Hotham Mission
Asylum Seeker Project

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Monday, 17 December, 2012

Dear Committee members

Thank you for the opportunity to comment on the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012.

Hotham Mission Asylum Seeker Project **does not** support the Bill, and recommends that the Committee does NOT support its passage by the Parliament.

Please find our comments in the following document.

Yours sincerely,

Sarah Sanders

Policy and Research Officer
Hotham Mission Asylum Seeker Project

WHO WE ARE

Hotham Mission Asylum Seeker Project is a specialist non-government organisation based in Melbourne. We work with people seeking asylum who are lawfully awaiting an outcome on their refugee or humanitarian protection claim, but who face homelessness and destitution without community support.

The Asylum Seeker Project (ASP) envisions a future Australia in which those seeking asylum are treated with compassion, fairness and timeliness. We support and advocate for the most vulnerable asylum seekers in our community. We support and provide alternatives to mandatory detention.

In 2011, ASP expanded the scope of its work to house and to provide casework support for unaccompanied young people, families and vulnerable adults who are released from closed detention into community detention.

ASP provides:

- professional casework support
- housing
- basic living assistance (BLA)
- help with utilities and emergencies
- volunteer one-to-one support (LinkUP)
- men's and women's support groups
- policy advocacy
- research towards a better reception framework for the future

ASP led two ground-breaking multi-agency research projects in 2009-2010, addressing "Reception Housing for People Seeking Asylum" and "The Convention on the Rights of the Child as it applies to Humanitarian Appellant Children".

INTRODUCTION

ASP **does not support** the introduction of the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012. The Bill breaches international law and fails to uphold basic human rights principles. The amendments clearly contravene articles and important principles of the Geneva Convention[1], the Universal Declaration of Human Rights (UDHR)[2], and other universal human rights instruments. ASP believes that we need to respect the rights of all individuals and uphold our international obligations which we helped to shape and have committed to endorse.

ASP is primarily concerned with two major aspects of the Bill:

1. Classification of people arriving by boat anywhere on mainland as Unauthorised Maritime Arrivals
2. Transitory persons and related amendments:

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[1] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 and Protocol relating to the status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

[2] Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (10 December 1948)

a. Classification of people as 'transitory persons' even after they have been found to be refugees

b. Prohibiting all transitory persons to access legal review even if they have been in Australia for more than six months

We will discuss both of these aspects in regards to specific breaches of human rights and the Geneva Convention. We will then also discuss how the major themes of the Bill contradict our international obligations more broadly.

SECTION 1- UNAUTHORISED MARITIME ARRIVALS

We disagree with the amendments which will classify people arriving to the mainland by boat as 'offshore entry persons'. We do not support the current excision of Australian territory from the migration zone, and these amendments will significantly increase the amount of our land which is excluded. We are particularly concerned about the limitation on individuals to make valid visa applications (for example, amendment 18 and 76) if they arrive to our shores by boat seeking protection. This clearly contradicts article 14 (1) of UDHR which states that "everyone has the right to seek and to enjoy in other countries asylum from persecution". It also contradicts the key principles of the Geneva Convention such as non- refoulement; non-penalization; and non-discrimination.

The principle of non-refoulement is one of the cornerstones of the Geneva Convention (article 33). It is designed to protect people from being returned to places where their lives are in danger. The amendments will not allow for people arriving anywhere on our shores to make a valid visa application, unless the minister thinks it is in the best interests of the public to allow them to do so. This means that people can effectively be 'screened-out' without having their cases heard, and returned to their countries of origin. Without having had the opportunity to present their cases and state their reasons for seeking protection, it is likely that people will be sent back to countries where their lives are in danger.

The amendments also breach the principle of non-discrimination (article 3), as they discriminate against people based upon their mode of arrival to Australia. The proposed amendments are only relevant to those who arrive to Australia by boat. Those who arrive by plane will not be considered to be 'offshore entry persons' and will still be able to lodge valid claims for protection. This clearly discriminates against those who make their journey here by boat, which is particularly discriminatory given that they are unlikely to have chosen this mode of arrival if they had access to an alternative, due to risks of travelling by boat. The excision of territory from the migration zone is done in order to create a false dichotomy between authorised and unauthorised arrivals. This supports the perception that those arriving by boat are 'illegal'; which contradicts the Geneva Convention which clearly states that it can be necessary for those seeking protection to undertake journeys outside of mainstream migration channels in order to reach a place of safety. This is emphasised in the Introductory Note[3]which states that "the seeking of asylum can require refugees to breach immigration rules".

[3] Office of the United Nations High Commissioner for Refugees, 2010, "introductory Note", *Convention and*

This concept is further emphasised through article 31 of the Geneva Convention which prohibits states from imposing penalties on refugees for unauthorised entry or presence in their territory. This recognises that those seeking asylum have safety as their upmost priority, and that they may have to undertake journeys outside of mainstream migration channels in order to reach a place of safety. Hence, people often have no choice but to use whatever means of entry is available to them at that time. The excision of Australian territory to exclude those arriving by boat therefore does not respect the principles of the Convention as it punishes people simply for seeking safety.

There are many elements of the proposed amendments which are in breach of article 31 of the Convention. Not only does the excision of the mainland fail to recognise the necessity of asylum seekers to utilise irregular migration networks, it also frames such arrivals as illegal and reinforces these false beliefs within the Australian community. This provides justification for the imposition of penalties on people who arrive to Australia by boat.

