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

The “no advantage” policy is justified by a purported intention to stop asylum seeker deaths at sea. I provide evidence in this submission that policies of deterrence contribute to an increase in deaths, they do not reduce them.

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The proposed new wording

The Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (the Amendment Bill) seeks to amend wording to the Migration Act to change the definition of certain types of boat arrivals from *"offshore entry persons"* to *"unauthorised entry persons".*

The wording in the proposed Amendment Bill imputes a negative meaning to *offshore entry persons*, taking the definition from neutral to pejorative and so creates a false notion that asylum seekers are illegal.

This changed meaning is false, because Australia is a signatory of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (the Convention)[1].

When Australia becomes a party to an international convention, the terms of the convention create binding obligations in international law[2]. Asylum seekers are entitled under the Convention to arrive without prior authorisation from Australia, with no documents, or with false documents, and to seek asylum.

Is Australia obliged to uphold its obligations under international law?

Treaties are binding – the principle of *pacta sunt servanda* (from Latin, meaning 'agreements are to be kept' or 'treaties are binding') asserts that:

- when treaties are properly concluded, they are binding on the parties, and must be performed by them in good faith;
- the obligations created by a treaty are binding in respect of a State's entire territory;
- a State cannot use inconsistency with domestic law as an excuse for failing to comply with the terms of a treaty[3].

Australia may ratify a treaty and be bound as a State under international law, but without domestic legislation to implement the treaty provisions, this will not give binding rights to, or impose binding obligations on members of the Australian community[4].

Australia's obligations under domestic law: *Teoh*

The Australian government has on occasion sought to make decisions which contravene its obligations under international conventions. However, the High Court decision in *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (Teoh's case), extended the impact of Australia ratifying an international into the arena of administrative decision-making and procedural fairness.

[1] The UNHCR's 1951 Convention relating to the Status of Refugees, www.unhcr.org/3b66c2aa10.html
[2] UN Enable: Becoming a party to the Convention and the Optional Protocol http://www.un.org/disabilities/default.asp?id=231
[3] *Hot Topics 69: legal issues in plain language*, Jane Stratton, published by the Legal Information Access Centre (LIAC); International Law; Dewey Number: 341; ISSN 1322-4301, no. 69
[4] See eg, Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 at 74 per McHugh J. Dietrich v R (1992) 177 CLR 292, 305 per Mason CJ and McHugh J; 360; per Toohey J.; Tasmanian Wilderness Society Inc v Fraser (1982) 153 CLR 270, 274 per Mason J; Koowarta v Bjelke-Petersen (1982) 153 CLR 168 at 193 per Gibbs CJ.

Teoh's case also stated that an individual has a 'legitimate expectation' that any decisions made by the Commonwealth Government about themselves will conform with ratified treaties. In this case, Mason CJ and Deane J (in a joint judgment) held that:

> *...ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent any statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as `a primary consideration'[5].*

Teoh's Case means that the ratification of international treaties and instruments by the Commonwealth mean more than an act of grandstanding on the international stage[6], and that government decision makers are obliged to consider them.

As the proposed changes to the Migration Act are inconsistent with Australia's obligations under the Convention, the Senate Committee should recommend to the government that the proposed Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 not be passed.

Research shows that asylum seekers are not aware of a country's immigration policies when they leave their country of origin. Their reasons for leaving are 'push' factors in countries of origin such as repression, discrimination, ethnic conflict, human rights abuses and civil war. As migration expert Dr Khalid Koser has noted:

> *'There is wide consensus among both scholars and refugee organisations that conditions in origin countries… tend to be more important than conditions in destination countries… in explaining the movement of refugees.'[7] There is simply not enough evidence that deterrence works to justify the expense and potential harm of its implementation.[8]*

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[5] Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh; 7 April 1995 (1995)
[6] Roberts, Susan --- "Teoh v Minister For Immigration: The High Court Decision and the Government's Reaction to it" [1995] AUJlHRights 10; (1995) 2(1) Australian Journal of Human Rights 135
[7] Koser, K., 2010, 'Responding to Boat arrivals in Australia' kms1.isn.ethz.ch/.../Files/.../2010_Koser,+Responding_web.pdf
[8] Sharon Pickering, Professor of Criminology at Monash University; There's no evidence that asylum seeker deterrence policy works; theconversation.edu.au/theres-no-evidence-that-asylum-seeker-deterrence-policy-works-8367

No advantage

In November 2012, the Immigration Minister, Chris Bowen stated that the new "no advantage" regime has been brought in to stop people drowning at sea.[9] In re-establishing an offshore process for refugees, the Government has forgotten the lessons of the recent past as outlined in the Palmer Report[10] and as shown in the tragedy of SIEVX.

