2013, accessed 30 July 2014.

commence with 500 entrants; and Program 4.3 *Offshore Asylum Seeker Management* funding of \$2.9 billion for 2013–14.<sup>37</sup>

- 14 May 2013–The Gillard Government announces as part of the 2013–14 Commonwealth Budget that the Government will commission a comprehensive review into Australia’s refugee status determination (RSD) system. This will look to identify changes to improve the efficacy of the system and to ensure that acceptance outcomes for asylum seeker claims are consistent with Australia’s international obligations and with final acceptance rates for comparable cohorts in other countries. In Australia, a significant number of negative decisions on asylum claims at primary assessment are often overturned on review.<sup>38</sup>
- 27 June 2013–Kevin Rudd is re-appointed as Prime Minister. He retains this Ministerial appointment until 18 September 2013.
- 1 July 2013–Tony Burke is sworn in as Minister for Immigration, Multicultural Affairs and Citizenship. He retains this Ministerial appointment until 18 September 2013.
- 12 July 2013–*UNHCR Monitoring Visit to Manus Island, Papua New Guinea: 11–13 June 2013* report released.<sup>39</sup> This report is discussed in further detail under the heading ‘Key reports and inquiries’.
- 19 July 2013–Prime Minister Rudd announces a Regional Resettlement Arrangement between Australia and PNG which will see asylum seekers who arrive in Australia by boat being sent to PNG for assessment of their refugee status. If found to be refugees they will be settled in PNG, and not Australia.<sup>40</sup> On 6 August 2013, an MOU relating to the transfer, assessment and settlement in PNG of asylum seekers is subsequently concluded.<sup>41</sup>
- 3 August 2013–Prime Minister Rudd announces that he has signed an MOU with the President of the Republic of Nauru which is in broadly similar terms to the arrangements made with PNG. Under the MOU, asylum seekers may be processed and settled in Nauru, but not Australia. In the first instance, the Government will focus on family groups and unaccompanied minors for settlement.<sup>42</sup>
- 5 August 2013–The 43rd Parliament is prorogued and the House of Representatives dissolved for a general election to be held on Saturday 7 September 2013. On 19 September 2013, Tony Abbott is subsequently sworn in as Australia’s 28th Prime Minister. Key Coalition policy documents affecting refugees and asylum seekers released in the lead up to the election include:

[Our plan: real solutions for all Australians](#) (January 2013)

[The Coalition's Operation Sovereign Borders policy](#) (25 July 2013)

[The Coalition's policy to clear Labor's 30,000 border failure backlog](#) (August 2013)

[The Coalition's policy for a regional deterrence framework to combat people smuggling](#) (August 2013),  
and

[The Coalition's policy to withdraw taxpayer funded assistance to illegal boat arrivals](#) (August 2013).<sup>43</sup>

37. For more detail see J Phillips, ‘[Migration and humanitarian programs](#)’; and C Barker and H Spinks, ‘[Responding to unauthorised arrivals](#)’, *Budget review 2013–14*, Parliamentary Library, Canberra, 2013.

38. Australian Government, [Budget measures: budget paper no. 2: 2013–14](#), Canberra, 2013, p. 200, accessed 30 July 2014.

39. UN High Commissioner for Refugees (UNHCR), [UNHCR Monitoring Visit to Manus Island, Papua New Guinea 11–13 June 2013](#), 12 July 2013, accessed 30 July 2014.

40. K Rudd (Prime Minister) and P O’Neill (Prime Minister of Papua New Guinea), [Regional Settlement Arrangement](#), transcript, 19 July 2013, accessed 29 July 2014. The Regional Resettlement Arrangement is available at Department of Foreign Affairs and Trade (DFAT), [Regional Resettlement Arrangement between Australia and Papua New Guinea](#), accessed 29 July 2014.

41. Department of Foreign Affairs and Trade (DFAT), [Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues](#), 6 August 2013, accessed 30 July 2014.

42. T Burke (Minister for Immigration and Citizenship), [New arrangement with Nauru Government](#), media release, 3 August 2013, accessed 30 July 2014. The MOU is available at Department of Foreign Affairs and Trade (DFAT), [Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues](#), accessed 29 July 2014.

43. Liberal Party of Australia and the Nationals, [Our plan: real solutions for all Australians; The Coalition's Operation Sovereign Borders policy; The Coalition's policy to clear Labor's 30,000 border failure backlog; The Coalition's policy for a regional deterrence framework to combat people smuggling; The Coalition's policy to withdraw taxpayer funded assistance to illegal boat arrivals](#), Election 2013, accessed 31 July 2014.

## Key legal developments

### Legislation

#### Government initiated legislation

##### ***Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012***

On 21 September 2011, the Government introduced the [Migration Legislation Amendment \(Offshore Processing and Other Measures\) Bill 2011](#) into Parliament.<sup>44</sup> This Bill was subsequently amended by the Government and re-named the Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012. The purpose of the Bill was to address the issues arising from the High Court's decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship* (Malaysian Declaration case) delivered on 31 August 2011 in order to allow for offshore processing of asylum seekers.<sup>45</sup> The Bill sought to amend the Migration Act and the *Immigration (Guardianship of Children Act) 1946* (IGOC Act) to:

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

The [Bills Digest](#) examines the Bill (as introduced) in further detail.<sup>46</sup> This Bill was not referred to a Senate Committee for inquiry. However, the [Parliamentary Joint Committee on Human Rights](#) (the Human Rights Committee) conducted an inquiry into the human rights implications of the Migration Regional Processing package of legislation, which included the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (the Regional Processing Act).<sup>47</sup> Though the Regional Processing Act did not have a statement of compatibility with human rights,<sup>48</sup> the Immigration Minister subsequently provided an assessment following a request from the Human Rights Committee. The Minister stated that the legislation raised a number of human rights considerations, including in relation to detention, *non-refoulement*, family and children but confirmed the Government's clear view that the Act complied with Australia's human rights obligations. The Government considered it was complying with its human rights obligations in practice as well.<sup>49</sup>

In contrast, the Human Rights Committee expressed concern about the absence of any human rights criteria in the process for designating regional processing countries and shared the concerns raised by numerous stakeholders that the regional processing arrangements did not ensure that Australia's *non-refoulement* obligations would be respected. The Committee also did not consider that the Government had demonstrated that the conditions in the regional processing facilities were consistent with the provisions of the International Covenant on Civil and Political Rights (ICCPR),<sup>50</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>51</sup> the Convention on the Rights of the Child (CRC),<sup>52</sup> and the Convention Against Torture and

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44. Parliament of Australia, '[Migration Legislation Amendment \(Offshore Processing and Other Measures\) Bill 2011 homepage](#)', Australian Parliament website, accessed 15 July 2014.

45. *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, [\[2011\] HCA 32](#), accessed 15 July 2014.

46. E Karlsen, [Migration Legislation Amendment \(Offshore Processing and Other Measures\) Bill 2011](#), Bills digest, 53, 2011–12, Parliamentary Library, Canberra, 2011, accessed 15 July 2014.

47. Joint Committee on Human Rights, [Examination of legislation in accordance with the Human Rights \(Parliamentary Scrutiny\) Act 2011: Migration Legislation Amendment \(Regional Processing and Other Measures\) Act 2012 and related legislation](#), Canberra, June 2013, accessed 25 July 2014.

48. The original Bill was introduced before the *Human Rights (Parliamentary Scrutiny) Act 2011* came into force.

49. Joint Committee on Human Rights, [Examination of legislation in accordance with the Human Rights \(Parliamentary Scrutiny\) Act 2011: Migration Legislation Amendment \(Regional Processing and Other Measures\) Act 2012 and related legislation](#), Canberra, paragraph 2.83, June 2013, accessed 25 July 2014.

