The Senate

Legal and Constitutional Affairs Legislation Committee

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

February 2013

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RECOMMENDATIONS

Recommendation 1

2.42 The committee recommends that the Bill be amended to require the Minister for Immigration and Citizenship to report annually to both Houses of Parliament in respect of the following matters:

- **arrangements during each 12 month period for unauthorised maritime arrivals seeking asylum, including arrangements for:**
  - **assessing any claims for refugee status made by such unauthorised maritime arrivals;**
  - **the accommodation, health care and education of such unauthorised maritime arrivals;**
- **the number of asylum claims by unauthorised maritime arrivals that are assessed during each 12 month period; and**
- **the number of unauthorised maritime arrivals determined during each 12 month period to be refugees.**

Recommendation 2

2.43 Subject to recommendation 1, the committee recommends that the Senate pass the Bill.

CHAPTER 1

Introduction

Referral of the inquiry

1.1 On 31 October 2012, the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Bill) was introduced into the House of Representatives by the then Minister for Immigration and Citizenship (Minister), the Hon Chris Bowen MP.[1] On 1 November 2012, the Senate referred the provisions of the Bill to the Senate Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 5 February 2013.[2] This date was subsequently extended to 25 February 2013.[3]

Purpose of the Bill

1.2 The Bill seeks primarily to amend the *Migration Act 1958* (Cth) (Migration Act), to implement Recommendation 14 of the *Report of the Expert Panel on Asylum Seekers* (Expert Panel's Report):

> The Panel recommends that the [Migration Act] be amended so that arrival anywhere on Australia by irregular maritime means will not provide individuals with a different lawful status than those who arrive in an excised offshore place.[4]

Background to the Bill

1.3 On 27 September 2001, section 198A was inserted into the Migration Act.[5] This provision allowed for offshore entry persons to be removed from Australia to a country in respect of which a declaration under subsection 198A(3) was in force (the offshore processing regime).[6]

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1 House of Representatives, *Votes and Proceedings*, No. 141-31 October 2012, p. 1932.

2 Senate, *Journals of the Senate*, No. 121-1 November 2012, pp 3237-3238.

3 Senate, *Journals of the Senate*, No. 123-20 November 2012, pp 3324-3325.

4 Air Chief Marshal Angus Houston AC, AFC (Ret'd), Mr Paris Aristotle AM, Professor Michael L'Estrange AO, *Report of the Expert Panel on Asylum Seekers* (Expert Panel's Report), August 2012, p. 17 (Recommendation 14), available at: http://expertpanelonasylumseekers.dpmc.gov.au/report (accessed 22 February 2013). Also see Explanatory Memorandum (EM), p. 1.

5 Section 6 of the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth).

6 'Offshore entry person' is defined in subsection 5(1) of the *Migration Act 1958* (Cth) (Migration Act).

Judicial review of section 198A of the Migration Act

1.4 In August 2011, the High Court of Australia (High Court) reviewed section 198A of the Migration Act in the case of *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship*.[7]

1.5 The case related to two matters, known as M70/2011 and M106 of 2011, involving a 24-year-old male citizen of Afghanistan (Plaintiff M70/2011) and a 16-year-old unaccompanied male citizen of Afghanistan (Plaintiff M106 of 2011). Both plaintiffs arrived at Christmas Island (an excised offshore place) in August 2011 as part of a larger group of asylum seekers, and were identified as liable to transfer to Malaysia pursuant to a declaration made on 25 July 2011 under subsection 198A(3) of the Migration Act (Malaysia declaration).[8]

1.6 The plaintiffs commenced proceedings in the High Court seeking orders, which included a declaration of invalidity in respect of the Malaysia declaration, and an order in the nature of prohibition to restrain the Minister and the Commonwealth from taking any steps to remove them from Australia.

1.7 The main issues considered by the High Court were whether the Malaysia declaration had been validly made, and whether the Minister had satisfied the requirements of the *Immigration (Guardianship of Children) Act 1946* (Cth) (Guardianship Act) in relation to Plaintiff M106 of 2011.

1.8 In holding for the plaintiffs, a majority of the court (French CJ, Gummow, Hayne, Kiefel, Crennan and Bell JJ; Heydon J dissenting) found that the Minister's declaration of Malaysia as a declared country under subsection 198(3) was beyond power and therefore invalid.[9]

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7 [2011] HCA 32.

8 'Instrument of Declaration of Malaysia as a Declared Country under Subsection 198A(3) of the Migration Act 1958', registered 18 August 2011, available at: http://www.comlaw.gov.au/Details/F2011L01685 (accessed 22 February 2013).

The bilateral agreement relating to the transfer of asylum seekers from Australia to Malaysia, the *Arrangement between the Government of Australia and the Government of Malaysia on transfer and resettlement* (Malaysia Arrangement), is available at: http://www.minister.immi.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf (accessed 22 February 2013).

The Malaysia Arrangement was examined by the Legal and Constitutional Affairs References Committee in October 2011 and is available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/malaysia_agreement/report/index.htm (accessed 22 February 2013).

9 *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 per Gummow, Hayne, Crennan and Bell JJ at 136.

1.9 The reason for the decision was articulated in the joint majority judgement: the jurisdictional matters set out in paragraph 198A(3)(a) were not, and could not be, established.[10] These matters required a country the subject of a declaration to:

- provide asylum seekers with access to effective procedures for assessing their need for protection;
- provide asylum seekers with protection, pending determination of their refugee status;
- provide refugees with protection, pending voluntary repatriation to their country of origin or resettlement in another country; and
- meet relevant human rights standards in providing that protection.

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

1.10 The Prime Minister, the Hon Julia Gillard MP described the High Court's decision as 'deeply disappointing'[11] and, in response, the Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 (Regional Processing Bill) was introduced into the House of Representatives by the then Minister on 21 September 2011.[12]

1.11 The Regional Processing Bill sought to amend the Migration Act and the Guardianship Act to:

- replace the existing offshore processing regime; and
- clarify that provisions of the Guardianship 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.[13]

1.12 The Minister stated:

> The purpose of this bill is clear: to restore to the executive the power to set Australia's border protection policies, specifically the power to transfer asylum seekers arriving at excised offshore places to a range of designated

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10 *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 per Gummow, Hayne, Crennan and Bell JJ at 135.

11 The Hon Julia Gillard MP, Prime Minister (Prime Minister) and the Hon Chris Bowen MP, Minister for Immigration and Citizenship (Minister), 'Transcript of joint press conference, Brisbane', 1 September 2011, available at: http://www.pm.gov.au/press-office/transcript-joint-press-conference-brisbane-1 (accessed 22 February 2013).

12 House of Representatives, *Votes and Proceedings*, No. 70-21 September 2011, p. 941. The name of the bill, and all other references to the word 'offshore', was subsequently amended to reflect use of the word 'regional' throughout the proposed legislation.

13 Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011, EM, p. 1, available at: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4683 (accessed 22 February 2013).

> third countries within the region, while ensuring protection from *refoulement*, for the processing of their claims.
>
> This is a power that was thought to exist until 31 August this year, when the majority of the High Court decided that transfers under section 198A of the Migration Act could only take place to countries legally bound to provide protections equivalent to those offered by Australia.
>
> Subsequent legal advice has made it clear that the High Court's decision has thrown into significant doubt the ability of governments—present or future—to effect transfers to a range of countries in our region who are prepared to offer protection from *refoulement*, and will allow processing of refugee claims to be made, including Papua New Guinea and Nauru.[14]

1.13 Debate on the Regional Processing Bill commenced in the House of Representatives on 22 September 2011, at which time the Federal Opposition indicated that it would not be supporting the bill unless it were amended to require regional processing to take place in countries which are signatories to the 1951 *Convention Relating to the Status of Refugees*,[15] as amended by the 1967 *Protocol Relating to the Status of Refugees*[16] (collectively, the Refugee Convention).[17]

1.14 The Australian Government did not seek to amend the Regional Processing Bill and debate on the bill was adjourned until August 2012.

