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

17 December 2012

Dear Senate Committee,

Please consider this submission to the inquiry regarding proposed changes to the Migration Act 1958 (Cth) that would be introduced by *the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012*. My assessments are expressed as a citizen concerned that the Bill is based upon unfounded assumptions rather than evidence and constitutes a policy regression inconsistent with Australia's international law obligations. The submission challenges the policy justifications of the Bill; then examines its effect as an extension of the territorial excision principle.

First, please consider some contextual remarks:

Asylum seekers arriving in Australia by boat are generally recognised as refugees (around 90%); therefore engaging protection obligations pursuant to the 1951 Refugee Convention. They are pushed to Australia from transit states that do not offer viable formal resettlement pathways. They are pulled to Australia by the presence of established diaspora communities, livelihood opportunities, and the legal obligation to grant asylum.

Government policy cannot and should not seek to change what makes Australia a destination for asylum seekers: multiculturalism, prosperity and the rule of law. Government policy can and must provide genuine support to neighbouring states to extend the net of protection for persons fleeing persecution in their country of origin. This presents the most effective means to prevent more deaths at sea. Australia must lead by example in the region by fulfilling its obligations at home.

The Bill has the potential to undermine current and future efforts to strengthen regional protection arrangements and formal resettlement pathways – measures consistently promoted by refugee law experts as the most effective means to reduce the incidence of dangerous boat voyages to Australia by asylum seekers. The Bill will not 'save lives', nor will it encourage other states in the region to strengthen protection regimes. Government policy changes in Canberra do not deter asylum seekers in Indonesia from making the dangerous irregular journey to Australia by boat. This Bill is a regressive measure that seeks to relinquish Australia's international obligations to refugees.

In 2006 this Committee recommended against the passage of similar measures. The language is now of technical administrative restrictions but the intention, purpose and effect remain: to exclude access to our rule of law institutions for asylum seekers arriving by boat. The 2006 proposal to excise mainland Australia from the migration zone was an unprecedented measure that the Senate saw as unfit to become law. Semantic trickery suggests this Bill is different; it is not. It would be most appropriate for the Committee to revisit the judgements made by their peers in 2006; and once again recommend against providing a domestic legal basis for the absurd legal fallacy that our territories are not Australian and persons within Australia do not come under its jurisdiction.

Challenging Justifications for the Bill

The sole policy justification for this Bill is that current arrangements may provide an incentive for asylum seekers to undertake more dangerous journeys, by travelling longer distances to the Australian mainland in order to circumvent mandatory detention and offshore processing measures in place at excised offshore places. The logic is absurd. If current deterrence measures place lives at risk, the conclusion should be to repeal these measures – not extend their reach.

Political discourse framing this approach is based upon two assumptions: that pull factors include the absence of robust disincentives to deter asylum seekers undertaking irregular paths to Australia by boat; and that deterrence strategies are effective in 'stopping the boats'.

Push and Pull Factors

The strongest 'pull factors' to asylum destination states are not liberal and compassionate policies toward refugees. These pull factors are in fact social elements and perceptions that are not changed through Governments making policy on-the-run. Global trends and research consistently support the conclusion that push factors are the most important element influencing the flight of asylum seekers and their subsequent migration decisions. The proven impact of changes in pull factors is negligible at best, in any case occurring over extended periods of time and not a basis for explaining dramatic changes in refugee flows.

Policy responses cannot transform the greatest pull factors: these are the elements that make up Australian society, including: diverse social networks, prosperity and the right to protection.

In Australia, with its vibrant migrant communities, avenues for social networks of families or co-nationals are opened for refugees – increasing its attractiveness as an asylum destination.[1] The presence of family members is a key factor influencing the decision making process of all migrants: this is recognised by the Panel.[2] Studies elsewhere, such as in the UK, have found social networks and family connections are usually the most important factor influencing where refugees seek asylum.[3] Australia is a multicultural country with a longstanding refugee resettlement program, and there is little that Government can do about this pull factor. Research evidence shows there is limited scope for policy interventions once social networks are already established.[4]

Other important considerations for asylum seekers are perceptions of economic and livelihood opportunities and the ability to attain protection. Australia is arguably the most prosperous country in the region. In contrast to the majority of states in the region, Australia is party to the Refugee Convention and asylum seekers arriving by boat get asylum: according to the Panel, 90 per cent of irregular maritime arrivals are granted protection as refugees.[5] Government cannot realistically