50. [International Covenant on Civil and Political Rights](#), opened for signature 16 December 1966, [1980] ATS 23 (entered into force for Australia 13 November 1980), accessed 18 July 2014.

51. [International Covenant on Economic, Social and Cultural Rights](#), opened for signature 16 December 1966, ATS [1976] 5 (entered into force for Australia 10 March 1976), accessed 18 July 2014.

52. [Convention on the Rights of the Child](#), opened for signature 20 November 1989, ATS [1991] 4 (entered into force for Australia 16 January 1991), accessed 18 July 2014

Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>53</sup> In addition, the Committee expressed concern about the cumulative effect of the arrangements, which it considered was likely to have a significant impact on the physical and mental health of asylum seekers, contrary to the right to health in Article 12 of the ICESCR and the prohibition against degrading treatment in Article 7 of the ICCPR.<sup>54</sup> The Committee report is discussed in further detail under the heading ‘Key reports and inquiries’.

The Bill was passed on 16 August 2012 and became [Act no. 113 of 2012](#).<sup>55</sup>

### **Maritime Powers Act 2013**

On 30 May 2012, the Government introduced the [Maritime Powers Bill 2012](#) into Parliament.<sup>56</sup> The purpose of the Bill was to establish a framework for the exercise of maritime enforcement powers in Australian territories. The Bill sought to consolidate and harmonise the Commonwealth’s existing maritime enforcement regime, as well as to provide a single framework for use by Australia’s on-water enforcement agencies.

Most relevantly to the current context, the Bill established a system of authorisations under which a maritime officer could exercise enforcement powers in relation to vessels. It also provided for the enforcement powers available to maritime officers including boarding, obtaining information, searching, detaining, seizing and retaining things, and moving and detaining persons. In addition, it provided for processes for dealing with things seized, retained or detained and persons held and created offences for failure to comply. According to the Attorney-General’s Department, in doing so, the Bill did no more than harmonise and simplify what already existed in legislation.<sup>57</sup> The [Bills Digest](#) examines the Bill in further detail.<sup>58</sup>

The Maritime Powers (Consequential Amendments) Bill 2012 was introduced at the same time. Most relevantly, it repealed from the Migration Act sections 245B (request to board a ship), 245C (power to chase foreign ships for boarding), 245D (power to chase Australian ships for boarding), and subsection 245F(1) which related to the power to board and search ships. It also repealed section 245FB which related to returning persons to ships, section 245G which concerned the power to board ships on the high seas and section 245H which related to moving or destroying hazardous ships. The [Bills Digest](#) examines the Bill in further detail.<sup>59</sup>

These Bills were referred to the [Senate Legal and Constitutional Affairs Legislation Committee](#) for inquiry and report by 20 August 2012. The committee recommended that the Senate pass the Bills. Coalition Senators made a dissenting report on the basis that the Government had been unable to categorically say whether the power to turn back unauthorised boats would be preserved in the Maritime Powers Bill 2012.<sup>60</sup>

Both Bills were passed on 13 March 2013 and became [Acts no. 15](#) and [16 of 2013](#) respectively.<sup>61</sup>

### **Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013**

On 31 October 2012, the Government introduced the [Migration Amendment \(Unauthorised Maritime Arrivals and Other Measures\) Bill 2012](#) into Parliament.<sup>62</sup> The purpose of the Bill was to implement a recommendation by the [Expert Panel on Asylum Seekers](#) that the Migration Act be amended to ensure that arrival anywhere in Australia by irregular maritime means would not provide individuals with a different lawful status to those who

53. [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), opened for signature 10 December 1984, ATS [1989] 21 (entered into force for Australia 7 September 1989), accessed 18 July 2014.

54. *Ibid.*, paragraph 2.195.

55. [Migration Legislation Amendment \(Regional Processing and Other Measures\) Act 2012](#), Comlaw website, accessed 15 July 2014.

56. Parliament of Australia, [Maritime Powers Bill 2012](#), Australian Parliament website, accessed 15 July 2014.

57. J Reid (Assistant Secretary, International Law and Trade and Security Branch of the Attorney-General’s Department), Evidence to Senate Legal and Constitutional Affairs Legislation Committee, [Inquiry into Maritime Powers Bill 2012 and the Maritime Powers \(Consequential Amendments\) Bill 2012](#), 10 September 2012, accessed 15 July 2014.

58. C Barker, [Maritime Powers Bill](#), Bills digest, 170, 2011–12, Parliamentary Library, Canberra, 2012, accessed 15 July 2014.

59. M Coombs, [Maritime Powers \(Consequential Amendments\) Bill 2012](#), Bills digest, 6, 2012–13, Parliamentary Library, Canberra, 2012, accessed 15 July 2014.

60. Coalition Senators, ‘[Coalition Senators’ Dissenting Report](#)’, Senate Legal and Constitutional Affairs Legislation Committee, [Inquiry into Maritime Powers Bill 2012 and the Maritime Powers \(Consequential Amendments\) Bill 2012](#), The Senate, Canberra, 2012, accessed 15 July 2014.

61. [Maritime Powers Act 2013](#), [Maritime Powers \(Consequential Amendments\) Act 2013](#), Comlaw website, accessed 15 July 2014.

62. Parliament of Australia, ‘[Migration Amendment \(Unauthorised Maritime Arrivals and Other Measures\) Bill 2012 homepage](#)’, Australian Parliament website, accessed 15 July 2014.

arrived at 'excised offshore places', chiefly Christmas Island, Cocos (Keeling) Islands and Ashmore and Cartier Islands.<sup>63</sup>

The Bill thus extended the excision regime introduced in 2001. That regime provided that asylum seekers entering Australia at excised offshore places were 'offshore entry persons', and as such were unable to apply for protection visas unless the Immigration Minister considered it to be in the public interest that they be permitted to do so. The effect of the Bill was to extend the excision provisions to the whole country.

The Bill inserted a new term, 'unauthorised maritime arrival' (UMA) to cover any asylum seeker entering Australia by sea who became an unlawful non-citizen upon entry. Such persons would be unable to apply for a protection visa unless the Minister considered it to be in the public interest that they do so. Unauthorised maritime arrivals would be liable to be sent to 'regional processing countries' (currently PNG and Nauru) for the processing of their refugee claims. The [Bills Digest](#) examines the Bill in further detail.<sup>64</sup>

This Bill was referred to the [Senate Legal and Constitutional Affairs Legislation Committee](#) for inquiry and report by 25 February 2013. The committee recommended that the Senate pass the Bill. However it also recommended that the Bill be amended to require the Immigration Minister to report annually to Parliament on the number of asylum claims by UMAs and determinations made during the 12 month period as well as the arrangements made for assessing claims, the accommodation, health care and education of UMAs. This recommendation was subsequently adopted and thus section 198AJ was inserted into the Migration Act (reports about unauthorised maritime arrivals). Only the Australian Greens made a dissenting report. They strongly objected to the Bill on the basis that it would result in more people being sent to offshore processing centres and because no evidence had been put forward to justify the Bill.<sup>65</sup>

The Bill was passed on 16 May 2013 (with amendments) and became [Act no. 35 of 2013](#).<sup>66</sup>

### Privately sponsored legislation

#### Migration Amendment (Health Care for Asylum Seekers) Bill 2012

On 11 September 2012, Senators Sarah Hanson-Young and Richard Di Natale of the Australian Greens introduced the [Migration Amendment \(Health Care for Asylum Seekers\) Bill 2012](#) into Parliament.<sup>67</sup> The purpose of the Bill was to amend the Migration Act to create a health advisory panel to monitor, assess and report to Parliament on the health of asylum seekers who have their asylum claims processed outside Australia (offshore). The work of the Panel would be determined by the Panel itself, independent of the Immigration Minister and it would report to the Parliament on the health of people being processed offshore once every six months. The Bill was referred to the [Senate Legal and Constitutional Affairs Legislation Committee](#) for inquiry and report by 7 December 2012. The committee recommended that the Senate not pass the Bill. However, it also recommended (amongst other things) that the terms of reference for the existing Immigration Health Advisory Group (IHAG) should explicitly state that IHAG's role includes the oversight and monitoring of health services to offshore entry persons in regional processing countries.<sup>68</sup> The Australian Greens made a dissenting report.

