THE UNIVERSITY OF SYDNEY

Dr Ben Saul BA(Hons) LLB(Hons) *Sydney* DPhil *Oxford*
Professor of International Law
Australian Research Council Future Fellow

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

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Dear Committee,

Inquiry into the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

I welcome the opportunity to submit to this inquiry. My short submission is confined to the international law issues raised by the Bill. The *Refugee Convention* does not specify any particular method of refugee status determination, although individual assessment of some kind is implicitly required for a State to meet its non-refoulement obligations. The legal artifice of excising territory for migration purposes is unusual, but not per se illegal, as long as processing remains available and meets international standards.

The Bill does not, however, meet international standards for these reasons:

(a) It arbitrarily penalises more irregular arrivals by diverting them into a degraded status determination procedure compared with 'regular' onshore arrivals (including lesser review rights and lack of legal assistance), without adequate justification, contrary to article 31 of the *Refugee Convention*;

(b) By transforming refugee status from a claimable 'right' to a discretionary grant (by virtue of the statutory bar and waiver regime), it undermines the normative status and legal protection of refugees on which the *Convention* is predicated;

(c) By degrading the status determination procedure for more irregular arrivals, it increases the probability of bad decisions and heightens the risk of *refoulement*;

(d) By exposing more irregular maritime arrivals to (protracted) mandatory detention, and without adequate judicial control of detention, it unequivocally violates the prohibition on arbitrary detention under article 9 of the *International Covenant on Civil and Political Rights* (ICCPR);

(e) By exposing more irregular maritime arrivals to plainly inadequate conditions of detention in regional processing centres in Nauru and PNG, it risks likely violating articles 7 and 10 of the ICCPR (prohibiting inhuman treatment).

The Bill's Statement of Compatibility with Human Rights is, with respect, not accurate.

Faculty of Law
Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 9351 0354
F +61 2 9351 0200
E ben.saul@sydney.edu.au
www.law.usyd.edu.au

ABN 15 211 513 464
CRICOS 00026A

The Bill's Policy Objectives – Saving Life at Sea

If the Parliament is serious about achieving the stated policy objective of saving life at sea, it would provide genuine pathways for asylum seekers to obtain protection prior to travelling irregularly Australia, namely by facilitating refugee applications and determination in forward locations such as Malaysia and Indonesia.

Last month I visited refugee and asylum seeker communities in Indonesia, including a large immigration detention centre in Makassar, Sulawesi. After discussions with many detainees, and asylum seekers living in IOM-supported facilities, it soon became clear that the overwhelming majority of asylum seekers do not perceive excision and offshore processing as serious deterrents to travelling by boat to Australia.

Faced with a choice between returning to possible death in Afghanistan or Pakistan, or waiting for years in a squalid Indonesian detention centre, or living insecurely with few rights in Indonesian society, many asylum seekers and refugees still preferred to come directly to Australia – at least until such time as the facilities on Nauru or in PNG become more inhumane than, for example, the overcrowded Makassar detention facility – with one working toilet for 160 men in a very small concrete compound.

Further, one key reason why asylum seekers and refugees departed or intended to depart Indonesia by boat to Australia was precisely because 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 6 and 9 months just to be interviewed, followed by a further 6 months to a year awaiting a decision, followed by an unspecified period of time waiting for resettlement – which also might never happen.

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 by increasing the number of resettlement places from Indonesia and the speed with which resettlement happens.

If Australia does not take such steps, it will remain difficult to avoid the conclusion that the current policy settings are more designed for absolute deterrence of refugees coming to Australia at all, rather than a genuine, un-confected concern for life at sea or any perceived concern to ensure 'no advantage' (the new euphemism for 'queue jumpers').

Please be in touch if you require any further information.

Yours sincerely

Professor of International Law

Past President, Refugee Advice and Casework Service
Co-author, Future Seekers II: Refugees and the Law in Australia (Federation, Sydney, 2006)