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[1] Mary Crock and Daniel Ghezelbash, 'Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals' (2010) 19.2 *Griffith Law Review* 259

[2] Air Chief Marshal Angus Houston, Paris Aristotle & Prof Michael L'Estrange, 'Report of the Expert Panel on Asylum Seekers' (2012) *Australian Government* 60

[3] Vaughan Robinson & Jeremy Segrott, 'Understanding the decision-making of asylum seekers' (2002) *UK Home Office – Research, Development and Statistics Directorate* 39

[4] Dr Khalid Koser, 'Responding to Boat Arrivals in Australia: Time for a Reality Check' (2010) *Lowy Institute Analysis*

[5] Report of the Expert Panel, above n2 27

pursue policy responses to the realities that our prosperity and international obligations to refugees act as pull factors in the decision making processes of asylum seekers who choose to come to Australia by boat. The capacity of the state to influence these pull factors is a myth.

Australia can do much more to address push factors – inadequacy of regional protection arrangements and formal resettlement pathways – through greater responsibility sharing and setting an example in the region.

Evidence suggests asylum seekers only choose their final destination after leaving their country of origin.[6] This means that 'push factors' are considered by asylum seekers who are in transit. In this context the key factors influencing decisions by asylum seekers to come to Australia by boat are the absence of satisfactory protection arrangements of transit states, and deficiencies of regular pathways for resettlement in a third country.

Asylum seekers look toward irregular journeys to Australia because transit states, including Indonesia and Malaysia, do not offer effective protection or access to education and livelihood opportunities. Refugees in these states often fear harassment by police and migration services, and may not have adequate personal security or livelihoods. They may fear deportation or even involuntary return to their country of origin, a particularly real threat when the transit state is not a signatory to the Refugee Convention. If the UNHCR is present in-country and a person is able to register as a refugee, they will likely face a protracted and possibly infinite wait for third country resettlement.

Deficiencies in protection arrangements in the region do influence decisions by asylum seekers to travel to Australia by boat. The Panel has recognised this:

> Many of the regular pathways for international protection arrangements in Australia's region are failing to provide confidence and hope among claimants for protection that their cases will be processed within a reasonable time frame and that they will be provided with a durable outcome. For too many, these factors are shifting the balance… towards irregular migration and dangerous boat voyages.[7]

Most asylum seekers travelling by boat to Australia depart from Indonesia; many of these people may have also spent time in Malaysia. UNHCR data collated by the Panel indicates that of persons registering with the agency in Indonesia and Malaysia, 90 and 96 per cent are determined to be refugees, respectively.[8] In the period 2001 to 2010 Australia resettled only 560 refugees referred by the UNHCR in Indonesia, including 2 in 2001 and 95 in 2009.[9] This constitutes a mean humanitarian intake of 56 refugees per year from formal resettlement avenues in Indonesia. By contrast, 4100 new asylum claims were lodged with UNHCR in Indonesia in 2011.[10]

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[6] Dr Khalid Koser & Charles Pinkerton, 'The social networks of asylum seekers and the dissemination about countries of asylum' (2002) *UK Home Office – Research, Development and Statistics Directorate* 3
[7] Report of the Expert Panel, above n.2 28
[8] Ibid
[9] Elibritt Karlsen, 'Refugee resettlement to Australia: what are the facts?' (2011) *Parliamentary Library, Parliament of Australia – background note*, 6 December
[10] UNHCR Global Trends Report (2011) 26

Clearly there are too few substantive outcomes or durable solutions available for asylum seekers in Indonesia, and to date Australia has done little to better rates of resettlement. 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.

Evidence suggests push factors have a more significant influence on decision making by asylum seekers than pull factors. The most important pull factors – social networks and aspects of Australian society – remain relatively constant meaning that significant variances in arrivals can't be attributed to them.[11] Pull factors that matter to asylum seekers are difficult to alter through policy interventions. However there are proactive measures the Government could pursue to buffer against push factors and reduce the number of asylum seekers dangerous boat journeys to Australia from Indonesia. Policy options exist that could reduce the number of lives lost at sea. This Bill represents a whole lot of energy and taxpayer money invested in an approach that is anything but a 'circuit breaker'. Rather than saving lives the core purpose of this Bill is simply to stop the boats.

