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

17 December 2012

Dear Secretary,

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

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at [www.libertyvictoria.org.au](http://www.libertyvictoria.org.au).

Liberty Victoria welcomes this opportunity to contribute to the Senate Legal & Constitutional Affairs Committee inquiry into the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 ("**the Bill**").

Submissions made in response to the Bill examine proposed amendments made to the *Migration Act 1958 (Cth)* ("**the Act**"), and offer assessment of their operation and compliance with international law.

### **Introduction to the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012**

Liberty Victoria is deeply concerned that the Bill, at a minimum, undermines Australia's international obligations. The Bill bars unauthorised maritime arrivals from applying for such visas,

permitting their removal to a third country, leading to uncertainty of when their claims may be processed, thereby increasing the likelihood of prolonged detention.

Asylum seekers that arrive by boat are effectively discriminated by the mode of their arrival. Further, they are denied legal rights and access to Australian courts. In essence, penalties are imposed on those who attempt to seek protection. The government has provided evidence that at least 80% of people who arrive by boat as assessed by Australian authorities are genuine refugees. In practice, the “no advantage” principle may mean that people who arrive by boat may experience long periods of time in regional processing countries and be subjected to resettlement limbo.

Under Article 26 of the Vienna Convention, Australia has an obligation to perform its obligations in good faith. This good faith is breached where a State may seek to avoid or divert that obligation which it has accepted. Australia arguably breaches this via the no advantage policy if it attempts to prevent asylum seekers travelling by boat to Australia without providing a safe alternative. Article 29 of the Vienna Convention holds that Australia’s treaty obligations apply to its “entire territory” and hence, not affected by the excision policy. It is doubtful that the Bill is consistent with the Refugee Convention and Australia’s human rights obligations.

The Bill seeks to implement recommendation 14 of the Report of the Expert Panel on Asylum Seekers, released on 13 August 2012 (“**the Report**”). Recommendation 14 recommended amendment to the Act so that arrival in Australia by irregular maritime means would not provide individuals with a different lawful status than those who arrived at an excised offshore place. Its purpose was to dissuade asylum seekers from taking greater risks by trying to reach the mainland, expanding the scope of persons falling within the provisions introduced by the *Migration Amendment (Regional Processing and Other Measures) Act 2012* (“**Regional Processing Act**”). The Expert Panel asserted that Australia’s existing excision legislation may create such an incentive. The Panel carefully stated that the range of recommended disincentives are consistent with Australia’s international obligations and did not seek to punish individuals that seek such protection.

It is acknowledged that the policy of excision is not of itself inconsistent with international law. However, international law requires that the processing of asylum seekers be fair, efficient and accord to international standards. The UNHCR in response to the Bill has recently expressed its concern that “under international law any excision of territory for a specific purpose has no bearing on the obligation of a country to abide by its international treaty obligations which apply to all of its territory. This includes the 1951 Refugee Convention, to which Australia is a party.”<sup>1</sup>

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<sup>1</sup> UNHCR Statement 31 October 2012 Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, [http://unhcr.org.au/unhcr/index.php?option=com\\_content&view=article&id=277:unhcr-statement-migration-amendment-unauthorised-maritime-arrivals-and-other-measures-bill-2012&catid=35:news-a-media&Itemid=63](http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=277:unhcr-statement-migration-amendment-unauthorised-maritime-arrivals-and-other-measures-bill-2012&catid=35:news-a-media&Itemid=63)

Professor Gillian Triggs, President of the Australian Human Rights Commission, referring to Australia's excision legislation, states that "[w]hatever the validity of such acts of excision under domestic law, they can have no effect on obligations arising under international treaties with respect to human rights".<sup>2</sup>

## **Current State of Law**

### 1. Introduction: Australia's Migration Regime

Introduced after the ratification of the Refugee Convention in 1954, the *Migration Act 1958 (Cth)* is the legislation that determines how asylum seekers may seek refuge in Australia. The Bill takes its place within a suite of amendments to the Migration Act that limit the ability of asylum seekers to secure refugee status in Australia. This includes such things as the narrowing of the definition of 'persecution' for the purposes of establishing the definition of a refugee<sup>3</sup> – that the person holds a well-founded fear of persecution on the basis of their race, religion, nationality, political opinion or membership of a particular social group. For the purposes of understanding the Bill, the most relevant parts of Australia's migration scheme relate to the differing treatment the Act affords to asylum seekers who arrive in Australia by boat, compared to those who arrive by air. In order to understand the impact of the Bill, it is necessary to place it in context within the history of developments to this area of law.