Migration Legislation Amendment (The Bali Process) Bill 2012

1.15 Mr Robert Oakeshott MP sought to resolve the political deadlock with the introduction in February 2012 of a private member's bill, the Migration Legislation Amendment (The Bali Process) Bill 2012 (Bali Process Bill).[18]

1.16 The provisions of the Bali Process Bill were similar to those of the Regional Processing Bill; however, there was a key difference in the proposed provision concerning the designation of a country for regional processing purposes (proposed subsection 198AB(2)). Whereas both bills provided for the Minister to make such a

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14 *House of Representatives Hansard*, 21 September 2011, p. 10946 (italicisation added). '*Refoulement*' is an international legal term meaning the return by a state, in any manner whatsoever, of an individual to the territory of another state, in which: the individual's life or liberty would be threatened; the individual would be persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or the individual would run the risk of torture.

15 Opened for signature 28 July 1951, [1954] ATS 5 (entered into force for Australia on 22 April 1954).

16 Opened for signature on 31 January 1967, [1973] ATS 37 (entered into force for Australia on 13 December 1973).

17 The 1951 *Convention Relating to the Status of Refugees* and 1967 *Protocol Relating to the Status of Refugees* (collectively, the Refugee Convention) are available at: http://www.unhcr.org/pages/49da0e466.html (accessed 22 February 2013). The international law obligation prohibiting *refoulement* by a state is contained in article 33(1) of the Refugee Convention.

18 House of Representatives, *Votes and Proceedings*, No. 87-13 February 2012, p. 1203.

designation in the national interest, the Bali Process Bill added the further condition that the country concerned must be a party to the 'Bali Process', a process established at the Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime held in Bali in February 2002.[19]

1.17 On 31 May 2012, the second reading debate for the Bali Process Bill began in the House of Representatives. During debate the Leader of the Opposition, the Hon Tony Abbott MP reiterated the Federal Opposition's objection to proposed legislation which 'strips' protections from asylum seekers in regional processing countries.[20] The Shadow Minister for Immigration and Citizenship, Mr Scott Morrison MP explained further the reasons why the Bali Process Bill did not address the concerns of the Federal Opposition:

> The only objective, legally binding protection that can be used as a litmus test for this parliament to give instructions to the executive as to which countries and which places they could send people is whether a country is a signatory to the [R]efugee [C]onvention. There are 148 countries who have signed that convention. That includes the Philippines, that includes Nauru, that includes Papua New Guinea, and that includes many other countries.
>
> These protections are important. You have to ask yourself the question: why is it necessary to abolish the protections that exist in the Migration Act…The Bali process…is a worthy process and one we initiated in government but it does not provide legally binding international obligations on its participants.[21]

1.18 Mr Morrison moved amendments to require a country designated for regional processing purposes to be a party to the Refugee Convention.[22] The proposed amendments were negatived in the House of Representatives,[23] and the Bali Process Bill was passed in that house on 27 June 2012.[24]

1.19 On 28 June 2012, the Bali Process Bill was introduced into the Senate, where it was defeated.[25] Subsequently, the Prime Minister and the then Minister held a joint press conference, where it was announced that the Australian Government had invited Air Chief Marshal Angus Houston AC AFC (Ret'd), the former chief of Australia's

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19 The Bali Process is a voluntary regional forum, which brings together participants to work on practical measures to help combat people smuggling, trafficking in persons and related transnational crime in the Asia-Pacific region: see http://www.baliprocess.net/ (accessed 22 February 2013).

20 *House of Representatives Hansard*, 27 June 2012, p. 8222.

21 *House of Representatives Hansard*, 27 June 2012, p. 8225.

22 *House of Representatives Hansard*, 27 June 2012, p. 8226.

23 House of Representatives, *Votes and Proceedings*, No. 119-27 June 2012, pp 1641-1643.

24 House of Representatives, *Votes and Proceedings*, No. 119-27 June 2012, pp 1642-1643.

25 Senate, *Journals of the Senate*, No. 99-28 June 2012, p. 2678.

defence force, to lead an expert panel to provide a report on the best way forward in dealing with asylum seeker issues.[26]

Expert panel on asylum seekers

1.20 On 13 August 2012, following a six week inquiry, the expert panel reported to the Prime Minister and the then Minister.[27] The expert panel indicated that, in formulating a solution to the political impasse, its focus had been to find practical ways to progress effective regional cooperation on asylum seeker issues:

> [T]he only viable way forward is one that shifts the balance of risk and incentive in favour of regular migration pathways and established international protections and against high-risk maritime migration.[28]

1.21 The expert panel made 22 recommendations proposing an integrated regional approach to policy on asylum seeker and refugee issues, including that 'legislation to support the transfer of people to regional processing arrangements be introduced into the Australian Parliament as a matter of urgency'.[29]

1.22 On 14 August 2012, debate resumed on the Regional Processing Bill, with the Minister foreshadowing government amendments, as agreed with the Federal Opposition, to ensure that the parliament must approve the designation of each regional processing country under section 198AB of the Migration Act.[30] On 15 August 2012, the bill was passed in the House of Representatives[31] and in the Senate on 16 August 2012.[32] The bill received Royal Assent on 17 August 2012 and commenced the following day.

Loss of life at sea

1.23 In its report, the expert panel referred to the loss of life at sea by asylum seekers and refugees undertaking irregular maritime journeys to Australia:

> The loss of life on dangerous maritime voyages in search of Australia's protection has been increasing. The number of irregular maritime arrivals

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26 Transcript of joint press conference, Canberra, 28 June 2012, available at: http://www.pm.gov.au/press-office/transcript-joint-press-conference-canberra-29 (accessed 22 February 2013).

27 EM, p. 1. The Expert Panel's Report is available at: http://expertpanelonasylumseekers.dpmc.gov.au/report (accessed 22 February 2013).

28 Expert Panel's Report, August 2012, p. 8.

29 Expert Panel's Report, August 2012, p. 15 (Recommendation 7).

30 Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011, Government Amendments, BP256, available at: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4683 (accessed 22 February 2013); the Hon Mr Chris Bowen MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 14 August 2012, pp 8510-8511 and 8517.

31 House of Representatives, *Votes and Proceedings*, No. 122-15 August 2012, pp 1681-1682.

32 Senate, *Journals of the Senate*, No. 102-16 August 2012, p. 2791.

> …who have arrived in Australia in the first seven months of 2012 (7,120) has exceeded the number who arrived in total in 2011 (4,733) and 2010 (6,850). The likelihood that more people will lose their lives is high and unacceptable. These realities have changed the circumstances that Australia now faces. They are why new, comprehensive and integrated strategies for responding are needed. Those strategies need to shift the balance of Australian policies and regional arrangements to give greater hope and confidence to asylum seekers that regional arrangements will work more effectively, and to discourage more actively the use of irregular maritime voyages.[33]

1.24 As stated by the then Minister in his second reading speech for the current Bill:

> [T]he recommendations in the report are an integrated set of proposals. To be effective in discouraging asylum seekers from risking their lives, the incentives and disincentives the panel recommended must be pursued in a comprehensive manner. The legislative amendments proposed in the [B]ill are part of this integrated approach.[34]

Key provisions of the Bill

1.25 The *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) repealed section 198A of the Migration Act, and replaced that provision with Subdivision B of Division 8 of Part 2 of the Act (the regional processing framework).[35]

1.26 The regional processing framework provides for offshore entry persons to be taken to another country for assessment of their refugee status under the Refugee Convention. The Bill proposes to amend several of these provisions: the key amendments are contained in Part 1 of Schedule 1 of the Bill and are summarised below.

