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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600
BY EMAIL: legcon.sen@aph.gov.au

Dear Secretary

Submission: Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

The Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 ('2012 Bill') implements recommendation 14 of the Report of the Expert Panel on Asylum Seekers (August 2012).

While it has been much reported that the Bill will excise the mainland from the migration zone, this is not what the Bill does. Rather, the Bill retains the current distinction between excised offshore places and other areas of the Australian territory, but introduces a new definition of 'unauthorised maritime arrival' that applies to persons arriving by boat to an excised offshore place *or* elsewhere in Australia (the proposed section 5AA). In effect, the Bill applies the regime that was applied to persons who arrived in the excised offshore places to all unauthorised maritime arrivals.

This submission will first consider the purpose behind the excision of territory from the migration zone in 2001, before turning to the current proposal to, in effect, remove the distinction created by this excision. We have concerns with the continuation in the 2012 Bill of the government's policy of discriminating against persons who arrive in Australia by boat seeking asylum. We also have concerns with the Bill's undermining of Australia's international obligations under the Refugee Convention. We also submit that the distinction between excised offshore places and the migration zone ought to be removed as the distinction no longer serves any purpose.

Excised Offshore Places – Initial Purpose and Critique

The concept of excised offshore places was introduced into the *Migration Act 1958* (Cth) by the *Migration Amendment (Excision from Migration Zone) Act 2001* for three main purposes:

(a) to prevent persons without a visa arriving at an excised offshore place (an 'offshore entry person') from making a visa application under the *Migration Act*, except when this bar was lifted by the Minister (section 46A);

(b) to empower Australian officials to detain unauthorised asylum seekers who are either in or seeking to enter an excised offshore place (section 189(3)); and

(c) to empower Australian officials to send offshore entry persons from an excised offshore place to another country (section 198A), where a Ministerial declaration is in force under section 198A(3).[1]

Excised offshore places included Christmas Island, Ashmore and Cartier Islands and Cocos (Keeling) Islands – all places where persons travelling by boat from Indonesia and seeking asylum in Australia had historically landed.

The 2001 amendments created, in effect, two classes of persons under the Migration Act - those who arrived on excised offshore places, predominantly by boat, and those who arrived within the migration zone, predominantly by air. In practice, the significance of this distinction was reduced following the High Court decision in *Plaintiff M61/2010E* in November 2010,[2] and there was no distinction following 24 March 2012, until off-shore processing was reintroduced in the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* in August 2012.

This distinction between those offshore places which were excised, and the rest of Australia, is not recognised by international law. Australia's obligations under international law, and specifically under the 1951 *Convention Relating to the Status of Refugees* ('*Refugee Convention*') and the 1967 *Protocol Relating to the Status of Refugees*, are identical in respect of persons arriving at excised offshore places and on the mainland. Article 29 of the 1969 *Vienna Convention on the Law of Treaties* (to which Australia is party) makes clear that Australia's treaty obligations apply to 'its entire territory'. Australia has lodged no relevant reservations to limit the territorial scope of its obligations. Indeed, this is implicitly acknowledged in the extensive non-statutory provisions for determination of refugee status that have been implemented in respect of persons arriving in excised offshore places. Whatever its consequences for Australian law, as a matter of international law the excision of offshore places has no effect on Australia's international obligations.

The Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012

The 2012 Bill implements one dimension of the larger policy recommended by the Report of the Expert Panel on Asylum Seekers. The Bill's purpose is to ensure that 'arrival anywhere on Australia by irregular maritime means will not provide individuals with a different lawful status than those who arrive in an excised offshore place' (recommendation 14). This is part of the overarching policy to

1 These provisions have been amended by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*.

2 (2010) 243 CLR 319.

implement a 'no advantage' principle, to ensure that no benefit is gained through circumventing regular migration arrangements. It is also part of a policy to reduce the likelihood of persons taking great risks with their lives by seeking to reach the Australian mainland by boat, rather than arriving at an excised offshore place.

The Bill purports to do this by removing the definition of 'offshore entry person' and inserting a definition of 'unauthorised maritime arrival' in the proposed section 5AA. This definition is framed to include persons who enter Australia by boat who arrive *either* at an excised offshore place or at any other place. Certain exclusions for New Zealand citizens and residents of Norfolk Island are included. Section 46A is then amended so as to extend the regime previously in place for 'offshore entry persons' to 'unauthorised maritime arrivals'. In this way, the Bill excludes any person arriving in Australia by sea (wherever they arrive) from applying for a visa under the *Migration Act*, except at the discretion of the Minister. Section 198AD is also amended so that Australian officers are empowered to remove 'unauthorised maritime arrivals' to a regional processing country.