The [Bills Digest](#) examines the Bill in further detail.<sup>69</sup> This Bill lapsed on commencement of the 44th Parliament on 12 November 2013.

#### Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012

On 10 October 2012, Senator Hanson-Young of the Australian Greens introduced the [Migration and Security Legislation Amendment \(Review of Security Assessments\) Bill 2012](#) into Parliament.<sup>70</sup>

63. Australian Government, [Report of the Expert Panel on Asylum Seekers](#), August 2012, accessed 15 July 2014.

64. I McCluskey, [Migration Amendment \(Unauthorised Maritime Arrivals and Other Measures\) Bill](#), Bills digest, 84, 2012–13, Parliamentary Library, Canberra, 2013, accessed 15 July 2014.

65. Australian Greens Senators, ['Dissenting report by the Australian Greens'](#), Dissenting report, Senate Legal and Constitutional Affairs Legislation Committee: *Inquiry into the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012*, accessed 15 July 2014.

66. [Migration Amendment \(Unauthorised Maritime Arrivals and Other Measures\) Act 2013](#), Comlaw website, accessed 15 July 2014.

67. Parliament of Australia, ['Migration Amendment \(Health Care for Asylum Seekers\) Bill 2012 homepage'](#), Australian Parliament website, accessed 15 July 2014.

68. *Senate Legal and Constitutional Affairs Legislation Committee*, [Migration Amendment \(Health Care for Asylum Seekers\) Bill 2012](#), The Senate, Canberra, 7 December 2012, accessed 15 July 2014.

69. R de Boer, [Migration Amendment \(Health Care for Asylum Seekers\) Bill 2012](#), Bills digest, 25, 2012–13, Parliamentary Library, Canberra, 2013, accessed 15 July 2014.

The purpose of the Bill was to amend: the *Administrative Appeals Tribunal Act 1975* to enable non-citizens to be eligible for a protection visa, to seek a merits review of their security assessment in the Administrative Appeals Tribunal (AAT); and to create the position of Special Advocate to provide support for these reviews; to amend the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to require the Director-General of the Australian Security Intelligence Organisation (ASIO) to review adverse or qualified security assessments of protection visa persons every six months or on referral from the Immigration Department; and to amend the Migration Act to require the Minister to review a decision to refuse or cancel a protection visa when an adverse security assessment is revoked by an ASIO review or an AAT merits review.

The Bill was referred to the [Senate Legal and Constitutional Affairs Legislation Committee](#) for inquiry and report by 30 April 2013.<sup>71</sup> The Committee recommended that the Senate not pass the Bill but also recommended that the Government:

- enshrine in stand-alone legislation the role, responsibilities and functions of the Independent Reviewer of Adverse Security Assessments which should specifically acknowledge and maintain the independence of that position, and
- amend the ASIO Act to provide refugees who have received an adverse security assessment from ASIO with a right to merits review of that assessment in the AAT.<sup>72</sup>

The Australian Greens and Coalition senators both made dissenting reports. This Bill lapsed on commencement of the 44th Parliament on 12 November 2013.

#### **Migration Amendment (Special Protection Scheme for Afghan Coalition Employees) Bill 2012**

On 20 November 2012, Senator Hanson-Young of the Australian Greens introduced the [Migration Amendment \(Special Protection Scheme for Afghan Coalition Employees\) Bill 2012](#) into Parliament.<sup>73</sup>

The purpose of the Bill was to create a class of special protection visas for non-citizens (and their families) who were refugees under the 1951 Refugees Convention and who are subject to persecution in their home country because they worked to assist either the International Security Assistance Force (ISAF), the Australian Embassy or a subcontractor for a Commonwealth defence agency in Afghanistan for at least 12 months. The Bill provided for the same administrative processes, requirements and appeal rights as existed for Protection visas.

The Senate Selection of Bills Committee resolved to not refer the Bill to a Committee for inquiry.<sup>74</sup> This Bill lapsed on commencement of the 44th Parliament on 12 November 2013.

#### **Migration Amendment (Reinstatement of Temporary Protection Visas) Bill 2013 [No. 2]**

On 28 February 2013, Senator Cash of the Liberal Party introduced the [Migration Amendment \(Reinstatement of Temporary Protection Visas\) Bill 2013 \[No. 2\]](#) into Parliament.<sup>75</sup> On 11 February 2013, the then Shadow Immigration Minister, Scott Morrison had introduced an earlier version of this Bill into Parliament.<sup>76</sup>

The purpose of the Bill was to insert two new temporary protection visas into the Migration Act. Namely, the temporary protection (offshore entry) visa, and the temporary protection (secondary movement offshore entry) visa. Both visas would be temporary for a term of up to three years, to be set by the Minister or his/her delegate. Both visas permitted holders to apply for successive temporary visas upon conclusion of the term of the visa unless the Minister allowed an application for a permanent protection visa to be made. However, the holder of a temporary protection (secondary movement offshore entry) visa could not be granted a permanent protection

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70. Parliament of Australia, '[Migration and Security Legislation Amendment \(Review of Security Assessments\) Bill 2012 homepage](#)', Australian Parliament website, accessed 15 July 2014.

71. *Senate Legal and Constitutional Affairs Legislation Committee*, [Migration and Security Legislation Amendment \(Review of Security Assessments\) Bill 2012](#), The Senate, Canberra, 30 April 2013, accessed 15 July 2014.

72. *Senate Legal and Constitutional Affairs Legislation Committee*, [Migration and Security Legislation Amendment \(Review of Security Assessments\) Bill 2012](#), The Senate, Canberra, 30 April 2013, accessed 15 July 2014.

73. Parliament of Australia, '[Migration Amendment \(Special Protection Scheme for Afghan Coalition Employees\) Bill 2012 homepage](#)', Australian Parliament website, accessed 15 July 2014.

74. Senate Selection of Bills Committee, [Report No. 16 of 2012](#), The Senate, Canberra, 29 November 2012, accessed 15 July 2014.

75. Parliament of Australia, '[Migration Amendment \(Reinstatement of Temporary Protection Visas\) Bill 2013 \[No. 2\] homepage](#)', Australian Parliament website, accessed 15 July 2014.

76. Parliament of Australia, '[Migration Amendment \(Reinstatement of Temporary Protection Visas\) Bill 2013 homepage](#)', Australian Parliament website, accessed 15 July 2014.

visa. Such a person could only apply for a further TPV, or if eligible, one of the mainstream visas for which TPV holders were eligible.<sup>77</sup>

The Senate Selection of Bills Committee resolved to not refer the Bill to a Committee for inquiry.<sup>78</sup> This Bill was negated at 2nd reading on 27 June 2013.