Unauthorised maritime arrivals

1.27 The defined term 'offshore entry persons' will be repealed (item 3 of Schedule 1), and will be replaced by the new term 'unauthorised maritime arrival' in proposed new section 5AA of the Migration Act (item 8 of Schedule 1). A person will be an unauthorised maritime arrival if:

> (a) the person entered Australia by sea:
>
> > (i) at an excised offshore place at any time after the excision time for that place; or
> >
> > (ii) at any other place at any time on or after the commencement of this section; and

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33 Expert Panel's Report, August 2012, p. 7.

34 *House of Representatives Hansard*, 31 October 2012, pp 12738-12739.

35 Section 25 of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).

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

(c) the person is not an excluded maritime arrival.[36]

Visa applications and unauthorised maritime arrivals

1.28 Section 46A of the Migration Act sets out provisions regarding visa applications by offshore entry persons. Items 10 to 14 of Schedule 1 will amend that provision, to reflect the use of the new term 'unauthorised maritime arrival'. The effect of this amendment will be that persons who are unauthorised maritime arrivals will not be able to make a valid visa application, if they are in Australia and they are unlawful non-citizens, unless the Minister exercises a personal discretion under subsection 46A(2) of the Act.

Detention of unlawful non-citizens

1.29 Section 189 of the Migration Act provides for the detention of unlawful non-citizens. An unauthorised maritime arrival will become an unlawful non-citizen if the person entered Australia by sea – as set out in proposed new paragraph 5AA(1)(a) – and is not an excluded maritime arrival. Item 15 of Schedule 1 will amend subsection 189(2) to replace the words 'must detain' with the words 'may detain'. The effect of this amendment will be that an officer will have discretion whether to detain certain persons seeking to enter the migration zone (other than an excised offshore place) if they would, in the migration zone, be unlawful non-citizens.

Unauthorised maritime arrivals and transfer to a regional processing country

1.30 Section 198AD of the Migration Act sets out provisions in relation to taking offshore entry persons to a regional processing country. Items 19 to 30 of Schedule 1 amend this provision, to reflect the use of the new term 'unauthorised maritime arrival'. The effect of these amendments will be that persons who are unauthorised maritime arrivals, and who are detained under section 189, must be removed from Australia to a regional processing country as soon as reasonably practicable.[37]

Bar on certain legal proceedings

1.31 Items 51 to 58 of Schedule 1 make a number of 'consequential' amendments to section 494AA of the Migration Act, which provides for a bar on certain legal proceedings relating to offshore entry persons. The effect of the proposed amendments is to prevent the institution or continuation of certain legal proceedings against the Commonwealth by unauthorised maritime arrivals. For example, proceedings relating to an unauthorised entry (item 52 of Schedule 1).

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36 Proposed new subsection 5AA(1) of the *Migration Act 1958* (Cth) (Migration Act); item 8 of Schedule 1 of the Bill.

37 Subsections 198(1) and 198(2) of the Migration Act.

Reporting obligations

1.32 Item 47A of Schedule 1 of the Bill inserts proposed new section 198AI into the Migration Act, to require the Minister to report annually to each House of Parliament in respect of certain matters – such as the activities conducted under the Bali Process during the year ending on 30 June.

Transitory persons

1.33 The defined term 'transitory person' will be amended (items 4 to 6 of Schedule 1), with the effect that a person will continue to be a transitory person if they have been assessed as a 'refugee' under article 1A of the Refugee Convention.

Transitory persons and transfer to a regional processing country

1.34 Section 198AH of the Migration Act provides for the application of section 198AD to certain transitory persons. Items 43 to 46 of Schedule 1 amend section 198AH, to allow transitory persons to be removed from Australia to a regional processing country, as soon as practicable, if the person is an unauthorised maritime arrival detained under section 189, who was brought to Australia from a regional processing country for a temporary purpose, and who no longer needs to be in Australia for that purpose.

1.35 The Minister explained:

> This amendment will allow the government to bring people assessed as refugees—but who have not yet met the 'no advantage' principle—back to Australia for a temporary purpose such as medical treatment, and then return them to a designated regional processing country pending provision of a durable outcome.[38]

1.36 The 'no advantage' principle was articulated in Recommendation 1 of the Expert Panel's Report as one of six principles which the expert panel considered should shape Australian policy-making on asylum seeker issues:

> The application of a 'no advantage' principle to ensure that no benefit is gained through circumventing regular migration arrangements.[39]

Assessment of refugee status

1.37 Section 198C of the Migration Act sets out provisions regarding the entitlement of certain transitory persons to an assessment of refugee status. Item 48 of Schedule 1 repeals this provision, to remove the entitlement of a transitory person brought to Australia under section 198B of the Act to request an assessment of refugee status if the person remains in Australia for a continuous period of six months. According to the Explanatory Memorandum to the Bill, the proposed amendment is consistent with the 'no advantage' principle.[40]

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38 *House of Representatives Hansard*, 31 October 2012, p. 12739.

39 Expert Panel's Report, August 2012, p. 14 (Recommendation 1).

40 EM, p. 18.

Application and savings provisions

1.38 Part 2 of Schedule 1 of the Bill contains application and savings provisions. For example, the regional processing provisions contained in Subdivision B of Division 8 of Part 2 of the Migration Act, as amended by the Bill, will apply to all persons who entered Australia by sea on or after 13 August 2012 (item 60 of Schedule 1).

Conduct of the inquiry

1.39 The committee advertised the inquiry in *The Australian* on 7 November 2012. Details of the inquiry, including links to the Bill and associated documents, were placed on the committee's website at www.aph.gov.au/senate_legalcon. The committee also wrote to 135 organisations and individuals, inviting submissions by 17 December 2012. Submissions continued to be accepted after that date.

1.40 The committee received 36 submissions, which are listed at Appendix 1. All submissions were published on the committee's website.

1.41 The committee held a public hearing on 31 January 2013 at Parliament House in Canberra. A list of witnesses who appeared at the hearing is at Appendix 2, and the *Hansard* transcript is available through the committee's website.

Acknowledgement

1.42 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.43 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

CHAPTER 2

Key matters

2.1 Submitters and witnesses raised various matters in relation to the Bill. In particular, stakeholders opposed the extension of the regional processing regime from offshore entry persons to unauthorised maritime arrivals on the mainland, and argued that Australia is in breach of its international law obligations, including by transferring responsibility for unauthorised maritime arrivals to regional processing countries. A few witnesses also commented on the omission of reporting obligations in the Bill.

Opposition to extension of regional processing regime

2.2 While a number of submitters and witnesses were expressly supportive of measures aimed at preventing the further loss of life at sea as the result of dangerous maritime journeys, they opposed extending the policy of transferring asylum seekers to third countries for the processing of protection claims.[1] The reasons for this opposition varied.