### 2. Excised Offshore Places

In 2001 the Howard Government implemented the Pacific Solution through three pieces of legislation:

- *Migration Amendment (Excision from Migration Zone) Act 2001* ('the excision Act 1')
- *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* ('the excision Act 2')
- *Border Protection (Validation and Enforcement Powers) Act 2001*

The purpose of the scheme was to process asylum seeker applications 'offshore'. The Government achieved this purpose by excising (removing) certain Australian territories from the Australian migration zone and defining those areas as 'excised offshore places'. Australia's excised offshore places are Christmas Island (Indian Ocean), Ashore and Cartier Islands (Timor

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<sup>2</sup> Gillian Triggs, *International Law, Contemporary Principles and Practices* (2011) 100.

<sup>3</sup> *Migration Legislation Amendment Act (No. 6) 2001 (Cth)*, section 5. See High Court criticisms of an exhaustive definition of 'persecution' in *Applicant A & Anor v Minister for Immigration and Ethnic Affairs & Anor* [1997] 190 CLR 225 per McHugh J; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 per Kirby J.

Sea), Cocos (Keeling Islands (Indian Ocean) and those external territories or islands prescribed in the regulations of the excision Act 1.

Australia's migration zone includes the states and territories of Australia, and certain waters around those states and territories. The purpose of a migration zone is to determine the geographical area in which a non-citizen must hold a visa to legally enter a country. While an excised offshore place is still under Australian sovereignty, can be accessed and inhabited by all Australian citizens and permanent residents in the same manner as any other part of Australia, and can be accessed by non-citizens with a valid visa, the legislation imposes different rules for non-citizens who arrive on an excised offshore place without a valid visa.

In these circumstances, the excision Act 1 prevents this latter category of person, called 'offshore entry persons', from making a visa application on arrival or during their stay in Australia, either at the excised offshore place or anywhere else in Australia.<sup>4</sup> The offshore entry person is only able to apply for such a visa if the Minister exercises his or her discretionary power to allow the application where the Minister believes it is in the public interest to do so. The offshore entry person can be detained in the excised offshore place or removed from the excised offshore place to a country that has been declared as a suitable country under the legislation (s 189A of the excision Act 2). The asylum seeker's application is then processed in this declared country.

It is this legislative scheme that has led to the implementation of mandatory detention, which has had devastating effects on the mental and physical well being of the detained. It also raised a problematic distinction between asylum seekers who arrive by air, and those who arrive at an excised offshore place, predominantly by boat. The stripping of ordinary visa application rights from the latter category means that these asylum seekers are subject to treatment different to that of asylum seekers who arrive in Australia by air. It is a punitive regime that has led to repeated questions regarding Australia's compliance with its international obligations.

### 3. Relevant case law

The giving or taking away of visas is an exercise of a statutory power by a member of the Government, that is, under the rules of administrative law, reviewable to a limited extent by the Australian judiciary. Attempts by the Government to take asylum seeker migration decisions out of the ambit of judicial review have been met by the Australian courts with suspicion. While the development of case law in this area is complex and voluminous, the following two High Court decisions are notable for their contribution to the development of this area of law.

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<sup>4</sup> Australian Government Department of Immigration and Citizenship, *Fact Sheet 81 – Australia's Excised Offshore Places*, <http://www.immi.gov.au/media/fact-sheets/81excised-offshore.htm>.

Under s 198A(3) of the Migration Act (inserted by the excision Act 2), a declaration is to be made over a country if that country provides, to the asylum seeker, access to effective procedures for assessing their need for protection, provides protection for the asylum seeker pending determination of their claim, provides protection to those given refugee status while voluntary repatriation or resettlement is organised and if that country meets relevant human rights standards in providing these protections. In *Plaintiff M70/2011 v Minister for Immigration and Citizenship & Anor* [2011],<sup>5</sup> the High Court invalidated the decision of the Immigration Minister to make Malaysia a declared country under s 198A. The High Court found that, when making a declaration over a country, the Minister must be satisfied of the four factors under s 198A(3). The High Court also found that s 198A is informed by a legislative intent to facilitate Australia's compliance with its obligations under international refugee law instruments.