Claims made as to the effectiveness of "no advantage" or deterrence strategies (Temporary Protection Visas, offshore processing and mandatory detention) are largely ideological and not based on empirical research. Evidence[11] suggests in some contexts deterrence can simply displace deaths to another site, or changes the demographics of who dies. US research notes a relationship between deterrence policies and an increased number of border deaths.[12]

The Australian government's tough stance on asylum seekers is failing to deter boat arrivals, as record numbers are hitting Australian shores. A record number of over 7,000 asylum seekers have arrived since the announcement was made in August[13].

This was to be anticipated, as offshore processing and TPVs did not previously stop the flow of asylum seekers. When questioned, Andrew Metcalfe, former Secretary of the Department of Immigration, confirmed that Nauru was ineffective in deterring asylum seekers from leaving Indonesia for Australia. This, he said, is "not just a view of my department; it is the collective view of agencies involved in providing advice in this area." Metcalfe went on to cite why the evidence of this is clear:

> *"We all know what happened with the people who were taken to Nauru [the majority were eventually resettled in Australia or New Zealand]. We know that Nauru filled up very quickly. We know that the government needed to establish new facilities at Manus because people kept coming. In fact, 1,700 people came after the Tampa arrived."*

No advantage policy will encourage family members to come by boat

As part of the government's "no advantage" responses, it has once more introduced legislation ensuring that anyone who arrived by boat as an Irregular Maritime Arrival (IMA) on or after 13 August 2012 will not be able to propose family members for resettlement to Australia under the Humanitarian Program[14]. There are no exceptions to this change and it affects both adult and child proposers.

While this change was brought in as part of a range of measures aimed at preventing loss of life at sea, it will repeat the circumstances that brought about the incident involving the largest loss of life (SIEV X) occurred after the introduction of offshore processing.

The demographics of the passengers on the SIEV X have been widely regarded as being driven by the exclusion of family reunification as part of the temporary protection visa program[15].

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[9] Bowen toughens rules for asylum seekers; Bianca Hall, Sydney Morning Herald; November 22, 2012 www.smh.com.au/opinion/political-news/bowen-toughens-rules-for-asylum-seekers-20121121-29qbr.html
[10] The Inquiry into the Unlawful Detention of Cornelia Rau, by Mick Palmer, 2005.
[11] http://www.palgrave.com/products/title.aspx?pid=395839
[12] Sharon Pickering, Professor of Criminology at Monash University; There's no evidence that asylum seeker deterrence policy works; theconversation.edu.au/theres-no-evidence-that-asylum-seeker-deterrence-policy-works-8367
[13] smh.com.au/opinion/political-news/six-asylum-seeker-boats-arrive-in-three-days-20121105-28tq2.html
[14] http://www.immi.gov.au/visas/humanitarian/offshore/immediate-family.htm
[15] Sharon Pickering, Professor of Criminology at Monash University; There's no evidence that asylum seeker deterrence policy works; theconversation.edu.au/theres-no-evidence-that-asylum-seeker-deterrence-policy-works-8367

The best way to remember the 146 children, 142 women and 65 men who died on the SIEV X, is not to repeat the mistakes of the past. Asylum seekers arriving by boat are not a threat to Australia: their numbers are insignificant, they are not illegal, and they make Australia a better place. SIEVX survivors are living among us now, and are worthwhile and useful citizens[16].

The Australian government has restricted the legal avenues for asylum seekers to find protection in Australia. As the world's leading authority on international refugee law, Professor James Hathaway explains:

> *We created the market for human smuggling. If asylum seekers could lawfully come to Australia and make a refugee claim without the need of sneaking in by boat, they would do it.[17].*

I have attached for the committee's further consideration research and comment (see Attachment A; Issues for consideration) about a number of issues including:

1. Can Australia's refugee obligations be delegated to another country?
2. Nauru – asylum seekers subjected to arbitrary detention
3. Nauru – land ownership and construction delays
4. Is the screening out process a lawful process?
5. Is screening out a fair and accurate process?
6. What are conditions like on Nauru?
7. Malaysian immigration officials and human trafficking
8. Is a policy of deterrence in violation of Article 31 of the Convention?
9. Asylum seeker deaths in detention
10. Burning boats leads to more deaths.

Attachment B includes some recommendations for reducing deaths, both by sea and within immigration custody.

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12 December 2012

[16] www.theage.com.au/opinion/politics/tragic-legacy-of-sievxs-fatal-sinking-20091019-h38e.html#ixzz2Eou1kfqA
[17] http://www.abc.net.au/radionational/programs/breakfast/asylum-seeker-policy-international-refugee-law/3585712