Flawed policy basis

2.3 In evidence, Professor Penelope Mathew stated that the policy justification for the Bill is flawed:

> [T]he one justification that has been advanced is that we have to stop deaths at sea. Unfortunately, I do not think the bill will do that, even on its own logic. I think that pretending Australia does not exist—excising ourselves from our own migration zone—may, in fact, result in even longer journeys…[T]here was a report about some Sri Lankans who were saying that they would go even further to seek asylum.[2]

2.4 Mr Sean Bain submitted that the Explanatory Memorandum presents the Bill as a reasonable measure designed to rectify inconsistencies with the application of the Migration Act. However, he highlighted the inconsistency between the legal status conferred on irregular maritime arrivals arriving by boat at excised offshore places, and the legal status of those persons arriving by boat at any other place:

> The remedy proposed in the Bill is to extend discriminatory measures active in excised offshore places to the Australian mainland. The [g]overnment is using a questionable and problematic legal anomaly as the

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1 For example, Conference of Leaders of Religious Institutes in New South Wales, *Submission 4*, p. 2; Castan Centre for Human Rights Law, *Submission 17*, p. 2; Australian Human Rights Commission, *Submission 20*, p. 7; Office of the Commissioner for Equal Opportunity (SA), *Submission 21*, p. 1; Federation of Ethnic Communities' Councils of Australia, *Submission 23*, p. 2; Refugee Council of Australia, *Submission 26*, p. 1; Migration Institute of Australia, *Submission 32*, p. 3; Mr Richard Towle, United Nations High Commissioner for Refugees (UNHCR), *Committee Hansard*, 31 January 2013, p. 1.

2 *Committee Hansard*, 31 January 2013, p. 20.

> basis for policy making for the Australian mainland. This is policy on-the-run rather than a measured response to a complex issue.[3]

'Push' and 'pull' factors

2.5 Other evidence argued that the policy of regional processing does not deter asylum seekers from undertaking maritime journeys to Australia,[4] with some submitters focussing on the 'push' and 'pull' factors involved in refugee migration.

2.6 As Dr Gabrielle Appleby, Associate Professor Alexander Reilly and Dr Matthew Stubbs from Adelaide Law School explained:

> [G]iven the severity of the 'push' factors facing asylum seekers who cannot seek protection in their home states, there is a serious doubt as to whether the incapacity to apply for a protection visa and immediate removal from Australia to a third country will deter people from attempting to reach Australia by boat.[5]

2.7 Mr Bain submitted that the key factors in a person's decision to travel onward to Australia are the absence of satisfactory protection arrangements in transit states, and deficiencies of regular pathways for resettlement in a third country:

> Most asylum seekers travelling by boat to Australia depart from Indonesia…Asylum seekers in Indonesia have little hope of obtaining resettlement through formal mechanisms. This serves as a push factor influencing the decisions of asylum seekers to undertake the boat journey to Australia…[T]here are proactive measures the Government could pursue to buffer against push factors and reduce the number of asylum seekers [undertaking] dangerous boat journeys to Australia from Indonesia.[6]

2.8 Professor Ben Saul from the University of Sydney similarly focussed on the position of asylum seekers and refugees arriving in Indonesia:

> [O]ne key reason why asylum seekers and refugees departed or intended to depart Indonesia by boat to Australia was precisely because [United Nations High Commissioner for Refugees (UNHCR)] processing times and resettlement processes were too long and too uncertain. Upon arrival in Indonesia, a person registering with UNHCR will typically wait between [six] and [nine] months just to be interviewed, followed by a further [six] months to a year awaiting a decision, followed by an unspecified period of time waiting for resettlement – which also might never happen.

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3 *Submission 22*, p. 9.

4 For example, NSW Council for Civil Liberties, *Submission 3*, p. 4; Castlemaine Rural Australians for Refugees, *Submission 8*, p. 1; Federation of Ethnic Communities' Councils of Australia, *Submission 23*, p. 3; ACT Refugee Action Committee, *Submission 30*, pp 4-6; Ms Tania Penovic, Castan Centre for Human Rights, *Committee Hansard*, 31 January 2013, pp 10 and 13; Professor Penelope Mathew, *Committee Hansard*, 31 January 2013, p. 20.

5 *Submission 2*, p. 4. For similar comments regarding the strength of 'push' factors, see Ms Yanya Viskovich, *Submission 29*, p. 3.

6 *Submission 22*, pp 3-4.

> One of the most immediate ways Australia could save lives at sea, therefore, is to provide support (through more funding and staffing) to UNHCR to rapidly improve the speed of refugee status determination, as well [as] by increasing the number of resettlement places from Indonesia and the speed with which resettlement happens.[7]

Need for regional approach

2.9 At the public hearing, the United Nations High Commissioner for Refugees' (UNHCR) representative, Mr Richard Towle, emphasised the need for a regional approach to asylum seeker and refugee issues:

> [T]he best way to deal with th[e]se issues is to improve the quality of refugee protection and security for asylum seekers in other parts of the region, to provide them with a real option other than to take these dangerous and difficult journeys to Australia…[T]he proper and the most sensible investment is in South-East Asia. The key lies in South-East Asia, where people are coming from, buttressed by robust, fair asylum procedures in Australia…Unilateral approaches that divert refugee populations on to other countries, particularly poor and under-resourced Pacific island states, do not really deal with the root causes of the problem[.][8]

Australia's alleged breach of its international law obligations

2.10 Many submitters and witnesses identified a wide range of international law obligations, which are relevant to the measures proposed in the Bill. For example:

- article 26 of the Vienna Convention on the Law of Treaties, which states that parties must perform their treaty obligations in good faith;[9]
- article 14(1) of the Universal Declaration of Human Rights, which provides that everyone has the right to seek and enjoy in other countries asylum from persecution;[10]

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7 *Submission 1*, p. 2. Also see Refugee Action Coalition, which commented on 'properly resourced arrangements for the timely processing of asylum seekers in Indonesia', and resettlement in Australia of recognised refugees: *Submission 35*, p. 4.

8 *Committee Hansard*, 31 January 2013, pp 1 and 5-6. For similar views on the need for a regional approach, see, for example, Mr Sean Bain, *Submission 22*, pp 5-6; ACT Refugee Action Committee, *Submission 30*, p. 3; Ms Tania Penovic, Castan Centre for Human Rights, *Committee Hansard*, 31 January 2013, pp 12-13; Mr Paul Power, Refugee Council of Australia, *Committee Hansard*, 31 January 2013, p. 14.

9 For example, Australian Lawyers for Human Rights, *Submission 7*, p. 5; Professor Jane McAdam, *Submission 11*, pp 4-6; Liberty Victoria, *Submission 25*, p. 2; Ms Tania Penovic, Castan Centre for Human Rights, *Committee Hansard*, 31 January 2013, p. 9. These submissions argued that the Bill proposes to block access to Australia and its legal system, without providing a reasonable alternative, thereby breaching the principle to act in good faith.

- article 9 of the International Covenant on Civil and Political Rights (ICCPR), which protects the right to liberty and the right not to be arbitrarily detained;[11] and
- article 3 of the Convention on the Rights of the Child, which requires that member states must give primary consideration to a child's best interests in all actions concerning children.[12]

2.11 Stakeholders particularly expressed concerns regarding Australia's international law obligations under the Refugee Convention, including the principle of *non-refoulement*, and article 26 of the ICCPR.

