



Australian Government
Department of Immigration and Citizenship

**DIAC Submission to the Senate Legal and Constitutional
Affairs Legislation Committee Inquiry into the Migration
Amendment (Unauthorised Maritime Arrivals and Other
Measures) Bill 2012**

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people our business

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The Department of Immigration and Citizenship welcomes the opportunity to provide comment to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, following the introduction of this Bill into the House of Representatives on 31 October 2012. The Bill passed the House of Representatives on 27 November 2012, with an amendment moved by Mr Rob Oakeshott MP.

1.0 CONTEXT AND BASIS OF THE BILL

On 27-28 June 2012, the Australian Parliament debated the Migration Legislation Amendment (the Bali Process) Bill 2012 – introduced by Mr Rob Oakeshott MP – to amend the *Migration Act 1958* (the Migration Act) to enable offshore processing of asylum claims. The debate in the Parliament was brought on following another tragedy at sea. While the House of Representatives passed this bill, it did not pass the Senate.

In response, the Prime Minister and Minister for Immigration and Citizenship announced the creation of an Expert Panel on Asylum Seekers (Expert Panel) on 28 June 2012. The Expert Panel was asked to provide advice and recommendations to the Government on policy options available, and in its considered opinion, the efficacy of such options, to prevent asylum seekers risking their lives on dangerous boat journeys to Australia. The Panel was led by Air Chief Marshal Angus Houston AC AFT (former chief of the Australian Defence Force), who was joined by Paris Aristotle AM and Professor Michael L'Estrange AO.

The Panel released its report on 13 August 2012, making 22 recommendations including a number relating to legislation to amend the Migration Act. The Expert Panel highlighted that from 2001 to August 2012 more than a 1000 asylum seekers and crew are estimated to have died at sea on boats en route to Australia. Of these, around 700 people have lost their lives since October 2009. The Expert Panel stated that “the likelihood that more people will lose their lives is high and unacceptable.”

It proposed an integrated approach to policy on asylum seeker issues, based on incentives for the use of regular processes and asylum pathways and disincentives to use irregular and dangerous maritime options. The Government accepted all 22 recommendations in principle.

Recommendation 14 of the Expert Panel’s report was that the Migration Act be amended so that arrival anywhere in Australia by irregular maritime means will not provide individuals with a different lawful status than those who arrive in an excised offshore place. In support of this recommendation, the Panel indicated that such an amendment would be important to ensure that introduction of processing of asylum claims outside Australia does not encourage asylum seekers to avoid these arrangements by attempting to enter the Australian mainland. Their view was that such attempts would increase the existing dangers inherent in irregular maritime travel.

Under existing arrangements, irregular maritime arrivals (IMAs) have a different legal status depending on whether or not they are defined as an offshore entry person (OEP) under the Migration Act. An OEP is a person who has, at any time, entered Australia at an excised offshore place (such as Christmas Island) after the excision time for that place and became an unlawful non-citizen because of that entry. If an IMA is an OEP and is detained, then that individual is subject to regional processing arrangements introduced in August 2012 by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Regional Processing Act). If an IMA is not an OEP, because they have not entered Australia at an excised offshore place, then they are not subject to regional processing arrangements.

Currently, IMAs entering Australia at the Australian mainland are a relatively rare event. However, this could rapidly change if it is perceived that such journeys can circumvent regional processing arrangements and thereby provide a processing advantage.

2.0 PURPOSE OF THE BILL

The Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (the Bill) amends the Migration Act to implement recommendation 14 of the report by the Expert Panel and to implement other measures to strengthen the regional processing framework.

The Regional Processing Act amended the Migration Act to give effect to recommendation 7 of the Expert Panel's report to allow OEPs to be taken to designated regional processing countries for the processing of any asylum claims. The Regional Processing Act commenced on 18 August 2012.

Under the Regional Processing Act, regional processing arrangements only apply to OEPs who enter Australia on or after 13 August 2012 at excised offshore places. Regional processing arrangements do not currently apply to individuals who enter Australia at the Australian mainland because they are not classified as OEPs. Consequently, under current arrangements, there is an inherent risk that individuals may seek to travel to the Australian mainland to avoid being sent to a designated regional processing country.

The Expert Panel stated that all possible measures should be implemented to avoid creating an incentive for people to take even greater risks with their lives by seeking to bypass excised offshore places and reach the Australian mainland to avoid regional processing arrangements. The Expert Panel stated that such attempts would increase the existing dangers inherent in irregular maritime travel.

For this reason, the Expert Panel recommended (recommendation 14) that the Migration Act be amended to ensure that arrival anywhere in Australia by irregular maritime means will not provide individuals with a different lawful status than those who arrive at an excised offshore place. Arrival anywhere in Australia irregularly by sea in these circumstances should result in one status and make the person subject to regional processing arrangements (subject to specific exclusions).