The Efficacy of Deterrence?

The Bill is part of a broader framework of deterrence measures that includes mandatory detention, offshore processing and the regional processing of asylum seekers. All these measures – the scope of which would be extended by this Bill – are designed to stop asylum seekers making the decision to travel to Australia by boat. However evidence and experience suggests that deterrence strategies form an unstable foundation for effective policy.

<u>Contrary to the opinion of the Expert Panel, experience does not demonstrate a correlation between deterrence strategies and reductions in boat arrivals in Australia: the rationale for this bill is wrong.</u>

Between 2001 and 2007 there was a reduction in the number of asylum seekers undertaking boat journeys to Australia. The Panel has asserted that Government policy changes in this period had an impact on this. It is an assertion that underpins the rationale for this Bill. Yet the report presents no evidence supporting this implied conclusion that the Pacific Solution was effective in stopping boats.

> …'Push' factors in the period immediately after 2001, and later in the period after 2007, certainly had an impact on the flow of asylum seekers to Australia by boat. But *changes in Australia's policy settings during those periods also certainly had an impact on the particular flow of asylum seekers by boat to Australia* (emphasis added).[12]

The Panel is right to recognise the impact of push factors. The body of evidence shows push factors have the greatest impact upon refugee flows. However the second conclusion of the Panel is misplaced because the evidence suggests a reduction in boat arrivals during this time was a reflection of global trends rather than policy changes.

When the number of boat arrivals in Australia peaked at 5516 vessels 2001,[13] that was the same year the UNHCR recorded one of the highest ever figures of asylum claims in industrialised states:

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[11] Mary Crock and Daniel Ghezelbash, above n.1

[12] Report of the Expert Panel, above n.2 31

[13] Elibritt Karlsen, 'Refugee resettlement to Australia: what are the facts?' (2011) *Parliamentary Library, Parliament of Australia – background note*, 6 December 18

623,000 new asylum claims in 51 countries.[14] Between 2001 and 2007, UNHCR data indicates there was a global decrease in asylum claims, explaining the reduction in boat arrivals in Australia during that period.[15] The substantial annual variances in the number of boat arrivals over the past decade is a reflection of these global trends of asylum seeking, rather than the impact of deterrence policies by the Australian Government. At the same time, data relating to Australia during this period underestimates the number of boat arrivals. During this time, asylum seekers arriving in excised offshore territories (constituting the overwhelming majority of boat arrivals) and whose claims were processed in PNG or Nauru were not considered by the Government to have arrived in Australia and were excluded from data sets submitted to the UNHCR.[16] Perceptions of a decrease in boat arrivals during this period may have been compounded by this distortion of the statistics.

Evidence has not been presented to support the implication by the Panel that Government policy changes – which were foremost deterrence measures – had any significant impact upon the number of boat arrivals from 2001 to 2007. Current proposals that deterrence measures were an effective strategy during this time have no basis in fact. It is of concern that deterrence is the key concept of the Bill, given no supporting evidence has been provided to support its efficacy and global trends suggest it is of limited impact in this context.

<u>Research suggests asylum seekers are influenced more by general perceptions of destination countries rather than Government policy, and that information campaigns aimed at deterrence have little impact upon arrivals.</u>

A clear issue with the rationale of deterrence is the assumption that asylum seekers are aware of policy changes in potential destination states and modify their decision making accordingly. UK studies indicate asylum seekers often have little knowledge of refugee policy before arriving, and are motivated more by general perceptions linked to democracy and multiculturalism.[17] Decisions regarding onward travel are often made only after leaving one's country of origin.[18] In this context, smugglers are often key information sources influencing decision making.[19] Asylum seekers should not be assumed to have accurate and current access to information. Where deterrence strategies are in place, Governments are aware of the need to broadcast information, but evidence suggests information campaigns have only a neutral impact at best.[20] The absence of a solid evidence base indicating that Government policy is either known by asylum seekers or influences their decision making means there is a considerable credibility gap in the notion that deterrence measures can be effective in stopping asylum seekers coming to Australia by boat.