Refugee Convention

2.12 Submitters and witnesses commented on a range of international law obligations contained in the Refugee Convention, including:

- article 31(1) – the prohibition against the imposition of penalties on refugees;[13] and

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10 For example, Australian Lawyers for Human Rights, *Submission 7*, p. 4; Law Council of Australia (Law Council), *Submission 13*, p. 20; Hotham Mission Asylum Seeker Project, *Submission 14*, p. 3; St Vincent de Paul Society, *Submission 15*, p. 5; Coalition for Asylum Seekers Refugees and Detainees, *Submission 18*, p. 3; Refugee and Immigration Legal Centre (RILC), *Submission 24*, p. 2; Law Society Northern Territory, *Submission 34*, p. 2; Refugee Action Coalition, *Submission 35*, p. 2. These submissions argued that the proposed provisions breach article 14(1) of the Universal Declaration of Human Rights, by preventing unauthorised maritime arrivals from making a valid visa application and thereby seeking asylum in Australia.

11 For example, Law Council, *Submission 13*, pp 27-28; Australian Human Rights Commission, *Submission 20*, pp 8-9. These submissions argued that the Bill breaches article 9, by potentially subjecting unauthorised maritime arrivals to arbitrary detention in third countries.

12 For example, NSW Council for Civil Liberties, *Submission 3*, p. 7; Commissioner for Children and Young People, Western Australia, *Submission 12*, pp 1-2; Law Council, *Submission 13*, p. 28; Humanitarian Research Partners, *Submission 19*, p. 13; Office of the Commissioner for Equal Opportunity (SA), *Submission 21*, p. 2; Refugee Council of Australia (RCA), *Submission 26*, p. 3; Law Institute of Victoria (LIV), *Submission 31*, p. 9. These submissions argued that the proposed provisions breach article 3 of the Convention on the Rights of the Child, by failing to recognise that offshore detention in regional processing countries exposes children to violations of their human rights.

13 For example, Professor Ben Saul, *Submission 1*, p. 1; Dr Gabrielle Appleby, Associate Professor Alexander Reilly and Dr Matthew Stubbs, *Submission 2*, p. 6; Professor Penelope Mathew, *Submission 6*, p. 8; Professor Jane McAdam, *Submission 11*, pp 11-13; Law Council, *Submission 13*, p. 26; Hotham Mission Asylum Seeker Project, *Submission 14*, p. 4; Castan Centre for Human Rights, *Submission 17*, p. 3; Australian Human Rights Commission, *Submission 20*, pp 10-10; RILC, *Submission 24*, p. 2; Liberty Victoria, *Submission 25*, p. 11; RCA, *Submission 26*, p. 2; Ms Yanya Viskovich, *Submission 29*, p. 14. These submissions argued that the proposed provisions breach article 31(1) of the 1951 *Convention Relating to the Status of Refugees*, as amended by the 1967 *Protocol Relating to the Status of Refugees* (Refugee Convention), by penalising asylum seekers and refugees arriving in Australia by maritime means on or after 13 August 2012.

- article 21(1) – the prohibition against the expulsion of refugees lawfully in the territory of a member state.[14]

Principle of non-refoulement

2.13 In general, stakeholders expressed the most concern in relation to the principle of *non-refoulement* (article 33(1)):

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[15]

2.14 A large number of submitters expressed concern that the Bill breaches the *non-refoulement* principle, by applying regional processing arrangements to all unauthorised maritime arrivals arriving by boat on the Australian mainland.[16] Some stakeholders argued that Australia directly breaches this principle by, for example, not permitting refugee status determination to occur in Australia;[17] while others contended that the breach occurs vicariously through the refugee status determination procedures in regional processing countries.[18]

2.15 The Law Council of Australia (Law Council), for example, submitted that the Refugee Convention does not specifically prohibit the excision of territory for migration purposes, or expressly mandate that Contracting States process asylum seekers within their borders:

> However, the non-refoulement obligations contained in the [Refugee] Convention require [s]tate parties to provide access to a refugee status determination process that considers the individual circumstances of the person seeking protection and that complies with international standards and the object and purpose of the [Refugee] Convention.[19]

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14 For example, Castan Centre for Human Rights, *Submission 17*, p. 3. This submission argued that the Bill contravenes article 32(1) of the Refugee Convention, by preventing unauthorised maritime arrivals from making a valid visa application.

15 Article 33(1) of the Refugee Convention.

16 For example, Dr Gabrielle Appleby, Associate Professor Alexander Reilly and Dr Matthew Stubbs, *Submission 2*, p. 6; Professor Jane McAdam, *Submission 11*, p. 11; Castan Centre for Human Rights Law, *Submission 17*, p. 5; Office of the Commissioner for Equal Opportunity (SA), *Submission 21*, pp 1-2; RILC, *Submission 24*, p. 2; RCA, *Submission 26*, p. 2; Ms Yanya Viskovich, *Submission 29*, pp 8-10; Law Society Northern Territory, *Submission 34*, p. 2.

17 For example, Australian Lawyers for Human Rights, *Submission 7*, pp 6-7; Liberty Victoria, *Submission 25*, p. 12.

18 For example, Professor Ben Saul, *Submission 1*, p. 1; Australian Human Rights Commission, *Submission 20*, p. 10; LIV, *Submission 31*, p. 6.

19 *Submission 13*, p. 21.

2.16 Several submitters considered that current offshore refugee status determination procedures do not comply with international standards. Professor Saul stated that the Bill fails to meet these standards:

> [B]y degrading the status determination procedure for more irregular arrivals, the Bill increases the probability of bad decisions and heightens the risk of refoulement.[20]

Discrimination among asylum seekers

2.17 The issue of discrimination between regular and irregular arrivals (unauthorised maritime arrivals) in Australia was also a concern in relation to article 26 of the ICCPR, which provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[21]

2.18 Several submitters and witnesses argued that the proposed measures breach Australia's international law obligations under article 26 of the ICCPR, by discriminating among asylum seekers based on their mode of arrival in Australia;[22] the time of their arrival;[23] and also on the basis of race, or national or social origin due to certain groups of asylum seekers and refugees having no option but to travel by boat.[24]

2.19 The Law Council described the practical effect of such discrimination:

> [The] Bill effectively creates two classes of refugees based on mode of arrival. Under the approach endorsed by the [Bill], a temporary visa holder arriving by air who becomes unlawful after visa expiry and subsequently applies for protection will have access to the Migration Act provisions and be able to access legal or migration assistance, merits review and judicial review in Australia. In contrast, a person who arrives by boat seeking protection will be liable to transferred to an offshore location. If this occurs,

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20 Professor Ben Saul, *Submission* 1, p. 1. Also see Law Council, *Submission 13*, p. 20; RCA, *Submission 26*, p. 2; Professor Jane McAdam, *Committee Hansard*, 31 January 2013, p. 23.

21 Also see article 3 of the Refugee Convention, which provides that Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

22 For example, Dr Gabrielle Appleby, Associate Professor Alexander Reilly and Dr Matthew Stubbs, *Submission 2*, p. 4; Castan Centre for Human Rights Law, *Submission 17*, p. 6; RILC, *Submission 24*, p. 2; Liberty Victoria, *Submission 25*, p. 10; Mr Richard Towle, UNHCR, *Committee Hansard*, 31 January 2013, p. 2.

23 For example, Professor Jane McAdam, *Submission 11*, pp 13-14; Ms Tania Penovic, Castan Centre for Human Rights, *Committee Hansard*, 31 January 2013, p. 10; Ms Rosemary Budavari, Law Council, *Committee Hansard*, 31 January 2013, p. 10.