### **Guardian for Unaccompanied Children Bill 2013**

On 27 June 2013, Senator Hanson-Young of the Australian Greens introduced the [Guardian for Unaccompanied Children Bill 2013](#) into Parliament.<sup>79</sup>

The purpose of the Bill was to establish an independent statutory office of Guardian for Unaccompanied Children to advocate for the best interests of non-citizen children who arrived to seek humanitarian protection. The Bill sought to provide for the appointment, functions and powers of the guardian, as well as provide for staff and consultants. It also set out reporting requirements. The Bill was not referred to a Committee for inquiry and lapsed on commencement of the 44th Parliament on 12 November 2013.

### **Case law**

The High Court and the Federal Court delivered some significant judgments relating to asylum seekers and refugees during the period January 2012 to August 2013. These cases influenced or have the potential to influence legislative or policy reform. Following is a brief outline of some of the most significant judgments made during the period (listed chronologically).

#### ***Plaintiff S10/2011 v Minister for Immigration and Citizenship***

The High Court held that the distinct nature of the powers conferred on the Minister by sections 48B, 195A, 351 and 417 of the Migration Act meant that the exercise of the powers is not conditioned on the observance of the principles of procedural fairness. Sections 48B, 195A, 351 and 417 of the Migration Act confer powers on the Minister to intervene with respect to the granting of visas under the Act. The powers may only be exercised by the Minister personally and the Minister cannot be compelled to exercise them.<sup>80</sup>

#### ***Plaintiff M47/2012 v Director General of Security***

The High Court held that the Migration Regulations could not validly prescribe public interest criterion (PIC) 4002 as a condition for the grant of a protection visa because doing so was inconsistent with the Migration Act. PIC 4002 required the applicant to be assessed as not a risk to security under the *Australian Security Intelligence Organisation Act 1979* (Cth). Because the prescription of PIC 4002 as a criterion for the grant of a protection visa was invalid, the Court held that the decision to refuse the plaintiff a protection visa on the basis of this criterion had not been made according to law.<sup>81</sup>

#### ***Minister for Immigration and Citizenship v MZYYL***

The Full Federal Court found that the Refugee Review Tribunal had not misconstrued the Migration Act when it found that paragraph 36(2B)(b) relating to complementary protection, required a standard of protection different from the concept of state protection under the 1951 Refugees Convention. Their Honours held that paragraph 36(2B)(b) poses the question whether, in obtaining protection from the receiving country, the protection is such that there would not be a real risk that the non-citizen would suffer significant harm if returned. That requires an assessment of whether the level of protection offered by the receiving country reduces the risk of significant harm to the non-citizen to something less than a real one.<sup>82</sup>

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77. Explanatory Memorandum, [Migration Amendment \(Reinstatement of Temporary Protection Visas\) Bill 2013 \[No. 2\]](#), accessed 15 July 2014.

78. Senate Selection of Bills Committee, [Report No. 3 of 2013](#), The Senate, Canberra, 14 March 2013, accessed 15 July 2014.

79. Parliament of Australia, [Guardian for Unaccompanied Children Bill 2013](#), Australian Parliament website, accessed 15 July 2014.

80. *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [\[2012\] HCA 31](#), accessed 15 July 2014; High Court of Australia, *Plaintiff S10/2011 v Minister for Immigration and Citizenship & Anor; Kaur v Minister for Immigration and Citizenship & Anor; Plaintiff S49/2011 v Minister for Immigration and Citizenship & Anor; Plaintiff S51/2011 v Minister for Immigration and Citizenship & Anor* [2012] HCA 31, media release, 7 September 2012, Accessed 15 July 2014.

81. *Plaintiff M47-2012 v Director General of Security* (2012) 292 ALR 243, [\[2012\] HCA 46](#), accessed 15 July 2014; High Court of Australia, *Plaintiff M47/2012 v Director General of Security & Ors* [\[2012\] HCA 46](#), media release, 5 October 2012, accessed 15 July 2014. See also: I McCluskey, 'High Court holds security risk provision invalid', FlagPost weblog, 9 October 2012, accessed 15 July 2014.

82. *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211, [\[2012\] FCAFC 147](#), accessed 15 July 2014.

### ***Tahiri v Minister for Immigration and Citizenship***

The High Court held the delegate did not err in refusing a combined application for a Subclass 202 Refugee and Humanitarian visa. The plaintiff arrived unaccompanied in Australia as a 17-year-old and was granted a protection visa. The plaintiff proposed his mother's application for a visa with four of her children as additional applicants. The mother and the four children were citizens of Afghanistan living in Pakistan and the children's father had been missing since 2003. The criteria for granting the visa application included satisfaction of PIC 4015 which relevantly required the delegate to be satisfied either that the law of the children's home country (Afghanistan) permitted their removal, or that each person who could lawfully determine where the children were to live consented to the grant of the visa. The delegate was not satisfied that the law of Afghanistan permitted their removal nor that any of the father's relatives consented to the grant of visa. The High Court held that the delegate's factual conclusions were reasonably open and that the plaintiff failed to establish that the delegate proceeded on an incorrect legal understanding of PIC 4015.<sup>83</sup>

### ***Minister for Immigration and Citizenship v SZQRB***

The Full Federal Court found the Immigration Department's 'International Treaty Obligations Assessment' (ITOA), which concluded that the applicant's removal to Afghanistan would not breach Australia's *non-refoulement* obligations, was not carried out according to law. The test in considering whether a non-citizen is entitled to Australia's protection obligations identified in paragraph 36(2)(aa) is as for paragraph 36(2)(a) – whether there is a *real chance* that the applicant will suffer significant harm were he to be returned to Afghanistan. That being the case, the ITOA applied the wrong test in considering his entitlement for Australia's protection obligations. The ITOA assessed his claims as against whether it was 'more likely than not' that he would suffer significant harm, which was not the appropriate standard. In addition, the ITOA assessor failed to accord the applicant procedural fairness by bringing to his attention information that the assessor might rely upon for concluding that returning the applicant to Afghanistan would not breach Australia's *non-refoulement* obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) or the International Covenant on Civil and Political Rights (ICCPR).<sup>84</sup>

### ***SZOQQ v Minister for Immigration and Citizenship***

The High Court ordered the Administrative Appeals Tribunal (AAT) to review, according to law, the original decision of the Minister's delegate to refuse the applicant a protection visa. A delegate of the Minister had determined that, although the applicant had a well-founded fear of persecution, Australia owed him no 'protection obligations' under paragraph 36(2)(a) the Migration Act because he constituted a danger to the community, having been convicted of a 'particularly serious crime' within the meaning of Article 33(2) of the 1951 Refugees Convention and section 91U of the Act.<sup>85</sup> The High Court found that the proceedings below (including the AAT) had miscarried. Their Honours held that section 91U is not apt to confine the scope of persons to whom Australia has protection obligations. It is not expressed in terms which are apt to translate into the terms of subsection 36(2) the operation of Article 33(2) of the Convention to provide for the extinguishment of the *non-refoulement* obligation in Article 33(1) much less all of Australia's other extant protection obligations. The text of section 91U gives content to the expression 'particularly serious crime' in Article 33(2) but it does not purport to affect the operation of paragraph 36(2)(a).<sup>86</sup>

### ***Plaintiff M79/2012 v Minister for Immigration and Citizenship***

The High Court held that the plaintiff (an 'offshore entry person') was validly granted a temporary safe haven visa under section 195A of the Act and that the plaintiff's application for a protection visa was not valid. Section 195A of the Act gives the Minister the power to grant a visa of a particular class to a person in detention if the Minister thinks that it is in the public interest to do so. In the exercise of that power, the Minister granted the plaintiff a temporary safe haven visa, permitting a stay of seven days, and a bridging visa, permitting a stay of six months. When the plaintiff was released from detention, subsection 46A(1) of the Act no longer applied to prevent the making of a valid protection visa application. However, the grant of a temporary safe haven visa

83. *Tahiri v Minister for Immigration and Citizenship* (2012) 293 ALR 526, [2012] HCA 61; High Court of Australia, [Tahiri v Minister for Immigration and Citizenship \[2012\] HCA 61](#), media release, 13 December 2012, accessed 15 July 2014.