The Bill therefore provides that all arrivals in Australia by irregular maritime means will have the same legal status regardless of where they arrive, unless they are an excluded class. This means that all arrivals in Australia by irregular maritime means cannot make a valid application for a visa unless the Minister for Immigration and Citizenship (the Minister) personally thinks it is in the public interest to do so. Those people are also subject to mandatory immigration detention, are to be taken to a designated regional processing country and cannot institute or continue certain legal proceedings.

The Expert Panel emphasised the importance of implementing the recommendations as an integrated package as the best way to discourage dangerous sea voyages. This includes:

- creating incentives to encourage greater use of regular migration pathways and international protection arrangements; and

- disincentives to irregular maritime voyages, including the application of a 'no advantage' principle and regional processing arrangements.

The legislative amendments proposed in this Bill are part of this integrated approach and essential to ensuring that IMAs do not attempt to reach the Australian mainland and further risk their lives.

The amendment to the Bill that was moved by Mr Rob Oakeshott MP and passed by the House of Representatives on 27 November 2012 requires that the Minister report to each House of Parliament, as soon as practicable after 30 June in each year, on activities conducted under the Bali Process, and the steps taken and the progress made in relation to people smuggling, trafficking in persons and related transnational crime to support the Regional Cooperation Framework during the year ending on 30 June.

This Bill also provides for discretionary immigration detention of Papua New Guinea (PNG) citizens who are unlawful non-citizens and are in a protected area. The Regional Processing Act amended section 189 of the Migration Act to require mandatory immigration detention of unlawful non-citizens in an excised offshore place (except for allowed inhabitants of the Protected Zone in a protected area who are unlawful non-citizens). Prior to the commencement of the Regional Processing Act, the immigration detention of all unlawful non-citizens in an excised offshore place was discretionary.

3.0 CONTENT OF THE BILL

3.1 Unauthorised Maritime Arrivals

Under the amendments proposed, all non-citizens who arrive in Australia by irregular maritime means – to be known as *unauthorised maritime arrivals* – will be subject to the regional processing framework inserted into the Migration Act by the Regional Processing Act in August this year unless they are specifically excluded.

This is achieved by amending the Migration Act to repeal the defined term *offshore entry person* and insert a new defined term *unauthorised maritime arrivals* (UMA). A person will be a UMA if they entered Australia by sea:

- at an excised offshore place at any time after the excision time for that place;
or
- at any other place at any time on or after commencement of this Bill; and
- if the person became an unlawful non-citizen because of that entry; and
- if the person is not an excluded maritime arrival.

This will extend the operation of regional processing arrangements so that a person who enters Australia by sea, either at an excised offshore place or at any other place in Australia and became an unlawful non-citizen because of that entry will have the same status under the Migration Act as those who enter Australia at an excised offshore place. That is, entering anywhere in Australia by sea in these circumstances will make the person subject to regional processing arrangements. Further, UMAs will be prevented from applying for a visa (unless the Minister thinks it is in the public interest to allow them to do so), will be subject to mandatory immigration detention and will not be able to institute or continue certain legal proceedings, consistent with the *status quo* for OEPs.

3.2 Excluded Maritime Arrivals

Certain persons not intended to be subject to regional processing arrangements will be classed as excluded maritime arrivals and will thus not have the status of a UMA. Subsection 5AA(3) of the Bill sets out who is an excluded maritime arrival. These excluded classes of persons include certain New Zealand citizens and permanent residents of Norfolk Island who do not need visas to travel to Australia.

The Bill also provides the power to prescribe further classes of excluded persons in the *Migration Regulations 1994* should it become clear that further classes need to be excluded from UMA status and thus from regional processing arrangements. Excluded persons will not be subject to regional processing. Nor will they be subject to a statutory bar on applying for a visa.

In addition, the important safety valve provided under section 198AE of the Migration Act remains. This provides the Minister with a personal, non-compellable power to determine that a person should not be taken to a designated regional processing country if the Minister thinks it is in the public interest to exempt them. This section will continue to provide flexibility to exempt individuals or classes of people from regional processing. Unlike excluded maritime arrivals, exempt individuals or classes retain the status of a UMA and will be subject to a statutory bar on applying for a visa unless the Minister also decides to lift this bar.

Sound border management requires such flexibility, in recognition of the range of complex circumstances that can apply to a person's arrival in Australia by sea without a visa. For example, a person who has been rescued at sea, and who has inadvertently engaged these provisions by arriving in Australia without a visa, could be such a case. The person may have had no intention to come to Australia, and their circumstances may warrant a more flexible approach.

3.3 *Transitory Persons*

The Bill amends the definition of a transitory person in the Migration Act to provide flexibility to transfer persons from a regional processing country to Australia for a temporary purpose. The definition of transitory person in the Migration Act provides the ability, amongst other things, to bring a person temporarily from a regional processing country to Australia, such as for medical reasons, and then return them to the regional processing country. At present, the definition of transitory person excludes a person assessed to be a refugee for the purposes of the *1951 Convention relating to the Status of Refugees* as amended by the *1967 Protocol relating to the Status of Refugees*.