In *Plaintiff M61/2010E v Commonwealth* (2010),<sup>6</sup> two Sri Lankan asylum seekers, who had arrived by boat at an offshore excised place, argued that they were denied procedural fairness in their claims and that the Government official who considered their claims did not act according to law because they did not consider themselves bound by the Migration Act or any judicial decisions that related to it. The processing of the asylum claims of offshore entry persons, which was a different and distinct processing system to that conducted within the migration zone, was purported, by the Government, to be a non-statutory decision merely informed by, and not governed, by the Migration Act. This argument was made, and dismissed by the High Court. It was held that the failure to treat the Migration Act and related case law as binding on the decision maker when considering the application of both M61 and M69, was an error of law reviewable by Australian courts. The effect of *M61* was to allow judicial review of visa determinations made in relation to offshore entry persons.

In holding that the Migration Act applied in the determination of refugee status of offshore entry persons, *M61*, to some extent, dissolved the distinction between the treatment afforded to asylum seekers who arrive by boat and those who arrive by air. The decision was heralded as a victory for the rule of law and a win for Australia's asylum seekers.<sup>7</sup> In March 2012, the Federal Government announced that all asylum seekers, regardless of mode of travel or place of arrival, would be processed according to one statutory system under the Migration Act.

#### 4. The 2012 Act

In July 2012 there were over 90 deaths of asylum seekers en route to Australia. These tragic events increased the pressure on the Australian government to assume to a policy that would 'deter' people smugglers. The Australian government returned to a policy of distinct and separate

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<sup>5</sup> HCA 32.

<sup>6</sup> 243 CLR 319.

<sup>7</sup> Hannah Steward-Weeks, 'Case Note: Out of Sight but Not out of Mind: *Plaintiff M61/2010E v Commonwealth*' (2011) 33 *Sydney Law Review* 831, 831.

processing systems based on arrival mode in the *Migration Amendment (Regional Processing and Other Measures) Act 2012* ('the regional processing Act').

The regional processing Act set up a regional processing system for offshore entry persons. It implements recommendations of the Expert Panel Report that relate to regional processing. Under the regional processing Act, the four 'factors' that inform whether a country should be a declared country for the purposes of processing asylum seeker claims, has been repealed. It has been replaced by one requirement that the Minister think that it is in the national interest to make the country a declared country. This amendment removes the protections that were offered by the statutory thresholds under the previous s 198A, and essentially circumvents the implied obligations of s 198A found by the High Court in *M70*.

The regional processing Act is a further departure from Australia's international obligations, and is yet another amendment to the Migration Act that carves away at the protection of asylum seeker rights.

### ***The Operation of the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012***

*The Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* ("the Bill") seeks to implement recommendation 14 of the Report of the Expert Panel on Asylum Seekers handed down in August 2012. Recommendation 14 of the Expert Panel states "that arrival anywhere in Australia by irregular maritime means will not provide individuals with a different lawful status than those who arrive in an excised offshore place."

As already explored, effectively this is to ensure that all people arriving by boat are legally able to be processed offshore, as per the Regional Processing Act. This Act commenced on 18 August 2012 in response to Recommendation 7 of the Expert Panel report, which stated "that legislation to support the transfer of people to regional processing arrangements be introduced into the Australian Parliament as a matter of urgency."

The legislative framework of the Regional Processing Act and the Bill enforces the "No Advantage" principle, in accordance with recommendations of the Expert Panel on Asylum Seekers. It ostensibly sets out the same legal treatment of all persons seeking asylum in Australia by boat. This is in response to concerns from the Expert Panel that whilst mandatory detention and offshore processing only applied to people arriving in excised offshore places, there would be incentive for people to seek the Australian mainland by boat to circumvent these. The proposed legislation also takes into consideration the recommendation of the Report of the Expert Panel, that legislative

change is necessary to stop people from aiming to reach the mainland Australia and circumventing closer landing points, and therefore putting their lives in danger.

The Bill proposes to amend several aspects of the *Migration Act 1958*. Broadly speaking, the amendments seek to replace the use of the terminology 'offshore entry person' and replace it with 'unauthorised maritime arrival' throughout the entirety of the Act. It also seeks to impose the no-advantage policy (recommended by the Expert Panel) to all unauthorised maritime arrivals, irrespective of where their first point of arrival is. This effectively removes the system that was in place within the Migration Act (as it is now), which saw different regimes imposed on asylum seekers who were determined to be offshore arrivals and asylum seekers who entered the Australian mainland as their first point of entry, and intends that all processing of asylum seekers to be done offshore.