84. *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505, [2013] FCAFC 33, accessed 15 July 2014.

85. [Section 91U](#) of the Migration Act defines the term 'particularly serious crime': AustLII website, accessed 15 July 2014.

86. *SZOQQ v Minister for Immigration and Citizenship* (2013) 296 ALR 409, [2013] HCA 12; High Court of Australia, [SZOQQ v Minister for Immigration and Citizenship & Anor \[2013\] HCA 12](#), media release, 10 April 2013, accessed 15 July 2014.

engaged a similar statutory bar, imposed by section 91K of the Act. The plaintiff argued that section 195A did not allow the Minister to grant a temporary safe haven visa to a person who would not have qualified for such a visa under the Act and the decision to do so was made for an improper purpose (to prevent him making a valid protection visa application). The Court held that the key condition for the grant of a visa of a particular class under section 195A is that the Minister thinks that it is in the public interest to do so and that involves a discretionary value judgement. In the exercise of his power the Minister could decide to grant a particular class of visa because its legal characteristics and consequences served a purpose which he adjudged to be in the public interest. The Minister's purposes were not beyond the scope and purpose of the Act, nor the power conferred by section 195A.<sup>87</sup>

## Key policy developments

### *Offshore processing*

Offshore processing in Nauru and Papua New Guinea was reintroduced by the Gillard Government in August 2012.<sup>88</sup> Under this regime asylum seekers were to be selected and processed under a 'no advantage' principle. Although this principle was to be applied to all unauthorised arrivals, what this meant in practice was only ever explained in very general terms—a 'no advantage principle' would apply whereby 'irregular migrants gain no benefit by choosing to circumvent regular migration mechanisms'.<sup>89</sup>

On 29 August 2012 the Australian Government signed an MOU with the Government of Nauru and on 8 September 2012 the Government signed an updated MOU with the PNG Government.<sup>90</sup> The first transfer of asylum seekers to Nauru occurred on 14 September 2012 and to PNG on 21 November 2012.<sup>91</sup>

The Gillard Government also implemented recommendation 14 from the report by the Expert Panel on Asylum Seekers 2012 that all unauthorised maritime arrivals should have the same lawful status as those who arrive at 'excised offshore places', chiefly Christmas Island, Cocos (Keeling) Islands and Ashmore and Cartier Islands. Accordingly, the Government extended the excision policy to include the mainland through the enactment of the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*.

In June 2013 Kevin Rudd was reinstated as Prime Minister and shortly thereafter announced even tougher measures whereby all, not just some, asylum seekers who arrived by boat would be transferred to PNG for processing and if found to be refugees could also be settled there or elsewhere in the region. The Prime Minister made it clear that they would never be resettled to Australia.<sup>92</sup> A similar agreement was later made with the Government of Nauru in August 2013.<sup>93</sup>

During the 2013 election campaign the Coalition confirmed that offshore processing would remain under an Abbott Government and that a military-led, whole-of-government response, known as Operation Sovereign Borders, would be introduced to coordinate the Coalition's offshore processing and anti-people smuggling measures.<sup>94</sup>

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87. *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 133 ALD 221, [2013] HCA 24, accessed 15 July 2014; High Court of Australia, *Plaintiff M79/2012 v Minister for Immigration and Citizenship [2013] HCA 24*, media release, 29 May 2013, accessed 15 July 2014.

88. The policy section of this paper has largely been reproduced from J Phillips, *A comparison of Coalition and Labor government asylum policies in Australia since 2001*, Research paper, Parliamentary Library, February 2014. For further information on the lead-up to this policy announcement see: E Karlsen, *Developments in Australian refugee law and policy 2010–2011*, Background note, Parliamentary Library, Canberra, 12 April 2012.

89. A Houston, *Report of the Expert Panel of Asylum Seekers released*, media release, 13 August 2012, accessed 29 July 2014.

90. J Gillard (Prime Minister) and C Bowen (Minister for Immigration and Citizenship), *Australia signs Memorandum of Understanding with Nauru*, media release, 29 August 2012; and *Australia and Papua New Guinea sign updated memorandum of understanding*, media release, 8 September 2012, accessed 29 July 2014.

91. C Bowen (Minister for Immigration and Citizenship), *First transfer to Papua New Guinea*, media release, 21 November 2012; *Nauru designated for regional processing*, media release, 10 September 2012; and *Asylum seeker transfer to Nauru*, transcript, 14 September 2012, accessed 29 July 2014.

92. J Clare (Minister for Home Affairs), *\$200,000 bounty on the head of local people smugglers*, media release, 21 July 2013; K Rudd (Prime Minister), *Australia and Papua New Guinea Regional Settlement Arrangement*, media release, 19 July 2013; and Department of Immigration and Citizenship (DIAC), *Regional resettlement arrangements*, DIAC website archive, July 2013; accessed 29 July 2014.

93. K Rudd (Prime Minister), *New arrangement with Nauru Government*, media release, 3 August 2013, accessed 29 July 2014.

94. Liberal Party of Australia and the Nationals, *Our plan: real solutions for all Australians—the direction, values and policy priorities of the next Coalition Government*, Coalition policy document, January 2013, p. 47; and Liberal Party of Australia and the Nationals, *The Coalition's Operation Sovereign Borders policy*, Coalition policy document, Election 2013, July 2013, accessed 29 July 2014.

## **Immigration detention**

The Gillard's Government's 'no advantage' principle introduced in August 2012 prompted concerns by many stakeholders about prolonged detention, since under this principle boat arrivals would presumably remain in immigration detention and gain no time advantage over other applicants.

In an attempt to release pressure on the detention network, the Gillard Government introduced the practice of releasing significant numbers of asylum seekers on bridging visas (BVEs) in November 2012. Others remained in immigration detention (in either closed facilities or in the community) or were transferred to offshore processing centres in Nauru and PNG.<sup>95</sup>

However, the Gillard Government continued to assert that all who arrived after 13 August 2012—regardless of whether they were 'held' in detention (in a secure detention facility), in offshore processing centres or on BVEs—would be subject to the 'no advantage' policy, although it was not clear what this meant in practice.<sup>96</sup>

During this period, Opposition Leader Tony Abbott continued to state that while a Coalition Government would continue the policy of offshore processing, it would send all, not some, boat arrivals offshore and thus not detain any new arrivals in onshore detention facilities.<sup>97</sup>

On the return of Kevin Rudd as Prime Minister in June 2013, the Rudd Government also made the decision that all boat arrivals, not some, would be transferred to PNG for processing. A similar agreement with the Government of Nauru was announced in August 2013. Under these new regional settlement arrangements all asylum seekers arriving by boat after 19 July 2013 would be transferred, processed and even resettled either in Nauru or PNG.<sup>98</sup>

## **Temporary protection**

Although the Labor Government had abolished the Howard Government's temporary protection visa (TPV) regime, by 2012 there had been some softening of this position. In June 2012, in the context of the Government and Coalition being at an impasse on offshore processing following the successful High Court challenge of the Government's proposed arrangements with Malaysia, then Prime Minister, Julia Gillard, told the Opposition that the Government was prepared to review temporary protection visas and their deterrence value.<sup>99</sup>