Deterrence strategies do not buttress the fact that Australia is a prosperous state with international obligations to provide protection and is a place where social networks and economic opportunities exist, or are perceived to exist. Whilst there is minimal scope for policy responses to important pull factors, the crucial push factors could be addressed through the promotion of protection

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[14] UNHCR, 'Asylum levels and trends in industrialised countries: statistical overview of asylum applications lodged in Europe and selected non-European countries' (2008) 4
[15] Elibritt Karlsen, above no10
[16] UNHCR, 'Asylum Levels and Trends in Industrialised Countries' above no.13
[17] Robinson, V. & Segrott, J. above n10 46-47
[18] Dr Khalid Koser & Charles Pinkerton, above n6 3
[19] Khalkd Koser, 'Asylum policies, trafficking and vulnerability' (2000) 38.3 *International Migration* 91-112
[20] Dr Khalid Koser, (2010) above n4 8

frameworks in the region and by Australia strengthening UNHCR resettlement by greater responsibility sharing. This may require lifting the humanitarian intake but it would offer a more durable solution to refugees making dangerous journeys by boat. Measures that have the purpose of seeking to relinquish Australia's international obligations serve to undermine the integrity of protection, reducing the likelihood that transit states will provide greater protection and rights to refugees.

Deterrence strategies divert asylum seekers into more irregular and dangerous pathways

This Bill seeks to discourage asylum seekers from taking an even more dangerous journey than they may have if the deterrence strategy of excised offshore places was not in effect. Here is proof that deterrence strategies push asylum seekers into more dangerous migration pathways. The logic of the explanatory memorandum is that while the Australian mainland is not subject to the same restrictive measures as that in place in excised offshore territories, persons may be encouraged to make more dangerous sea journeys to access preferable conditions for asylum. If passage of this Bill is approved, asylum seekers will likely look to even more dangerous and irregular pathways to protection elsewhere. This Bill will not save lives; it would only lead asylum seekers to pursue equally dangerous routes to states where they may receive protection, or leave them trapped in places where they cannot receive protection.[21] If the Government is genuinely concerned about saving lives at sea, it should focus policy efforts on the push factors that lead people to make the journey to Australia. A sensible policy response aimed at saving lives would be to repeal the arrangements that create this risk in the first instance.

Application of a 'no advantage' principle does not improve regular migration pathways, so asylum seekers remain faced with the conflicted decision: await a lengthy and uncertain determination process in a transit state; or travel to Australia by boat where a durable solution is more likely.

The Panel recommended application of a 'no advantage' principle to serve as a disincentive to irregular maritime voyages to Australia. In the first reading of the Bill, the Minister explained:

> The application of the 'no advantage' principle is to ensure that no benefit is gained through circumventing regular migration pathways… designed to remove the attractiveness of attempting an expensive and dangerous irregular boat journey to Australia.[22]

Despite representations made by the Panel,[23] there is nothing reasonable or fair about the 'no advantage' principle. Arrivals by air and those granted visas are not held to this principle. This is the myth of the queue repackaged. It is a punitive measure dressed as a humanitarian doctrine. Asylum seekers pursuing formal resettlement pathways have little hope of a durable solution and are faced with living without protection or other basic rights and guarantees. Asylum seekers in transit states in the region, such as Indonesia, do not have a right to be granted protection and often have no right to pursue education and livelihood options. In this context, for many the irregular boat travel to Australia presents the greatest option for a durable solution. Asylum seekers should not be

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[21] Savitri Taylor 'What has the Bali Process got to do with it?' < http://inside.org.au/what-has-the-bali-process-got-to-do-with-it>

[22] Hon. Minister Chris Bowen, 'First Reading Speech - Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012' House of Representatives, Australian Parliament House, 31 October 2012

[23] Report of the Expert Panel, above n2 10

penalised for exercising a choice to proceed to Australia when their situation is untenable elsewhere.

Cracks are already appearing in the 'no advantage' architecture, as the Department of Immigration has begun issuing bridging visas because pressures on the detention system are too great. Even if this were a deterrent, it would be a failed deterrent already. That aside, the concept of a 'no advantage' test is unlikely to be heard or understood by asylum seekers considering undertaking a boat journey to Australia.