Despite the use of the word 'disincentives' to describe the range of recommendations included in the Houston report, we submit that many of these measures are in fact punishments or penalties. Exile is a punishment that has been used historically in many contexts around the world, and the sending of persons to island offshore locations is a punishment that has been used in the criminal justice systems of the Commonwealth. The restrictions placed upon people and the limits of what they can access, such as the legal system or employment, can also be clearly seen as punishments or penalties.

SECTION 2- TRANSITORY PERSONS

We are concerned about the amendments related to 'transitory persons', particularly in regards to two main areas. These are the ability to send, or to continue to keep, transitory persons in offshore processing centres; and also the removal of access to Australian legal procedures when on the mainland for an extended period of time.

Offshore processing

The proposed amendments enable people to be classified as 'transitory persons' even after they have been found to be a refugee. This is a new category of people created through the principle of 'no advantage' which will mean that people will need to wait for a certain number of years after they have been found to be refugees before they are able to settle as permanent residents in Australia. Amendments 129-131 allow for transitory persons to be sent to offshore processing centres, or for them to remain there if this is where they are already residing.

If transitory persons have been found to be refugees, then they would no longer be considered to be unlawful, and therefore their rights to liberty and freedom of movement should be respected. Article 12 of the International Covenant on Civil and Political Rights (ICCPR)[4] states that "everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence". Alongside this, article 9 of the ICCPR sets out the right to liberty and states that no one shall be subjected to arbitrary detention. These articles

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Protocol Relating to the Status of Refugees, UNCHR, http://www.unhcr.org/3b66c2aa10.html

[4] International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171

clearly show that the transfer of such people offshore and their continued detention are major human rights breaches and are in conflict with our international obligations.

Lack of access to legal review

We are concerned about the prohibition on transitory persons from accessing independent assessments of their asylum claims regardless of how long they spend in Australia. This is outlined in Amendments 135 and 136, which state that transitory persons who spend a continuous period of six months or more in Australia will not entitled to request an assessment of refugee status through merits or judicial review processes. This prohibition contradicts our international obligations, as it does not respect the right of people to access the judicial system in line with article 16 of the Convention. Article 16 states that "a refugee shall have free access to the courts of law on the territory of all Contracting States". Clearly, according to our international obligations, if a person seeking asylum is in Australia then they should be able to access the Refugee Review Tribunal and further merits and judicial review processes.

It is inevitable that some individuals will need to be transferred to the Australian mainland from offshore locations for periods of time due to medical reasons. Offshore processing in Nauru and Papua New Guinea involves inherent health risks due to the living conditions on the islands, the presence of tropical diseases such as dengue fever and malaria, and also due to the well documented mental health disorders which are likely to occur in a detention environment. For example, we have recently seen a man transferred to Australia from Nauru due to the necessity of medical treatment required for his physical and mental health post a 50 day hunger strike.

As well as these health reasons, many other people will be transferred to the Australian mainland due to a lack of capacity in offshore centres or due to various other operational reasons. Such individuals are transferred in situations outside of their control. It is unlikely for such people to be able to come and stay deliberately as the proposed amendments imply; as these transfers would be beyond the control of the individuals involved and removals back to offshore centres would be implemented by the Department of Immigration and Citizenship when necessary. Under these circumstances, it is unjust for us to allow these individuals to reside in our country without access to the law and judicial system which is meant for all.

SECTION 3- OVERALL HUMAN RIGHTS OBLIGATIONS

The Statement of Compatibility with Human Rights attached to the Explanatory Memorandum of this Bill outlines some of the major human rights abuses that are likely to occur if this is adopted as legislation. However, the Statement then disregards these abuses by stating that the people affected will not have officially arrived in Australian territory and therefore Australia is not obliged to honour these rights. A major overarching principle of the UN Declaration on Human Rights is that it is intended to apply to everyone, regardless of any other factor, including migration status.

As articulated by McAdams[5], there is a "whole body of universal human rights law which applies to everyone, irrespective of their nationality or formal legal status". Human rights are intended to

[5] McAdams, J., 2005. "Humane Rights: The Refugee Convention as a Blueprint for Complementary Protection Status", Paper presented at *Moving On: Forced Migration and Human Rights* Conference, NSW Parliament House, 22/11/2005

be above local politics, hence why so many international conventions and agreements have been established in order to enable this to occur. Through the proposed bill, it is clear that we are not currently committed to fulfilling our international obligations and respecting the rights of all people, which can be seen as a selective withdrawal from the Geneva Convention based upon our own local politics. As discussed by Manne[6], when people seeking asylum arrive on our shores we have specific obligations towards them, and we have agreed to do this through the Geneva Convention and various other human rights instruments. It is not fair in an international context for us to remove our borders to 'get around' our international commitments.

The proposed legislation applies solely to the Migration Act, and excises Australia for this purpose only. It does not change that Australia exists, it is merely a legal fiction designed to remove the ability of people to access our refugee determination system. However, so long as our shoreline physically exists, and so long as Australia continues as a nation, then the rule of law must apply and we must continue to uphold our international human rights obligations. This view is also shared by the UNHCR, who state that their "longstanding view is that under 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"[7].

[6] Manne, D., 2003. "Excision crosses ethical border", *The Courier Mail*, 6/11/2003

[7] United Nations High Commissioner for Refugees, 2012. "UNHCR Statement: Migration Amendment (Unauthorised Maritime Arrivals and Other Measures Bill) 2012", *UNHCR*, 31/10/2012, http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=277&catid=35&Itemid=63