In addition, on 21 November 2012, the Minister for Immigration and Citizenship announced that people who had arrived by boat after 13 August 2012 would not necessarily be transferred offshore due to the sheer numbers. Instead, under the 'no advantage' principle, if found to be refugees they would not be issued with permanent protection visas 'until such time that they would have been resettled in Australia after being processed in our region'. Others, released from detention into the community while they awaited an outcome on their asylum claims, would be issued with bridging visas without work rights.<sup>100</sup> The widespread use of bridging visas was characterised by some observers as a return to temporary protection under a different name.<sup>101</sup>

Before the 2013 election, the Coalition consistently stated that, under an Abbott Government, TPVs would be reintroduced as a deterrence measure and issued to any unauthorised asylum seeker arrival found to be a refugee onshore (that is, had not been transferred to an offshore processing centre).<sup>102</sup>

## **Boat turnarounds**

One notable policy difference between the two major parties centres on the practice of boat 'turnarounds' as employed previously by the Howard Government. In 2012 and 2013, the then Leader of the Opposition, Tony

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95. C Bowen (Minister for Immigration and Citizenship), [No advantage onshore for boat arrivals](#), media release, 21 November 2012, accessed 29 July 2014.

96. Ibid.

97. 9 MSN, [Opposition to send all boat arrivals offshore](#), 9 News National, 16 April 2013, accessed 29 July 2014.

98. K Rudd (Prime Minister), M Dreyfus (Attorney-General) and T Burke (Minister for Immigration), [Australia and Papua New Guinea Regional Settlement Arrangement](#), joint media release, 19 July 2013; and K Rudd (Prime Minister), [New arrangement with Nauru Government](#), media release, 3 August 2013, accessed 29 July 2014.

99. J Gillard (Prime Minister), Statements of indulgence: [Asylum seekers](#), House of Representatives, Debates, 27 June 2012, p. 8219, accessed 29 July 2014.

100. C Bowen (Minister for Immigration and Citizenship), [No advantage onshore for boat arrivals](#), media release, 21 November 2012, accessed 29 July 2014.

101. M Dodd and L Wilson, '[Worse off now than in Howard years: Le](#)', *The Australian*, 14 October 2011, p. 6, accessed 29 July 2014.

102. Liberal Party of Australia and the Nationals, [The Coalition's policy to clear Labor's 30,000 border failure backlog](#), Coalition policy document, Election 2013, 1 August 2013, accessed 29 July 2014.

Abbott, stated that within a week of taking office he would instruct the Australian Navy to turn boats back and prevent them from entering Australian waters or arriving onshore.<sup>103</sup> There were only ever a few instances of successful boat ‘turnarounds’ during the term of the Howard Government, due in part to the practical complexities involved.<sup>104</sup> However, Tony Abbott reiterated in the lead up to the 2013 election that turning boats around could again be an option ‘in the right circumstances’ under a Coalition Government.<sup>105</sup>

### **Humanitarian Program increase**

In 2012, Minister Bowen was supportive of an increase in Australia’s Humanitarian Program intake and stated on several occasions that his preference would be to increase Australia’s humanitarian intake to 20,000. However, he pointed out that such an increase would be expensive.<sup>106</sup>

In an address to the Institute of Public Affairs in April 2012, the then Leader of the Opposition, Tony Abbott, also expressed support for an increase in Australia’s humanitarian intake under a future Coalition Government.<sup>107</sup> This would be achieved through sponsorship options by allowing ‘community groups to sponsor refugees on a bonded basis that would take the annual intake to 15,000’. In June 2012 Tony Abbott went further and made a commitment to his parliamentary colleagues that a Coalition Government would increase the Humanitarian Program annual intake to 20,000.<sup>108</sup>

In line with recommendations of the Expert Panel on Asylum Seekers, the Gillard Government announced on 23 August 2012 that, in spite of the expense, it would be increasing Australia’s Humanitarian Program from 13,750 to 20,000 places in 2012–13. The decision included an immediate commitment to resettle an additional 400 refugees directly from Indonesia.<sup>109</sup>

The Coalition’s June 2012 commitment to increase the Humanitarian Program was reversed after the Gillard Government increased the humanitarian intake to 20,000. On 23 November 2012 Tony Abbott announced that, if elected, a Coalition Government would return the annual intake to the level of 13,750 (with 11,000 of the places reserved for offshore entrants) as a cost saving measure.<sup>110</sup> In his announcement Tony Abbott stated that the bulk of the 13,750 Humanitarian Program places would be reserved for ‘genuine refugees applying offshore’. The Shadow Minister for Immigration and Citizenship, Scott Morrison, stated ‘Not one of those places will go to anyone who comes on a boat to Australia. They will go to people who have come the right way’.<sup>111</sup> Subsequently, in the lead-up to the 2013 election the Coalition made it clear that, if elected, the Humanitarian Program would be reduced and that the annual intake would return to 13,750.<sup>112</sup>

When Kevin Rudd returned as Prime Minister in July 2013 he confirmed that the humanitarian intake would remain at 20,000 per year, with 12,000 places reserved for offshore refugees referred by the UNHCR. Kevin Rudd also flagged that, if regional arrangements with Pacific nations led to a decrease in boat arrivals, he would be prepared to consider progressively increasing Australia’s humanitarian intake to 27,000.<sup>113</sup>

103. T Abbott (Leader of the Opposition), [The Coalition’s plan for more secure borders: address to the Institute of Public Affairs, Melbourne](#), 27 April 2012, accessed 29 July 2014.

104. Expert Panel on Asylum Seekers, [Report of the Expert Panel on Asylum Seekers](#), Attachment 8, Canberra, August 2012, accessed 29 July 2014.

105. T Abbott (Leader of the Opposition), [Restoring sovereignty and control of our borders](#), op. cit.; and Liberal Party of Australia and the Nationals, [Our plan: real solutions for all Australians – the direction, values and policy priorities of the next Coalition Government](#), op. cit., p. 47, accessed 29 July 2014.

106. For example see C Bowen (Minister for Immigration and Citizenship), [‘The Refugee Convention and beyond’](#): keynote address to the International Association of Refugee Law Judges: Australasian Chapter regional conference, [Melbourne](#), 3 February 2012, accessed 29 July 2014.

107. T Abbott (Leader of the Opposition), [The Coalition’s plan for more secure borders](#), address to the Institute of Public Affairs, [Melbourne](#), 27 April 2012, accessed 29 July 2014.

108. As noted in J Moylan, [Malaysian swap legislation: statement](#), media release, 29 June 2012, accessed 29 July 2014.

109. J Gillard (Prime Minister) and C Bowen (Minister for Immigration and Citizenship), [Refugee program increased to 20,000 places](#), media release, 23 August 2012, accessed 29 July 2014.

110. T Abbott (Leader of the Opposition), [Government must live within its means: Humanitarian Programme](#), media release, 23 November 2012, accessed 29 June 2014.

111. T Abbott (Leader of the Opposition) and S Morrison (Shadow Minister for Immigration and Citizenship), [Transcript of joint press conference](#), [Melbourne](#), 23 November 2012, accessed 29 July 2014.

112. Liberal Party of Australia and the Nationals, [The Coalition policy to clear Labor’s 30,000 border failure backlog](#), op. cit.

113. K Rudd (Prime Minister), [Australia and Papua New Guinea Regional Settlement Arrangement](#), media release, 19 July 2013, accessed 29 July 2014.