The Bill also includes new implications for asylum seekers intending to apply for Australian visas when determined to be an 'unauthorised maritime arrival'. The Bill will also seek to expand the term 'transitory person' to include Refugees as assessed under Article 1A of the *Convention Relating to the Status of Refugees* 1951. Amendments set out within this proposed bill will also diminish the rights of 'transitory persons' (including people with United Nations Refugee Status) from being able to seek judicial review regarding their assessment and status within Australia. This submission will now look to each major amendment within the Bill separately.

#### 1. Amending Section 5(1)

Amend the definition of "transitory person" at Section 5(1) to include people who have already been assessed as refugees for the purposes of the Refugee Convention. This has the effect at Section 198AH(2) of allowing people who have been assessed as genuine refugees to be taken regional processing countries regardless of the fact that their refugee status has already been determined under Article 1A of the Convention. Also, by the repeal of Sections 198C and 198D, transitory persons cannot apply to the Refugee Review Tribunal to have their status assessed in Australia.

Both of these definitions or redefinitions are relevant to Section 46. By amending Section 46A to refer to "unauthorised maritime arrivals", subsection 46A(1) prevents persons arriving in this manner from applying for any visa in Australia. The redefinition of "transitory person" has the effect of making Section 46B irrelevant; in that people under this definition are included in the ban on making valid visa applications. The combined effect of the new definition of "unauthorised maritime arrivals" and the redefinition of "transitory persons" makes Section 46 a blanket ban on any such people making valid visa applications in Australia. More importantly, it removes a legal avenue for assessment of refugee status of transitory persons by making any such assessment inherently meaningless under the new definition.

## 2. Inserting of section 5AA.

Section 5AA(1) will insert a definition of 'unauthorised maritime arrival'. This definition will include arrival by sea –

- (i) at an excised offshore place; or
- (ii) at any other place.

This effectively will set up the practice that an asylum seeker landing on the Australian mainland by sea arrival, will be within the definition of an 'unauthorised maritime arrival'. Section 5AA(2) will provide a definition necessary to determine if a person has entered Australia by sea and section 5AA(3) provides exceptions to this definition, including exceptions for New Zealand citizens and those people who have passports with the authority to reside in Norfolk Island. This section also gives the scope for an exception to people within a prescribed class of persons.

## 3. Section 46A amendment.

The substitution of the words 'offshore entry person' for 'unauthorised maritime arrival' in section 46A effectively will prevent any person within this definition from being able to make a valid application for a visa within Australia. This is different to the application of this section as it is today, as this bar previously only applied to 'offshore entry persons.' This amendment will have the effect of barring any person who fits the definition of 'unauthorised maritime arrival' from making a visa application. This reflects the no-advantage recommendation made by the Expert Panel.

## 4. Inserting new subsection 198AE(1A)

This proposed section will come after subsection 198AE(1). That section gives the Minister power to, in writing, determine that s198AD does not apply to an offshore entry person who is detained under s198 of the Act, if the Minister thinks that it is in the public interest to do so. Under this section the Minister has power to declare in writing that a person is exempt from being removed from Australia (under s198) and being taken offshore to a regional processing country under s198AD if it is in the public interest.

The additional section 198AE(1A) will state that the Minister may, in writing, vary or revoke a determination made under subsection 198AE(1). Therefore the Bill is purporting to give the Minister retrospective power, if it can be deemed to be within the public interest to do so. If the Minister can prove it is within the public interest, there is power here to take a person to a regional offshore processing country, even if that person had previously been told that that regime did not apply to him or her.



#### 5. Amendments made to section 198AH.

The proposed Bill substitutes, as throughout the entire Act, the words 'offshore entry person' and substitutes 'unauthorised maritime arrival' in s198AH(a). This section purports to apply section 198AD to all 'unauthorised maritime arrivals' to which section meaning any person fitting that definition may be taken offshore to a regional processing country.

The Bill also repeals section 198AH(d) and 198AH(e) as a consequence of the repeal of section 198C and D (as discussed below.)

The Bill also adds a new subsection 198AH(2) which states that this section as a whole applies whether or not the transitory person has been assessed to be covered by the definition of the refugee in Article 1A of the Refugees Convention as amended by the Refugees Protocol. This amendment, if passed, will be taken to mean that even if a person has been declared by the United Nations to be refugee, under this proposed amendment they will still be able to be forcibly taken to a regional processing country under valid Australia law.