24 For example, Law Council, *Submission 13*, p. 27; LIV, *Submission 31*, p. 5.

> he or she will be dependent upon whatever legal frameworks and processes apply in that location for his or her protection claim.[25]

2.20 Dr Appleby, Associate Professor Reilly and Dr Stubbs argued:

> The concept of the excised offshore place makes sense if there is a territorial migration zone. However, the Bill completely changes the concept of the migration zone. It is no longer an absolute concept (where land is either in or out of the migration zone). It is now a relative concept. The same territory can be part of the migration zone, or not, depending on the mode of arrival of the person and their national identity.[26]

2.21 In evidence, Mr Towle from the UNHCR reflected on the current 'bifurcated' model of differential treatment, and asserted that the Bill entrenches this model:

> In [UNHCR's] view, this bifurcated system can discriminate unfairly and arbitrarily on the basis of the manner of arrival if the rights and entitlements are significantly different, which in our assessment they will be under the current policy parameters of the government.
>
> …[T]he UNHCR does not agree that deterrence is a legitimate justification by which substantially different treatment can be justified.[27]

Access to the legal system

2.22 Some stakeholders expressed concern that the measures proposed in the Bill deny asylum seekers and refugees access to the legal system in Australia,[28] for example, by:

- transferring unauthorised maritime arrivals from Australia to regional processing countries (item 20 of Schedule 1);
- repealing certain transitory persons' rights to access the Refugee Review Tribunal, as set out in section 198C of the Migration Act (item 48 in Schedule 1);[29] and

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25 *Submission 13*, p. 26. For similar comments, see Dr Gabrielle Appleby, Associate Professor Alexander Reilly and Dr Matthew Stubbs, *Submission 2*, p. 4; Hotham Mission Asylum Seeker Project, *Submission 14*, p. 3; Office of the Commissioner for Equal Opportunity (SA), *Submission 21*, p. 1; Professor Mary Crock and Ms Hannah Martin, *Submission 36*, p. 4.

26 *Submission 2*, p. 4. For similar comments regarding the conceptual change, see LIV, *Submission 31*, p. 5. For similar comments regarding potential discrimination based on country of origin or race, see Law Council, *Submission 13*, p. 27; Officer of the Commissioner for Equal Opportunity (SA), *Submission 21*, p. 2; Liberty Victoria, *Submission 25*, p. 10.

27 *Committee Hansard*, 31 January 2013, p. 2. Also see Australian Human Rights Commission, *Submission 20*, p. 7 and LIV, *Submission 31*, p. 5, which did not accept saving lives at sea as justification for the discriminatory treatment.

28 For example, Dr Gabrielle Appleby, Associate Professor Alexander Reilly and Dr Matthew Stubbs, *Submission 2*, p. 5; NSW Council for Civil Liberties, *Submission 3*, p. 6.

29 For example, Hotham Mission Asylum Seeker Project, *Submission 14*, p. 5; RILC, *Submission 24*, p. 6.

- banning the institution or continuation of certain legal proceedings against the Commonwealth, as set out in section 494AA of the Migration Act (items 51 to 58 of Schedule 1).[30]

2.23 The Law Council expressed concern that the Bill fails to adhere to several rule of law principles, including, for example, not providing 'unauthorised maritime arrivals' with equal access to competent and independent legal advice, as is available to asylum seekers arriving by air.[31] Australian Lawyers for Human Rights agreed:

> There is better access to legal representation when a refugee is processed in Australia, including a clearly defined process for the provision of interpreters, migration agents, solicitors and barristers. Historically, legal assistance to offshore detainees in declared countries is not only unavailable – it has been actively blocked.[32]

2.24 Mr Towle from the UNHCR highlighted the potential for discrimination in the rights, entitlements and treatment of people who have arrived by boat in Australia after 13 August 2012, and who have not been transferred offshore for processing:

> [B]y far the majority of the post 13 August arrivals group will remain in Australia. In [UNHCR's] view, the rights and entitlements for their treatment in this country needs to be aligned as closely as possible to all other asylum seekers to avoid the kind of discriminatory treatment that… would be offensive to article 31 of the [R]efugee [C]onvention [the prohibition against penalisation of non-citizens].
>
> For those people who will inevitably remain in Australia and be processed in Australia, we are concerned that they face uncertainty, delays to the commencement of their refugee status determination process and lesser rights and entitlements, potentially following recognition as refugees as well.[33]

Breach of rules of natural justice

2.25 Liberty Victoria and the Law Council particularly commented on proposed new subsection 198AE(1A), which will allow the Minister to vary or revoke a determination made under subsection 198AE(1) of the Act (item 31 of Schedule 1). Subsection 198AE(1) of the Migration Act allows the Minister to determine that a person is exempt from transfer to a regional processing country.

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30 For example, NSW Council for Civil Liberties, *Submission 3*, p. 6; Humanitarian Research Partners, *Submission 19*, p. 5; Ms Yanya Viskovitch, *Submission 29*, p. 13; LIV, *Submission 31*, p. 9.

31 *Submission 13*, pp 30-31. For similar comments regarding the disparity in access to legal representation, see Federation of Ethnic Communities' Councils of Australia, *Submission 23*, p. 4; LIV, *Submission 31*, p. 8; Law Society Northern Territory, *Submission 34*, p. 3.

32 *Submission 7*, p. 7.

33 *Committee Hansard*, 31 January 2013, p. 2.

2.26 Liberty Victoria described proposed new subsection 198AE(1A) as a 'retrospective power',[34] and the Law Council remarked on it not being subject to the rules of natural justice (subsection 198AE(3) of the Migration Act; item 33 of Schedule 1):

> The effect of these amendments is to invest the Minister with a broad power to reverse a decision that prevents a person from being transferred offshore – without requiring that this decision be made in accordance with the rules of natural justice. Any individual subject to these provisions will be placed in a precarious situation where decisions that could have a highly significant impact on their visa status and well-being can be made and changed without regard to basic principles of fairness and justice.[35]

2.27 The Law Council of Australia recommended that the Minister be required to:

> …have regard to the full range of Australia's human rights obligations and [be] bound by the rules of natural justice when making decisions under section 198AE to exempt certain people from being transferred to a regional processing country, or to vary or change such an exemption, and to allow for judicial review of such decisions.[36]

Transferring responsibility to regional processing countries

2.28 Some submitters and witnesses argued that Australia is seeking to avoid its international protection obligations, by transferring responsibility for asylum seekers and refugees who arrive in Australia by boat to third countries for regional processing.[37] For example, the Law Council submitted:

> [The Bill] broadens the scope of the Government's offshore processing policy and leaves in no doubt the Government's intention to avoid a number of its human rights obligations at international law, and in particular its obligations under the [Refugee] Convention.[38]

2.29 According to the UNHCR, a member state cannot avoid its international law obligations on account of domestic policy:

> [U]nder international law any excision of territory for a specific purpose has no bearing on the obligation of a country to abide by its international treaty obligations which apply to all of its territory. This includes the 1951 Refugee Convention, to which Australia is a party.

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34 *Submission 25*, p. 8.

35 *Submission 13*, p. 33.

36 *Submission 13*, p. 7. The Law Council of Australia made a similar recommendation in respect of the exercise of ministerial discretion under section 46A of the Migration Act.