Concerns Regarding Content of the Bill

Territorial Excision Repackaged

The background to territorial excision is that in 2001 the *Migration Amendment (Excision from Migration Zone) Act 2001* was passed into law, excising certain offshore territories for the purpose of restricting unauthorised boat arrivals from lodging a valid visa application and thus preventing asylum seekers applying for a protection visa in Australia. Subsequent legislative attempts to extend the reach of excision in Australian territories were tried and failed in 2002,[24] and again in 2006 when the Coalition Government sought to extend coverage of the excision principle to all territories, including the Australian mainland and no matter the mode of arrival. [25] On each occasion the proposal was examined by the Legal and Constitutional Committee: both inquiries recommended against passage of the bill and neither proceeded through the Senate.

This Bill is an extension of these arrangements. While it does not change the definition of the *Migration Act 1958* it does repeal the ability of unauthorised maritime arrivals in Australia from accessing their rights under its provisions. The effect remains excision of the Australian mainland from the Migration Zone for asylum seekers arriving by boat. Its provisions serve the same purpose as the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* that was reviewed by this Committee, disapproved for passage, and rejected by the Senate six years ago. It should not be assumed that the Government is acting in good faith in presenting this Bill as a different instrument. The language has changed but the intent, purpose and effect remain the same as the prior Bill.

The Bill would create a technical administrative restriction on asylum seekers entering by boat, providing a domestic legal basis to preclude them petitioning for their right to seek protection

The Government has stated the objective of the Bill is to implement measures that would:

> '(Provide) 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 or otherwise exempted'[26]; and
>
> '…Avoid creating an incentive for people to take even greater risks with their lives by seeking to bypass excised offshore places to reach the Australian mainland'.[27]

[24] Migration Legislation Amendment (Further Border Protection Measures) Bill 2002
[25] Migration Amendment (Designated Unauthorised Arrivals) Bill 2006
[26] Explanatory Memorandum, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth)

All irregular maritime arrivals in Australia would be subject to the following measures:

- Inability to make a valid visa application, unless the Minister personally thinks it is in the public interest to do so;
- Mandatory immigration detention;
- Be taken to a designated regional processing country;
- Unable to institute or continue certain legal proceedings.

The consequence of the Bill is that persons arriving by irregular maritime means will be unable to apply for protection in Australia due to a technical administrative restriction. Once detained and transferred to a designated regional processing country – Nauru or Papua New Guinea – the Government considers that these persons cannot engage Australia's protection obligations under the Refugee Convention. The Bill is one of a series of measures designed by the Government to attempt to avoid its international obligations to refugees.

<u>The purpose, intent and effect of the Bill is the same as territorial excision measures</u>

The purpose of the Bill before the Committee is to extend this administrative limitation to unauthorised maritime arrivals in territories not included in the definition of an 'excised offshore place', with the effect that for these persons the Australian mainland has the same legal status as an excised territory. The Explanatory Memorandum of the Minister indicates the amendment bill would align the legal status of irregular maritime arrivals arriving at non-excised territories with that of IMAs arriving in an excised offshore place.

The Migration Act includes this instructive note on the definition of an 'excised offshore place':

> 'The effect of this definition is to excise the listed places and installations from the migration zone for the *purposes of limiting the ability of offshore entry persons to make valid visa applications*'[28] (emphasis added).

The consequence of current legislation is that asylum seekers arriving by boat without a visa in excised territories – such as Christmas Island and the Cocos Keeling Islands – cannot access the Australian refugee processing system, its procedural safeguards, and review systems such as the Refugee Review Tribunal.

The Bill would extend this technical administrative restriction, and its effects, to all irregular maritime arrivals anywhere in Australia:

> '…All arrivals in Australia by irregular maritime means will have the same legal status regardless of where they arrive… This means, *all arrivals in Australia by irregular maritime means cannot make a valid application for a visa* unless the Minister personally thinks it is in the public interest to do so'[29] (emphasis added).

The purpose, intent and effect of the Bill is identical to that of prior amendments instituting territorial excision measures: preventing asylum seekers arriving by boat without visas from

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[27] Ibid
[28] *Migration Act,* 1958 (Cth) s 5
[29] Explanatory Memorandum, above n25 1

accessing the Australian migration system and the rights and safeguards it confers by statute. The Bill leaves the definition of the Migration Act intact, instead shifting the criteria required for persons to qualify as being under the statutory jurisdiction of the Act. For those persons, the effect is like that of being in an excised place.