Under s 189 of the *Migration Act,* a complex set of arrangements provides for when an Australian Officer can (or must) detain a person suspected of being an unlawful non-citizen. While the distinction between a person in an excised offshore place and elsewhere is still used in the provision, if examined closely, the same powers now apply to persons *regardless* of whether the person is in or seeking to enter an excised off-shore place or elsewhere in the Australian territory.

Under ss 189(1) and (3), if an officer knows or reasonably suspects that a person in the migration zone *or* an excised offshore place respectively is an unlawful non-citizen, the officer must detain the person. The same regime applies in both areas. Under s 189(3A), if the officer knows or reasonably suspects that a person in a protected area (around the Torres Strait) is a citizen of Papua New Guinea and is an unlawful non-citizen, the officer may detain the person. While this currently exists as an exception to s 189(3), which relates to excised offshore places, it does not depend on that definition to operate - it could equally be an exception to a general provision applying in all areas.

Under s 189(2) if an officer reasonably suspects that a person in Australia but outside the migration zone (potentially in an excised offshore place) is seeking to enter the migration zone (other than an excised offshore place) and would, if in the migration zone, be an unlawful non-citizen, the officer ~~must~~ 'may' detain the person. Presently, s 189(2) states that the officer 'must' detain a person entering Australia in this way. Under s 189(4), 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. By changing the mandatory power to detain in s 189(2) to a discretionary power, the 2012 Bill aligns the power to detain in s 189(2) with the power to detain in s 189(4).

Under s 189 the distinction between excised offshore places and the migration zone is no longer necessary. If the 2012 Bill is passed in its current form, sub-ss 189(1) and (3) will apply an identical rule to excised offshore places and other places in the migration zone, and sub-ss 189(2) and (4) will apply an identical rule to persons outside the migration zone seeking to enter it. In s 189, excision of offshore places will be a distinction without a difference: sub-ss 189(3) and (4) should simply be repealed; the words '(other than an excised offshore place)' should be removed from sub-s 189(1); sub-s 189(2) should be amended as proposed in the 2012 Bill; and sub-s 189(3A) should be renumbered and rephrased as an exception to sub-ss 189(1) and (2).

The 2012 Bill amendments thus remove the distinction created in 2001 that applied discriminatorily between people depending on where they landed – in an excised offshore place or elsewhere. However, it now reinforces, more strongly than before, the distinction between how persons are treated depending on their mode of arrival.

Critique of the 2012 Bill

We make the following observations regarding the amendments in the 2012 Bill:

1. To achieve the purpose of the Bill, there is no reason to retain the excision of certain areas from the migration zone. As we have explained above, under international law it is a legal fallacy. Furthermore, there is a conceptual incompatibility between the limitation of the rights of persons in excised offshore places and the limitation of the rights of unauthorised maritime arrivals. The concept of the excised offshore place makes sense if there is a territorial migration zone. However, the Bill completely changes the concept of the migration zone. It is no longer an absolute concept (where land is either in or out of the migration zone). It is now a relative concept. The same territory can be part of the migration zone, or not, depending on the mode of arrival of the person and their national identity. Given that those arriving by boat are almost exclusively from Afghanistan, Sri Lanka, Iran and Iraq, the distinction between persons based on their mode of arrival is likely to amount to discrimination on the basis of their country of origin under Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR).

2. The Bill makes explicit a distinction between persons seeking a protection visa depending on their mode of arrival – persons arriving in Australia by plane are able to apply for a protection visa whereas people arriving by boat are not. This distinction had previously only existed because of the different treatment afforded under the legislation to those persons arriving in excised offshore places.

   The distinction between persons based on their mode of arrival does not reflect the merits of their claim for a protection visa. Often, the mode of arrival is simply a matter of personal circumstance – what opportunities there are for travel and what financial resources persons have available to them. It is, then, an arbitrary point of discrimination, and does not necessarily implement the 'no advantage principle' as recommended by the Expert Panel.