Although there was disagreement on the size of Australia's annual humanitarian intake, both major parties supported limiting family reunion options for those accepted under the Humanitarian Program who originally arrived by boat. In 2012, the Gillard Government accepted one of the Expert Panel's recommendations and announced changes barring all people arriving by boat after 13 August 2012 from sponsoring family members under Australia's Humanitarian Program (instead they had to propose family members under the family stream of the Migration Program). The changes also removed access to Special Humanitarian Program (SHP) family reunion concessions for people arriving by boat before 13 August 2012.<sup>114</sup> To accommodate the expected increase in demand for visas in the family migration stream the Government announced it would increase the number of family stream places by 4,000 per year which would be quarantined specifically for humanitarian entrants (both boat arrivals and non-boat arrivals). In response, refugee advocates expressed concerns that strict eligibility requirements and high application costs under the Migration Program would effectively prevent access to family reunion options for most boat arrivals and that the barriers to resolving these issues would be significant.<sup>115</sup>

The Coalition preferred the option of introducing TPVs with no family reunion rights at all and in the lead up to the election it was adamant that any boat arrivals waiting onshore for their applications to be assessed would not receive a permanent visa or have access to family reunion options under a Coalition Government.<sup>116</sup>

## Key reports and inquiries

The following lists chronologically some of the key reports and inquiries completed between January 2012 and August 2013:

- In February 2012, **Amnesty International** reported on visits to several Australian Immigration Detention Centres (IDCs), including those on Christmas Island.<sup>117</sup> The report argued that the most serious and damaging issue faced by asylum seeker detainees was the prolonged and indefinite nature of their detention. Amnesty International called for time limits of 30 days in IDCs; expedited use of community detention; and the closure of remote or isolated IDCs.
- On 21 March 2012 the **International Detention Coalition** (IDC) released a report on the immigration detention experiences of children and their families from all over the world, including Australia.<sup>118</sup> IDC also consulted with over 300 professionals from 62 countries on the effects of immigration detention on children specifically, and on detainees more broadly. The report found that 'Regardless of the conditions in which they are kept, detention has a profound and negative effect on children. It undermines their psychological and physical health and compromises their development.' The report argued that there are more effective and less harmful ways to manage the irregular migration of children and their families, including a presumption against the detention of children; child-sensitive case management; and the placement of the child and their families into community settings.
- On 12 April 2012, the **Joint Select Committee on Australia's Immigration Detention Network** (established by the Parliament on 16 June 2011) released its final report.<sup>119</sup> The report detailed high rates of mental illness and self-harm among detainees due to prolonged periods spent in immigration detention facilities (held detention) and noted that there were more humane and less costly alternatives. The Committee recommended that all reasonable steps be taken to limit held detention to 90 days; and advocated the use of community detention arrangements wherever possible. The Government accepted fully, in principle or partially, 26 of the 31 recommendations made in the report.<sup>120</sup>
- On 25 June 2012 the **Australian National Audit Office** released an audit report on the security assessments of individuals, including assessments of unauthorised maritime arrivals undertaken for the Immigration

114. C Bowen (Minister for Immigration and Citizenship), [Government implements Expert Panel's family reunion recommendation](#), media release, 22 September 2012, accessed 29 July 2014.

115. For example, Amnesty International, [Submission to the Department of Immigration and Citizenship 2013–14 Refugee and Special Humanitarian Program](#), 21 January 2013; and Federation of Ethnic Communities Councils of Australia (FECCA), [Submission to the Department of Immigration and Citizenship, Australia's Humanitarian Program 2013–14 and beyond](#), January 2013, accessed 29 July 2014.

116. Liberal Party of Australia and the Nationals, [The Coalition policy to clear Labor's 30,000 border failure backlog](#), op. cit.

117. Amnesty International, [Australian detention facilities visit 2012](#), February 2012, accessed 24 July 2014.

118. International Detention Coalition (IDC), [Captured childhood](#), 2012, accessed 24 July 2014.

119. See the [Joint Select Committee on Australia's Immigration Detention Network](#) webpage for the *Final report*, March 2012, and Government response, accessed 23 July 2014.

120. [Government response to the Joint Select Committee on Australia's Immigration Detention Network](#), op. cit.

Department.<sup>121</sup> The report commented on the complexity of this caseload, involving extensive and lengthy investigation, and made more challenging by a sharp increase in arrivals since 2009.

- In June 2012, the **Immigration Department** released a discussion paper seeking community views on a proposed private/community sponsorship program for refugees.<sup>122</sup>
- In July 2012 the **Australian Human Rights Commission** (AHRC) published a report on Australia's detention regime and the Government's increasing use of community detention arrangements.<sup>123</sup> The Commission condemned the practice of placing people in closed detention for prolonged periods and argued that community placement options should be urgently pursued for all asylum seekers who do not pose an unacceptable risk to the Australian community. The Government responded to the AHRC report in November 2012.<sup>124</sup>
- In response to growing concerns that some of the asylum boat crew members being charged and detained in adult correctional facilities were actually minors, the **Australian Human Rights Commission** conducted an inquiry into age assessment procedures.<sup>125</sup> The report, released in July 2012, was very critical of some of the procedures sometimes used by the Australian Federal Police (AFP)—particularly the use of wrist x-rays to determine age. Although reliance on the use of wrist x-ray analysis was abandoned in late 2011 (and replaced by focused age interviews conducted by the Immigration Department) the report outlined in detail many additional concerns on the treatment of the, mostly Indonesian, crew members. Before the AHRC released its report, the Attorney-General had already announced a review of some of the individuals convicted of people smuggling offences. In June 2012 the review outcomes were released—of the 28 crew members identified for re-examination, 15 were released on the basis that there was reasonable doubt that they were over 18 at the time they were apprehended.<sup>126</sup> The Attorney-General acknowledged the AHRC report on its release and outlined the Government's improvements to age determination processes on 27 July 2012.<sup>127</sup>
- In August 2012 a major report on asylum policy options was released.<sup>128</sup> Compiled over a six week period by the Government's **Expert Panel on Asylum Seekers**, the report outlined the complex policy challenges posed by asylum flows and presented a comprehensive package of possible integrated short and long-term policy responses. The short-term proposals included disincentives (such as the reintroduction of offshore processing) and incentives (such as an immediate increase of Australia's Humanitarian Program intakes). The long-term proposals included an expansion of legal migration pathways and better protection opportunities for refugees. These proposals were to be coordinated by Australia and its regional neighbours within an enhanced 'regional cooperation framework'. The Gillard Government accepted the Panel's recommendations and immediately implemented some, but not all, of the policy options. Most notably, offshore processing was reintroduced and the Humanitarian Program intake was increased from 13,750 to 20,000.<sup>129</sup>
- On 4 October 2012, the **Senate Legal and Constitutional Affairs References Committee** reported on its findings after being referred the matter of the detention of Indonesian minors in Australia for inquiry on 10 May 2012.<sup>130</sup> The Committee made seven recommendations, including the removal of wrist x-rays as a prescribed procedure for the determination of age under the *Crimes Act 1914* and regulation 6C of the

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121. Australian National Audit Office (ANAO), [Security assessments of individuals: Australian Security Intelligence Organisation](#), Audit report 49, June 2012, accessed 24 July 2014.

122. Department of Immigration and Citizenship (DIAC), [Australia's Humanitarian Program: Proposed pilot of a private/community refugee sponsorship program](#), discussion paper, June 2012, accessed 24 July 2014. See the departmental [Community proposal pilot](#) web page for further detail on this program.

123. Australian Human Rights Commission (AHRC), [Community arrangements for asylum seekers, refugees and stateless persons](#), Observations from visits conducted by the Australian Human Rights Commission from December 2011 to May 2012, July 2012, accessed 24 July 2014.