As refugees may have to wait for a period of time in a designated regional processing country due to the 'no advantage' principle, excluding refugees under the arrangements for transitory persons would be unworkable. Therefore, the Bill amends the Migration Act so that a person assessed to be a refugee can be a transitory person. The application of the 'no advantage' principle is to ensure that no benefit is gained through circumventing regular migration pathways.

The Bill also repeals section 198C and 198D of the Migration Act. Section 198C provides that certain transitory persons are entitled to make a request to the Refugee Review Tribunal (RRT) to make an assessment of their refugee status if the transitory person is brought to Australia and remains for a continuous period of six months.

This provision may encourage transitory persons to attempt to extend their stay in Australia in order to gain access to the RRT which would be inconsistent with them continuing to be processed in a regional processing country. This is not consistent with the 'no advantage' principle as it may mean that a benefit is gained through circumventing regular migration arrangements. As such, the Bill proposes to repeal this section.

Section 198D provides that if the Secretary of the Department of Immigration and Citizenship is satisfied that a transitory person has engaged in uncooperative conduct then the Secretary may issue a certificate to that effect. An assessment by the RRT under section 198C cannot commence or continue when a certificate by the Secretary is in force. As the Bill repeals section 198C, section 198D will become redundant and is therefore repealed.

3.4 Section 198AE

Section 198AE was inserted by the Regional Processing Act. Subsection 198AE(1) allows the Minister to make a determination that a person will not be taken to a designated regional processing country if the Minister thinks it is in the public interest to do so. The Bill inserts new subsection 198AE(1A) to clarify that the Minister may, in writing, vary or revoke a determination made under subsection 198AE(1) if the Minister thinks it is in the public interest to do so. While this power is already presumed to exist, this new subsection has been added to make this intention expressly clear. Consequential amendments are made to other provisions in section 198AE so that the making of a variation or revocation will be treated in the same manner as making a determination.

3.5 Immigration Detention Powers

The Bill makes technical amendments to the immigration detention provisions in subsections 189(2) and 189(3A) of the Migration Act.

Subsection 189(2) is being amended to provide for discretionary immigration detention. Currently, subsection 189(2) provides that it is a mandatory requirement to detain if:

- an officer reasonably suspects a person in Australia, but outside the migration zone, is seeking to enter the migration zone (other than an excised offshore place); and
- would be an unlawful non-citizen if they were in the migration zone.

However, subsection 189(4) provides that if an officer reasonably suspects that a person in Australia but outside the migration zone is seeking to enter an excised offshore place and would, if in the migration zone, be an unlawful non-citizen the officer may detain the person. The amendment will provide consistency and make immigration detention discretionary in both circumstances. It will also provide flexibility to manage the range of complex circumstances that may arise in Australia but outside the migration zone. For instance, this will allow officers to warn potential arrivals of the consequences of their entry and advise them to either discontinue their journey or apply for the appropriate visa before entering the migration zone.

This Bill also makes amendments to subsection 189(3A) of the Migration Act to provide for discretionary immigration detention of Papua New Guinea (PNG) citizens who are unlawful non-citizens and are in a protected area of the Torres Strait.

Prior to the commencement of the Regional Processing Act in August 2012, the immigration detention of all unlawful non-citizens in an excised offshore place was discretionary. However, the Regional Processing Act amended section 189 of the Migration Act to change the immigration detention of these persons to mandatory. The exception is allowed inhabitants of the Protected Zone in the Torres Strait who are unlawful non-citizens. The Migration Act recognises the special status of PNG citizens who are 'allowed inhabitants of the Protected Zone' under the Torres Strait Treaty by including provisions to permit their visa free travel within a protected area in certain circumstances. However, there are other PNG citizens who are not 'allowed inhabitants of the Protected Zone', and are not provided for under the Treaty.

Due to the complex relationships, long standing cultural connections and way of life of the communities in and adjacent to the Protected Zone, the Bill extends discretionary immigration detention to persons in the Protected Zone who are unlawful non-citizens but who are citizens of PNG. This provision will only apply to PNG citizens while they are in a Protected Zone of the Torres Strait, regardless of whether they are also allowed inhabitants of the Protected zone.

4.0 HUMAN RIGHTS IMPLICATIONS

In accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Bill is accompanied by a Human Rights Statement of Compatibility. The Department of Immigration and Citizenship refers the Committee to the Statement of Compatibility which assesses the Bill against the rights and obligations contained in the seven core human rights treaties.

The *1951 Convention Relating to the Status of Refugees*, and its 1967 Protocol (the Refugees Convention) are not covered by the scope of the *Human Rights (Parliamentary Scrutiny) Act 2011* or the Statement of Compatibility. The Department's view is that the arrangements under the Bill are consistent with Australia's obligations under the Refugees Convention.