The Bill would use the dubious legal notion of an 'excised offshore place' as the basis for national policy

The Explanatory Memorandum represents the Bill as a reasonable measure designed to rectify inconsistencies with the application of the Migration Act, specifically the different legal status conferred to irregular arrivals by boat at excised offshore places compared to those arriving 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 Government is using a questionable and problematic legal anomaly as the basis for policy making for the Australian mainland. This is policy on-the-run rather than a measured response to a complex issue.

It is appropriate for the Committee to review its 2006 report which assessed and recommended against passage of the failed *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.* That Bill had the same purpose, intent and effect as the Bill that is subject to the current enquiry.

The 2006 Report of the Senate Legal and Constitutional Legislation Committee noted that all submissions to the inquiry, except the Immigration Department, were of the view that the Bill should be opposed completely. The Committee came to the same conclusion. Its key concerns were:

> Uncertainty about how the proposed arrangements will actually work; domestic policy issues such as the Bill's broad incompatibility with the rule of law; the potential breach of Australia's obligations under international law in a number of key areas; and arguments that the Bill is an inappropriate response…'[30]

The report concluded that much of the evidence presented to the Committee focused on the removal of access to the Australian migration system for asylum seekers. This measure was consistently considered to be incompatible with the rule of law. Some submissions pointed out that known significant case failures by the Department highlight the necessity for effective oversight mechanisms. This assessment remains applicable to the Bill currently under review, for it would remove access to key review mechanisms including the Refugee Review Tribunal.

Submissions to the inquiry by legal experts highlighted a number of potential breaches of Australia's international obligations as a result of the range of deterrent measures. Specifically, the Bill – like the amendment before the Committee now – would be in breach of the non-penalisation clause of the Refugee Convention,[31] as the application of the policy to asylum seekers arriving by boat only constitutes a discriminatory penalisation. Additionally, recent reports that asylum seekers granted bridging visas due to overcapacity at detention centres will be denied work rights may also be in

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[30] Senate Legal and Constitutional Legislation Committee, 'Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 – Inquiry Report' 2006 *Australian Parliament House* 59

[31] *Convention Relating to the Status of Refugees (Refugee Convention),* opened for signature 28 July 1951, UNTS 189, art 31 (entered into force 22 April 1954)

violation of Australia's international obligations.[32] The full range of international law concerns were included by the Committee in its 2006 report.

The Committee (which now has different members) would be well guided in reviewing the report of its peers made in 2006, and would be encouraged to come to its same conclusions about the proposed provisions mirrored in this Bill. Passage of the Bill would represent a significant departure from established norms of efficacy and responsibility in the Parliament.

Summary of Observations

- Policy responses cannot transform the greatest pull factors: these are the elements that make up Australian society, including: diverse social networks, prosperity and the right to protection;
- Australia can do much more to address push factors – inadequacy of regional protection arrangements and formal resettlement pathways – through greater responsibility sharing and setting an example in the region;
- Contrary to the opinion of the Expert Panel, experience does not demonstrate a correlation between deterrence strategies and reductions in boat arrivals in Australia: the rationale for this bill is wrong;
- Research suggests asylum seekers are influenced more by general perceptions of destination countries rather than Government policy, and that information campaigns aimed at deterrence have little impact upon arrivals;
- Deterrence strategies divert asylum seekers into more irregular and dangerous pathways;
- Application of a 'no advantage' principle does not improve regular migration pathways, so asylum seekers remain faced with the conflicted decision: await a lengthy and uncertain determination process in a transit state; or travel to Australia by boat where a durable solution is more likely;
- The Bill would use the dubious legal notion of an 'excised offshore place' as the basis for national policy;
- The Bill would create a technical administrative restriction on asylum seekers entering by boat, providing a domestic legal basis to preclude them petitioning for their right to seek protection;
- The purpose, intent and effect of the Bill is the same as territorial excision measures;
- It is appropriate for the Committee to review its 2006 report which assessed and recommended against passage of the failed *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.* That Bill had the same purpose, intent and effect as the Bill that is subject to the current enquiry.

Thank you for the opportunity to present a submission to this inquiry.

Yours Sincerely,

Sean Bain

[32] Bianca Hall, 'Bowen toughens rules for asylum seekers' (2012) *The Sydney Morning Herald* 22 November