37 For example, Conference of Leaders of Religious Institutes in New South Wales, *Submission 4*, p. 2; Australian Lawyers for Human Rights, *Submission 7*, p. 3; Hotham Mission Asylum Seeker Project, *Submission 14*, p. 6; Mr Sean Bain, *Submission 22*, p. 8; Law Society Northern Territory, *Submission 34*, p. 3; Mr David Manne, RILC, *Committee Hansard*, 31 January 2013, p. 15.

38 *Submission 13*, p. 18.

…

> If asylum-seekers are transferred to another country, the legal responsibility for those asylum-seekers may in some circumstances be shared with that other country, but such an arrangement would not relieve Australia of its own obligations under the [Refugee] Convention.[39]

2.30 Several submitters and witnesses provided examples of instances in which Australia's international protection obligations could be breached, or are alleged to have been breached, by a third country to which asylum seekers and refugees have been sent from Australia for regional processing.[40]

2.31 Professor Mathew, for example, contended that Australia could only rely on Nauru and Papua New Guinea for the purpose of meeting international law obligations if those countries had relevant legal obligations, and could implement those obligations in practice:

> Nauru is not party to the ICCPR, and neither Papua New Guinea nor Nauru are party to [the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT)]…Nauru and Papua New Guinea are bound by customary international legal obligations with respect to torture and related ill-treatment, however it is foolhardy to rely on mere obligation alone and essential to ensure that the obligations are respected in practice.
>
> Australia is relying on the procedures for determination of refugee status in [Papua New Guinea] and Nauru to ensure that Australia's own *non-refoulement* obligations are met under the Refugee Convention. In theory, these procedures would also go some way to ensuring that Australia's *non-refoulement* obligations under the ICCPR and CAT are met too. However, Papua New Guinea and Nauru do not presently have the capacity to determine refugee status fairly and efficiently.[41]

2.32 In this context, some submitters and witnesses argued that the Bill adversely affects Australia's international reputation,[42] and does not encourage ratification of

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39 *Submission 28*, p. 2. Also see Australian Lawyers for Human Rights, *Submission 7*, p. 4; Law Council, *Submission 13*, pp 21-22; Humanitarian Research Partners, *Submission 19*, pp 8-9; LIV, *Submission 31*, p. 6.

40 For example, Professor Jane McAdam, *Submission 11*, pp 9-10; Law Council, *Submission 13*, pp 22-23; Australian Tamil Congress, *Submission 16*, p. 2; RILC, *Submission 24*, p. 4; Mr Paul Power, RCA, *Committee Hansard*, 31 January 2013, p. 14.

41 *Submission 6*, p. 4. For similar comments in relation to capacity to fairly and efficiently determine refugee status, see Australian Lawyers for Human Rights, *Submission 7*, p. 3; Liberty Victoria, *Submission 25*, p. 12.

42 For example, see Ms Yanya Viskovich, *Submission 29*, p. 3; Associate Professor Alexander Reilly, University of Adelaide, *Committee Hansard*, 31 January 2013, p. 19.

and compliance with international instruments.[43] Stakeholders indicated further that the Bill undermines a multilateral, or regional, protection regime.[44]

2.33 At the public hearing, Mr Towle from the UNHCR commented:

> [T]he practice of excising territory domestically not only impacts on Australia's international obligations but is also watched very carefully by other countries, which face different and sometimes similar problems and challenges around balancing the humanitarian and human rights needs of individuals against the legitimate concerns of state about border integrity and security. We are concerned that measures to excise large portions of territory to set up systems which substantially reduce fundamental refugee protection rights set a negative precedent internationally. If all 148 countries that have signed the refugee convention were to set up similar kinds of systems, which are in essence designed to deter and relocate asylum seeker populations to other territories, this would have quite a significant and deleterious impact on the international system of refugee protection.[45]

Departmental response

2.34 Officers from the Department of Immigration and Citizenship (Department) confirmed that the Department has considered whether the Bill is consistent with Australia's international obligations:

> Part of the paperwork around the tabling of the [B]ill was a statement about human rights obligations as seen against the purpose and the provisions of the [B]ill. We are of the view…and have advice to the effect that it is not in breach of our international obligations.[46]

2.35 A representative confirmed further that the Australian Government is working with both the Nauruan and Papua New Guinean Governments:

> …the arrangements for refugee status determination and the memoranda of understanding that [we] have with those countries provides that all people who are transferred under these arrangements under our legislation will have access to refugee status determination processes.[47]

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43 For example, Professor Penelope Mathew, *Committee Hansard*, 31 January 2013, p. 20.

44 For example, see LIV, *Submission 31*, p. 3; Mr Richard Towle, UNHCR, *Committee Hansard*, 31 January 2013, p. 2; Associate Professor Alexander Reilly, *Committee Hansard*, 31 January 2013, p. 19.

45 *Committee Hansard*, 31 January 2013, p. 3.

46 Dr Wendy Southern PSM, Department of Immigration and Citizenship (DIAC), *Committee Hansard*, 31 January 2013, p. 26. Also see Ms Vicki Parker, DIAC, *Committee Hansard*, 31 January 2013, p. 26.

47 Dr Wendy Southern PSM, DIAC, *Committee Hansard*, 31 January 2013, p. 26.

Reporting requirements

2.36 At the public hearing, a few witnesses provided evidence in relation to the inadequacy of the Bill's reporting requirements. Ms Penovic from the Castan Centre for Human Rights commented:

> The Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 was the apogee, if you like, of the Howard government's Pacific strategy and, in effect, would have erased Australia's onshore protection program and converted it into a discretionary resettlement scheme. Yet this earlier bill would have required the minister to report on arrangements for refugee status assessment, accommodation, education and health care. The current bill lacks these safeguards, raising profound concerns about the protections accorded to those subject to its provisions.[48]

2.37 Professor McAdam also expressed concerns regarding the sufficiency of reports which are, or have been, presented to the parliament, and questioned whether the conditions in which people are detained offshore will in future be rigorously scrutinised.[49]

Committee view

2.38 The committee notes that the intent of the Bill is to prevent the further loss of life at sea by dangerous maritime journeys to Australia. Not only is this the stated rationale for the Bill,[50] it was also a key factor in the deliberations of the independent Expert Panel on Asylum Seekers (expert panel), which recommended the current course of action to the Australian Government.[51] Although the number of persons arriving at the Australian mainland is relatively small,[52] the committee concurs that any loss of life at sea by persons seeking asylum is simply not acceptable.[53]

2.39 The measures adopted in the Bill represent one approach to resolving asylum seeker and refugee issues, and the committee is particularly mindful that the proposed legislation implements one of 22 integrated recommendations – all of which the

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48 *Committee Hansard*, 31 January 2013, p. 9. Also see former section 198A of the Migration Act, which was repealed by section 25 of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*. Former section 198A contained a requirement for the Minister to consider human rights obligations in the designation of a country for regional processing.

49 *Committee Hansard*, 31 January 2013, p. 23.

50 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 31 October 2012, pp 12738-12739; the Hon Julia Gillard MP, Prime Minister and the Hon Chris Bowen MP, Minister for Immigration and Citizenship, 'Transcript of joint press conference', 13 August 2012, available at: http://www.minister.immi.gov.au/media/cb/2012/cb189223.htm (accessed 13 February 2013).

51 Expert Panel's Report, August 2012, p. 17 (Recommendation 14).

52 Dr Wendy Southern PSM, DIAC, *Committee Hansard*, 31 January 2013, p. 26; DIAC, answer to question on notice, received 13 February 2013, p. 1.