#### 6. Repeal of sections 198C and 198D.

The Bill proposes to repeal these two sections. The effect of this amendment is that transitory persons brought to Australia from a regional processing country, under s198, will not be allowed to request an assessment of their refugee status if they remain in Australia for continuous 6 months. This amendment is seen to be part of the no-advantage policy, as it may otherwise be seen to be creating an advantage for persons who seek to circumvent the regular migration scheme and who gain an advantage though these sections under the Act.

Language used by government in relation to this amendment would tend to indicate that this is to encourage persons to make an offshore application for a visa and to prevent unauthorised maritime arrivals within Australia and in an effort to save lives due to incidents that come with this maritime travel.

#### 7. Amending Section 494AA

Section 494AA – Bar on certain legal proceedings relating to unauthorised maritime arrivals (previously "offshore entry persons")

As another consequence of the amendments and substitution of definitions, Section 494AA now excludes any legal proceedings currently listed under Section 494AA(1) from being instigated or pursued by any person classified as an unauthorised maritime arrival. Amongst these barred

proceedings are any relating status of an offshore entry person; or the lawfulness of their detention.

## **Inconsistencies between the Bill and International Law Obligations**

### 1. Discriminatory nature of the amendments

As a contracting State under a number of international treaties, Australia has obligations owed in respect to its implementation of administrative processes and procedures which would discriminate on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Such obligations can be found in international treaties such as the *International Covenant on Civil & Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child*.

In the report produced by the Expert Panel on Asylum Seekers which informed these amendments (The Houston Report), it was noted by reporting experts that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the relevant treaty.

The differentiation of arrivals of people entering Australia by boat however represents an application of a discriminatory procedure based in part on country of origin. As supplied in Attachment 2 of the Houston Report on the nature of people smuggling and Australia, it is recognised that “smuggling by sea is disproportionately important to particular groups of migrants as the best, or possibly only, form of available transport for a particular leg of their journey.” The report provides that nationals arriving by boat in Australia are dominated by “a few key nationality groups, primarily Afghan Hazaras, Iranian, Iraqi and Sri Lankan Nationals”, with these groups representing the significant majority of all those arriving by boat to Australia.

The differentiation of treatment between its proposed class of Section 5AA UMA’s and those arriving in Australia by other means of transport places a limitation upon the rights of those who arrive by sea. Due to the highly localised nature of ethnicity and the countries of origin of which these people arrive, distinction based upon their form of arrival to Australia is likely to amount to discrimination on the basis of their country of origin.

The distinction placed upon people arriving to Australia in boats does not reflect the merits of their claim for protection visas, and discriminates against those arriving from originating countries whose migration practice is characterised by unauthorised arrival to Australia by boat.

It also plainly constitutes discrimination on the basis of mode of arrival, contrary to the Convention.

## 2. Penal nature of the amendments

Under obligations owed under the 1951 Refugees Convention, contracting States are prohibited from imposing penalties upon asylum seekers on account of their illegal entry or presence in those countries they have entered without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Under the amendments envisaged by Section 46A of the Bill, the substitution of the words 'offshore entry person' for 'unauthorised maritime arrival' effectively prevents any person falling within the category of an UMA from being able to make a valid application for a visa within Australia.

In addition, amendments set out within the Bill repealing Sections 198C and 198D of the *Migration Act* also act to diminish the rights of 'transitory persons' from being able to seek judicial appeal regarding their assessment and status within Australia.

The specific amendments relating to "transitory person" at Section 5(1) to include people who have already been assessed as refugees for the purposes of the Refugee Convention and the effect of Section 198AH(2), which allows people who have been assessed as genuine refugees to be taken to regional processing countries regardless of the fact that their status has already been determined as valid under Article 1A of the Refugees Convention, is evidence of a significant penalty placed upon persons arriving in such circumstances into Australia, and is in contravention to Section 31 of the Refugees Convention.

In restricting their ability to make an application for a protection visa, and revoking their ability to access judicial review, it is plain that these amendments would have a punitive effect on asylum seekers, in contravention of international law.

## 3. Increased likelihood of Refoulement:

The prohibition of *refoulement* under international refugee law is applicable to any form of forcible removal from a state's borders.