   The rationale for the distinction is that it is designed to discourage persons in need of protection from entering Australia after a dangerous boat journey. There is no doubt that the journeys asylum seekers make by boat are potentially dangerous. Since 2009, one estimate is that 605 asylum seekers have died at sea attempting to reach Australia to seek protection. However, given the severity of the ‘push’ factors facing asylum seekers who cannot seek protection in their home states, there is a serious doubt as to whether the incapacity to apply for a protection visa and immediate removal from Australia to a third country will deter people from attempting to reach Australia by boat. Since the announcement on 13 August 2012 that asylum seekers would be deported to third countries

upon arrival in Australia, the number of people arriving by boat in subsequent months has continued to increase.

3. It is through the granting of protection visas in s 36 of the *Migration Act* that Australia fulfils its obligations under the *Refugee Convention*. The Bill excludes persons arriving by boat from making an application for a protection visa under s 36 and, in doing so, facilitates their removal to third countries. As such, the Bill significantly detracts from the system of protection that is offered to asylum seekers under the Act. We acknowledge that in fulfilling its commitment to refugees, Australia must have a policy that is sustainable over time, and that a regional approach to offering protection to asylum seekers is an important part of this. We acknowledge that the Bill is designed to facilitate this regional approach by enabling the government to remove asylum seekers who have arrived by boat to other countries for the processing of their claims. The capacity for the government to engage with the region in this way is clearly an important aspect of Australia's refugee policy following the recommendations of the Houston report, and the Bill directly facilitates engagement with the region.

   However, there is a serious doubt whether the off-shore processing regime that replaces applications for a protection visa fulfils Australia's obligations under the *Refugee Convention*. There are several concerns here.

   a. The *Refugee Convention* clearly envisages that refugees will arrive at the border and seek protection. Arriving on the territory of a signatory state is the means by which the overwhelming majority of refugees in the world seek asylum. The process provided for in the Bill, whereby refugees who arrive on the territory of Australia are removed for the processing of their claims, is inconsistent with this underlying principle of the *Convention*.

   b. Under Article 3 of the *Refugee Convention*, states are obliged to apply the *Convention* 'without discrimination as to race, religion or country of origin'. Given that the profile of refugees arriving by plane or boat may be distinct, there is a danger that the differential treatment of unauthorised maritime arrivals in the Bill could be discriminatory on one or more of these grounds.

   c. Refugees are, under Article 16 of the *Refugee Convention*, to have free access to the courts on the territory of contracting states. While the High Court in *Plaintiff M61/2010E v Commonwealth* held that in very limited circumstances a refugee to whom s 46A applies may have recourse to Australian courts, free access is clearly denied to unauthorised maritime arrivals under the Bill.

d. Under Article 31 of the *Refugee Convention*, contracting states are not to penalise refugees for arriving on their borders without authorisation, 'provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'. Denying access to protection, and subjecting asylum seekers to indefinite and arbitrary detention while they await removal to a third country, and once in a third country imposing detention upon them under the expressed 'no advantage' test, is a significant penalty.

e. Under Article 33 of the *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.' Offshore processing puts Australia at risk of breaching the obligation of non-refoulement if the Australian government is not able to guarantee the safety of a refugee seeking its protection.

4. Given that the Bill detracts from Australia's commitment under the *Refugee Convention* as outlined above, it is important that the changes be seen as facilitating a more effective response to the refugee issues in the region. Denying access to protection visas in Australia to maritime arrivals may be justifiable as part of a broader regional approach to refugee protection and resettlement, but only if there is a coherent and justifiable regional approach to processing the claims of refugees in the region. To this end, emphasising Australia's commitment to the resettlement of refugees in the region, through its negotiations with Malaysia and Indonesia and other nations in South-East Asia on the treatment of asylum seekers, and the role of the UNHCR in processing claims in the region, are vitally important to the broader justification for the exclusion of unauthorised maritime arrivals from seeking protection in Australia. The current use of Nauru and Papua New Guinea for the detention and processing of asylum seekers transferred from Australian territory does not fit within this broader justification.

Concluding Observations

The objectives of the Bill would be better achieved by removing entirely the provisions in the *Migration Act* relating to excised offshore places. The critical distinction under the policy being pursued is between unauthorised maritime arrivals and other unlawful non-citizens; the artificial (and legally ineffectual) concept of excising offshore places no longer serves any purpose, and should be removed.

However, we also contend that there are reasons to question the policy of the Bill in establishing a distinction between unauthorised maritime arrivals and other unlawful non-citizens, particularly in respect of its capacity to fulfil Australia's international obligations under various international treaties described above.

Yours sincerely

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