124. Australian Government, [Response to the Australian Human Rights Commission Report on Community arrangements for asylum seekers, refugees and stateless persons who arrived by boat](#), November 2012, accessed 24 July 2014,

125. AHRC, [An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children](#), July 2012, accessed 31 July 2014.

126. N Roxon (Attorney-General), [People smuggling convictions review completed](#), media release, 29 June 2012, accessed 24 July 2014.

127. N Roxon (Attorney-General), [Important improvements made in age determination](#), media release, 27 July 2012, accessed 24 July 2014.

128. Expert Panel on Asylum Seekers, [Report of the expert panel on asylum seekers](#), 12 August 2012, accessed 24 July 2014.

129. J Gillard (Prime Minister) and C Bowen (Minister for Immigration and Citizenship), [Refugee program increased to 20,000](#), media release, 23 August 2012; and [Australia signs memorandum of understanding with Nauru](#), media release, 29 August 2012, accessed 24 July 2014.

130. Senate Legal and Constitutional Affairs References Committee, [Detention of Indonesian minors in Australia](#), 4 October 2012, accessed 24 July 2014.

Crimes Regulations 1990. The Government responded in December 2012, agreeing with many of the recommendations (8), but disagreeing with the majority.<sup>131</sup>

- In October 2012 the **Australian Human Rights Commission** published a report (that was subsequently updated in March 2013) outlining human rights concerns for the asylum seekers being transferred by the Australian Government to processing centres in third countries (in Papua New Guinea and Nauru).<sup>132</sup> Areas of concern included screening and assessment procedures, delays in processing asylum claims, protracted detention durations and the conditions and situations for children and their families.
- In November 2012, **Amnesty International** published a damning review of its three day inspection of the Nauru Offshore Processing Facility.<sup>133</sup> Amnesty argued that there was ‘a toxic mix of uncertainty, unlawful detention and inhumane conditions creating an increasingly volatile situation on Nauru’.
- On 14 December 2012, the **UNHCR** released a report on its mission to the Republic of Nauru between 3 and 5 December 2012.<sup>134</sup> The report noted that any transfer arrangements should include effective protection safeguards, but concluded that ‘the transfer of asylum seekers to what are currently harsh and unsatisfactory temporary facilities, within a closed detention setting, and in the absence of a fully functional legal framework and adequately capacitated system to assess refugee claims, do not currently meet the required protection standards’.
- Similar comments were expressed in a report released on 4 February 2013 by the **UNHCR** outlining the findings of a monitoring visit to Manus Island, PNG between 15 and 17 January 2013.<sup>135</sup> The report acknowledged the efforts by the Governments of PNG and Australia to fulfil their international obligations under the 1951 Refugees Convention and other applicable instruments. However, the report noted that ‘there are still very significant inadequacies in the legal and operational framework governing the transfer, treatment and processing of transferees’.
- The Parliamentary **Joint Standing Committee on Migration** reported on an inquiry into migration and multiculturalism in Australia in March 2013.<sup>136</sup> The Committee’s terms of reference included an examination of the role of multiculturalism in terms of the Government’s social inclusion agenda; and settlement programs for new migrants and refugees that support their full social and economic participation in Australian society. The report noted that unintended or directly imposed racism entrenched within service provision cultures can present barriers to social and economic participation of migrants and refugees. The Committee was given evidence of such issues in the employment, housing, transport, education, child protection and police and justice spheres.
- In May 2013 the **Commonwealth Ombudsman** released its report into suicide and self-harm in the onshore immigration detention network.<sup>137</sup> The report concluded that increases in the incidence of self-harm in detention centres could not be explained simply by the increase in the number of detainees. Rather, the report found that there was a strong correlation between the rise in the average time spent in detention and the increase in self-harming behaviour.
- In June 2013 the Parliamentary **Joint Committee on Human Rights** reported on an inquiry into the human rights implications of the Migration Regional Processing package of legislation.<sup>138</sup> The Committee noted that the Government had been unable to provide any details as to how the ‘no advantage’ policy would operate in practice and was of the view that it remained a vague and ill-defined principle. The evidence before the Committee suggested that the Government’s approach to ‘no advantage’ had gone further than that which was originally contemplated by the Expert Panel to actively create *disadvantage*. The Committee’s primary

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131. [Australian Government response to the Senate Legal and Constitutional Affairs References Committee report: Detention of Indonesian minors in Australia](#), December 2012, accessed 31 July 2014.

132. AHRC, [Human rights issues raised by the transfer of asylum seekers to third countries](#), 15 November 2012; and the updated paper, [Human rights issues raised by the third country processing regime](#), March 2013, accessed 24 July 2014.

133. Amnesty International, [Nauru Offshore Processing Facility Review 2012](#), November 2012, accessed 24 July 2014.

134. UNHCR, [UNHCR Mission to the Republic of Nauru: 3 to 5 December 2012](#), 14 December 2012, accessed 24 July 2014.

135. UNHCR, [UNHCR Monitoring Visit to Manus Island, Papua New Guinea: 15 to 17 January 2013](#), 4 February 2013, accessed 25 July 2014.

136. Joint Standing Committee on Migration, [Inquiry into Migration and Multiculturalism in Australia](#), March 2013, accessed 25 July 2014.

137. Commonwealth Ombudsman, [Suicide and self-harm in the immigration detention network](#), Report 2, May 2013, accessed 25 July 2014.

138. Joint Committee on Human Rights, [Examination of legislation in accordance with the Human Rights \(Parliamentary Scrutiny\) Act 2011: Migration Legislation Amendment \(Regional Processing and Other Measures\) Act 2012 and related legislation](#), June 2013, accessed 25 July 2014.

concern was how it would impact on Australia's fulfilment of its human rights treaty obligations and in that respect it concluded that on the basis of the evidence before it, the measures carried a significant risk of being incompatible with a range of human rights. To the extent that some of those rights may be limited, it was of the view that the reasonableness and proportionality of those limitations had not been clearly demonstrated.

- In July 2013 the **UNHCR** reported on another monitoring visit to the Regional Processing Centre on Manus Island in PNG conducted in June 2013.<sup>139</sup> Although acknowledging some positive developments since its January visit, the UNHCR reported that conditions remained 'below international standards for the reception and treatment of asylum seekers' and noted shortcomings in the legal framework, including PNG laws and regulations.

The following Parliamentary Library publications also analyse some of the asylum and refugee policy issues and developments between January 2012 and August 2013:

- L Buckmaster, [Australian government assistance to refugees: fact v fiction](#), Background note, Parliamentary Library, updated September 2012
- J Phillips, [The 'Pacific Solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island](#), Background note, Parliamentary Library, September 2012
- H Spinks, [Destination anywhere? Factors affecting asylum seekers' choice of destination country](#), Research paper, Parliamentary Library, February 2013
- J Phillips, [Asylum seekers and refugees: what are the facts?](#), Background note, Parliamentary Library, updated February 2013
- C Barker, [The people smuggler's business model](#), Research paper, Parliamentary Library, February 2013
- J Phillips and H Spinks, [Immigration detention in Australia](#), Background note, Parliamentary Library, updated March 2013
- R de Boer, [Health care for asylum seekers on Nauru and Manus Island](#), Background note, Parliamentary Library, June 2013, and
- J Phillips and H Spinks, [Boat arrivals in Australia since 1976](#), Research paper, Parliamentary Library, updated July 2013.

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139. UNHCR, [UNHCR Monitoring Visit to Manus Island, Papua New Guinea: 11 to 13 June 2013](#), 12 July 2013, accessed 25 July 2014.

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