The operation of the principle of *refoulement* is considered to extend to include any deportation, expulsion, extradition, informal transfer or "renditions", and non-admission from states in international law.

Under its ambit, no contracting state in this system may return a refugee in any manner whatsoever to the frontiers of territories where the person's life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. In its operation, the principle applies to the return of a person to any other place where a

person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention.

Unlike the proposed operation of the Bill, the operation of the principle of non-refoulement creates no delineation between those people already recognised as refugees and those who have yet to be processed to have their status formally declared.

Where non-refoulement concerns are raised in international law, an assessment of the real risk of harm must take into account all the circumstances of the particular case. These risks would include the personal risks faced by the claimant, the human rights record of the relevant country and, if relevant, the content and credibility of any agreements or assurances as to treatment.

It is the view of our association that detaining those people who fall under the definition of a UMA or 'transitory person' to regional processing centres for an indefinite period of time is inappropriate, and fails to accord with non-refoulement obligations to which Australia's duty is owed.

As a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, states are required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.

Under the amendments envisaged by the Bill to the Migration Act, such access to territory and fair asylum procedures are not in place.

### **Liberty Victoria's response to the Bill**

Liberty Victoria is profoundly troubled by the Bill, and what it seeks to achieve. Asylum seeker and border control processes must be consistent with obligations owed by Australia at international law. The obligations imposed under international instruments should be complied with and promoted within Australia in all of its measures. It is the view of Liberty Victoria that the provisions of the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 fail to meet such standards, and pose significant legal concerns as to the obligations owed at international law, and the instruments to which Australia is party.

Australia's compliance with international law obligations depends upon its continued enactment of legislation and administration processes which set the highest benchmark for the processing of people seeking asylum. In its current manifestation, the proposed amendment Bill to the Migration Act fails to meet these standards. In its submission, Liberty Victoria points specifically to the following practices which are inconsistent with Australia's obligations at international law:

- Processes introduced in the Bill which would differentiate between arrivals of people from particular countries of origin entering Australia by boat are highly discriminatory;
- Restrictions on mechanisms for judicial review and amendments relating to “transitory persons” at Section 198AH(2) allowing people who have been assessed as genuine refugees to be taken to regional processing countries regardless of the fact that their status has already been determined as valid acts as a penalty placed upon persons arriving in such circumstances into Australia, and is in contravention to Section 31 of the Refugees Convention;
- It is the submission that in the matter of all refugees who face indefinite detention where such people are not convicted or accused of any offence cannot be justified. The right to humane treatment while being deprived of liberty and the right to freedom are associated with the right to liberty;
- Liberty Victoria considers it imperative that the bases of originating laws within Australia provide fair and effective asylum procedures, enacting administrative procedures and standards which comply with both international law and Australia’s refugee and human rights law obligations.

Put simply, it is the view of Liberty Victoria that any measure that is intended to deter people from seeking asylum in Australia by punishment and other harsh treatment is indefensible. Australia is a party to the relevant Conventions and Treaties and has undertaken to abide by the spirit of these laws. The past decade of “deter & deny” policy has seen Australia descend to the very basest standard of treatment of asylum seekers. It is Liberty Victoria’s view that this Bill is just another step in the unedifying erosion of the rights of asylum seekers in Australia.

While Liberty Victoria is deeply saddened by the high number of deaths at sea of asylum seekers trying to enter Australia, it is absolutely clear that punishment and deterrence is not an effective strategy to prevent such tragedies from occurring. It is illogical and unfair to punish people for arriving in Australia by boat without first providing them some other option. The current regime – sought to be furthered by this Bill – is all stick, and no carrot. Asylum seekers arriving by boat require an opportunity to be processed *before* they get on boats; they ought not be punished after doing so in the absence of any other available option.

Until such time as Australia provides asylum seekers with a meaningful opportunity to be processed according to law *without* the need to get on a boat, there will continue to be boat arrivals and deaths at sea. Punishment of asylum seekers will not stop attempts to seek asylum in Australia; two decades of mandatory indefinite detention have proven that. Push factors are much stronger than deterrent measures at the destination. To legislate as if this is not the case is naïve and short-sighted.

This Bill ought not pass.

Liberty Victoria thanks the Committee for the opportunity to contribute to the inquiry. For further information or comment please contact Jessie Taylor through the Liberty Victoria office; [info@libertyvictoria.org.au](mailto:info@libertyvictoria.org.au)

Sincerely yours,

Liberty Victoria