53 Expert Panel's Report, August 2012, p. 7.

Australian Government has accepted in principle, and has committed to implementing.[54]

2.40 In view of the efforts currently being undertaken by the Australian Government and regional processing countries to implement fair and effective regional processing arrangements,[55] the committee supports the intent of the Bill, subject to one important amendment.

2.41 The committee considers that a comprehensive reporting requirement would be desirable, to ensure transparency and accountability in relation to regional processing arrangements. The committee considers that such an important requirement should be included in the Bill, to enable the parliament to properly scrutinise the arrangements for unauthorised maritime arrivals transferred to regional processing countries as a result of this legislation. The details to be provided to the parliament should cover issues such as refugee status determination procedures and their outcomes, as well as arrangements for the accommodation, health care and education of unauthorised maritime arrivals in regional processing countries.

Recommendation 1

2.42 The committee recommends that the Bill be amended to require the Minister for Immigration and Citizenship to report annually to both Houses of Parliament in respect of the following matters:

- **arrangements during each 12 month period for unauthorised maritime arrivals seeking asylum, including arrangements for:**
  - **assessing any claims for refugee status made by such unauthorised maritime arrivals;**
  - **the accommodation, health care and education of such unauthorised maritime arrivals;**
- **the number of asylum claims by unauthorised maritime arrivals that are assessed during each 12 month period; and**
- **the number of unauthorised maritime arrivals determined during each 12 month period to be refugees.**

54 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 31 October 2012, pp 12738-12739; the Hon Julia Gillard MP, Prime Minister and the Hon Chris Bowen MP, Minister for Immigration and Citizenship, 'Transcript of joint press conference', 13 August 2012, available at: http://www.minister.immi.gov.au/media/cb/2012/cb189223.htm (accessed 13 February 2013).

55 See Dr Wendy Southern PSM, DIAC, *Committee Hansard*, 31 January 2013, p. 26; Ms Vicki Parker, DIAC, *Committee Hansard*, 31 January 2013, pp 28-29; Ms Kate Pope PSM, DIAC, *Committee Hansard*, 31 January 2013, p. 30.

Recommendation 2

2.43 Subject to recommendation 1, the committee recommends that the Senate pass the Bill.

Senator Trish Crossin

Chair

DISSENTING REPORT BY THE AUSTRALIAN GREENS

1.1 This Bill amends the *Migration Act 1958* (Cth) so that when refugees arrive by sea they cannot access normal immigration procedures in applying for protection. It effectively excises the entire mainland Australia from the ordinary operations of the migration zone whenever a refugee or asylum seeker arrives by boat.

1.2 The two-tiered arrangement of protection application processing, in which refugees arriving by boat are treated differently to air arrivals, was first established by the Howard Government in 2001.

1.3 This Bill, proposed in 2012 by the Labor Government, goes even further than former Prime Minister Howard was able to in setting up discriminatory and punitive arrangements regarding asylum seekers who arrive by boat. The Bill is another aspect of the government's race to the bottom with the Coalition. Punishing refugees for seeking protection in Australia is the central concept of this Bill, even though there is ample evidence that many people who arrive here by boat have not had the opportunity of taking any other safer option.

1.4 This Bill has been heavily criticised by a wide range of legal and human rights experts who submitted to the inquiry. The Australian Greens concur with their views that this Bill is inconsistent with the spirit and purpose of the Refugee Convention to which Australia is party and undermines Australia's obligations under international law.

1.5 The primary effect of this Bill is that it would extend the punitive offshore processing regime to a new class of people – all asylum seekers who arrive on the Australian mainland. This means a wider group of men, women and children will be exposed under Australian law to being sent offshore to places including Papua New Guinea and Nauru for indefinite detention, in harsh conditions which do not adhere to the rule of law, human rights or basic compassion. There has been no evidence put forward to justify this Bill. It has been brought to Parliament on the basis of pure politics, on no strong policy basis, as part of the government and Coalition's race to the bottom to look tough on refugees.

1.6 For these reasons, the Australian Greens strongly oppose this Bill and recommend that it should not be passed.

Recommendation 1

1.7 The Australian Greens recommend that the Bill should not be passed.

Senator Sarah Hanson-Young
Australian Greens

Senator Penny Wright
Australian Greens

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Professor Ben Saul
2	Dr Gabrielle Appleby, Associate Professor Alexander Reilly and Dr Matthew Stubbs
3	NSW Council for Civil Liberties
4	Conference of Leaders of Religious Institutes NSW
5	Catholic Religious Australia
6	Professor Penelope Mathew
7	Australian Lawyers for Human Rights
8	Castlemaine Rural Australians for Refugees
9	Name Withheld
10	Ms Fabia Claridge
11	Professor Jane McAdam
12	Commissioner for Children and Young People WA
13	Law Council of Australia
14	Hotham Mission Asylum Seeker Project
15	St Vincent de Paul Society
16	Australian Tamil Congress
17	Castan Centre for Human Rights Law
18	Coalition for Asylum Seekers, Refugees and Detainees
19	Humanitarian Research Partners

20	Australian Human Rights Commission
21	Office of the Commissioner for Equal Opportunity (SA)
22	Mr Sean Bain
23	The Federation of Ethnic Communities' Councils of Australia
24	Refugee and Immigration Legal Centre
25	Liberty Victoria
26	Refugee Council of Australia
27	Department of Immigration and Citizenship
28	United Nations High Commissioner for Refugees
29	Ms Yanya Viskovich
30	ACT Refugee Action Committee
31	Law Institute of Victoria
32	The Migration Institute of Australia
33	Australian Customs and Border Protection Service
34	Law Society Northern Territory
35	Refugee Action Coalition
36	Professor Mary Crock and Ms Hannah Martin

ADDITIONAL INFORMATION RECEIVED

1 Responses to questions on notice provided by Department of Immigration and Citizenship on 13 and 18 February 2013

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, 31 January 2013

BUDAVARI, Ms Rosemary, Co-Director, Criminal Law and Human Rights, Law Council of Australia

CONSTANTINOU, Ms Katie, Assistant Secretary, Community Support and Children Branch, Department of Immigration and Citizenship

HANSEN, Ms Ellen, Senior Protection Officer for Australia, New Zealand, Papua New Guinea and the Pacific, United Nations High Commissioner for Refugees

LARKINS, Ms Alison, First Assistant Secretary, Refugee, Humanitarian and International Policy Division, Department of Immigration and Citizenship

MANNE, Mr David, Executive Director and Principal Solicitor, Refugee and Immigration Legal Centre

MATHEW, Professor Penelope, Private capacity

McADAM, Professor Jane, Private capacity

MOULDS, Ms Sarah, Senior Policy Lawyer, Criminal Law and Human Rights, Law Council of Australia

PARKER, Ms Vicki, Chief Lawyer, Governance and Legal Division, Department of Immigration and Citizenship

PENOVIC, Ms Tania, Deputy Director, Castan Centre for Human Rights Law, Monash University

POPE, Ms Kate, PSM, First Assistant Secretary, Community Programs and Children, Department of Immigration and Citizenship

POWER, Mr Paul, Chief Executive Officer, Refugee Council of Australia

REILLY, Associate Professor Alexander, University of Adelaide

SOUTHERN, Dr Wendy, PSM, Deputy Secretary, Department of Immigration and Citizenship

TOWLE, Mr Richard, Regional Representative for Australia, New Zealand, Papua New Guinea and the Pacific, United Nations High Commissioner for Refugees