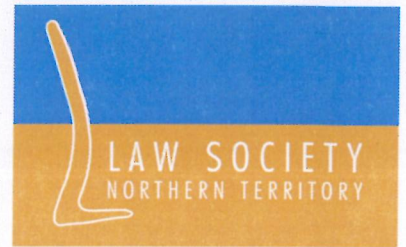


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20 December 2012

Senate Standing Committee on Legal and Constitutional Affairs  
Parliament House  
Canberra ACT 2600

Via email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Committee,

### **Migration Amendment (Unauthorised Maritime Arrivals and Other Measure) Bill 2012**

The Law Society Northern Territory (the Society) represents approximately 550 lawyers in the Northern Territory including Government and private lawyers. The mission of the Society is to enhance access to justice, improve the law and maintain individual rights. Importantly the Society is charged with considering proposed changes in the law and aiding such amendments and reforms thereof that are likely to benefit the public. In doing this the Society focuses on evidence based interventions and ensuring legal needs are addressed.

The Society welcomes the opportunity to comment on the Inquiry into the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measure) Bill 2012* (the Bill).

The Society has conducted consultations with its Social Justice Committee in developing this response and additionally is a member of the Law Council of Australia and endorses that submission. The Society considers that the amendments proposed by the Bill do not meet Australia's obligations under various international treaties. In the opinion of the Society the Bill discriminates against some of the most disenfranchised people in our region, based on their mode of arrival in Australia.

#### **SUMMARY**

In summary the Society is concerned about the following:

- Australia's violation of obligations as a signatory to various international treaties, particularly
  - The Universal Declaration of Human Rights: Article 14
  - the Refugee Convention: Articles 3, 16, 31 and 33
  - The International Covenant on Civil and Political Rights (ICCPR): Articles 2 and 26
- Denial of access to justice



- Denial of natural justice, and procedural fairness
- Failure to provide essential legal assistance

### **Right to asylum and obligation of non-refoulement**

Under international law, everyone has a right to seek and enjoy in other countries asylum from persecution. This fundamental right is expressed without any reservation in Article 14 of the Universal Declaration of Human Rights. This forms one of the most basic mechanisms for the protection of refugees. It is notable that Australia was one of the 26 States Parties responsible for the drafting of the Refugee Convention and, as such, may be said to have a special responsibility to ensure its legitimate effectiveness.

Australia also has a legal obligation of non-refoulement arising from article 33(1) of the *Convention Relating to the Status of Refugees 1951* (Refugee Convention)::

*“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.”*

In the Society’s opinion the approach proposed in the Bill is prohibited by it’s commitment to the above conventions

### **Discrimination**

The Bill proposes to amend the *Migration Act 1958* (the Act), by designating a new class of persons - ‘unauthorised maritime arrival’ (UMA) which include persons arriving by boat to the Australian mainland. This will replace the term “offshore entry person,” and includes persons arriving at excised offshore paces. The Society is concerned that the amendment of section 46A of the Act and the repeal of paragraphs 198AH(d) and (e) will act to exclude persons arriving in Australia by sea from applying for a visa under the Act (except at the discretion of the Minister). Not only does this defeat the purpose of the protection regime in section 36 of the Act, it also violates the normative principle and protection of refugees which is guaranteed in the Refugee Convention and the *Protocol Relating to the Status of Refugees 1967*.

The distinction between people based on their means of arrival (by air or sea) is an arbitrary one. The merit of a person’s claim for asylum is not reflected in their means of arrival and the classification of some asylum seekers as UMAs is discriminatory and unlawful. In the Society’s opinion such distinction contravenes Australia’s obligations as a signatory to the *International Covenant on Civil and Political Rights* (ICCPR) and the Refugee Convention. It particularly violates articles 2 (right of non-discrimination) and 26 of the ICCPR (equality before the law) and articles 3 (non-discrimination) and 31(1) of the Refugee Convention:

*“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present*



*themselves without delay to the authorities and show good cause for their illegal entry or presence.”*

### **Lack of access to justice**

The Society is equally concerned about the provisions of the Bill which will deny an expanded class of asylum seekers access to the courts. This appears to be in breach of article 16 of the Refugee Convention which guarantees free access to the courts in the territory of all contracting states. In the Society's view this contravenes the fundamental principle of a civilized society, the entitlement to Natural Justice and procedural fairness.

### **Lack of legal assistance**

There is an abundance of evidence that unrepresented litigants are costly to the legal system and place a burden on already stretched resources. The Society is concerned that people detained in immigration detention (onshore and offshore) have complex legal needs not limited to their immigration issues. There is thus a need to ensure they have access to legal advice and assistance. The proposal to expand the class of persons not able to readily access Australia's legal system is concerning. As the mechanisms for dealing with asylum seekers continues to become more complex recognition needs to be given to the growing area of legal need.

### **Increased risk of refoulement**

Generally the proposed amendments of the Act increase the risk of refoulement. For instance, the proposed amendments in section 198AD of the Act empower officers to remove UAMs to a regional processing country.

### **Conclusion**

The Bill seeks to further transfer responsibility for asylum seekers arriving in Australia by boat to regional processing countries in contravention of Australia's human rights obligations.

In conclusion, the Australian government cannot avoid its obligations and responsibilities for persons seeking asylum in Australia. The Bill violates international human rights law and should not be passed.

We look forward to contributing further to this process if required.

Yours sincerely

**Megan Lawton**  
Chief Executive Officer