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

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**Senate Committee on Legal and  
Constitutional Affairs**

**17 December 2012**

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## Acknowledgement

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## Executive Summary

1. The *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* (the UMA Bill) seeks to amend the *Migration Act 1958 (Cth)* (the Migration Act) by replacing the term, 'offshore entry person' with a new term, 'unauthorised maritime arrival' in certain provisions of the Migration Act. As a result of this amendment and others in the Bill, all asylum seekers who arrive by sea will be subject to regional processing arrangements unless they are specifically exempt. This eliminates the current distinction between asylum seekers who arrive by boat at an excised offshore place and those who reach the Australian mainland.
2. The UMA Bill also amends the Migration Act to make it clear that asylum seekers arriving by boat cannot institute or continue certain legal proceedings. Such asylum seekers are not eligible to apply for a visa in Australia unless the Minister for Immigration and Citizenship (the Minister) exercises a personal discretion to allow them to do so.
3. The introduction of the UMA Bill forms part of the Government's response to the recommendations of the Expert Panel on Asylum Seekers' (the Expert Panel) and follows the enactment of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (the Regional Processing Act) in August 2012, which amended the Migration Act to permit an 'offshore entry person' to be taken to a regional processing country.
4. The Law Council strongly opposes the amendments contained in the UMA Bill on the grounds that the UMA Bill:
  - is inconsistent with the spirit and purpose of the Refugees Convention<sup>1</sup> to which Australia is party;
  - undermines Australia's obligations under other human rights Conventions to which it is party; and
  - expands the current arrangements for transfers of asylum seekers to regional processing countries which do not adhere to human rights and rule of law principles.
5. For these reasons, the Law Council submits that the UMA Bill should not be passed.
6. If, contrary to the Law Council's recommendation, the Committee takes the view that the current regional processing arrangements should continue, the Law Council urges the Committee to ensure that the most concerning provisions of the Bill are substantially amended. This could include, for example, requiring the Minister to have regard to the full range of Australia's human rights obligations before making decisions relating to the transfer of such asylum seekers to regional processing countries, or in exercising his or her discretion to allow such asylum seekers to apply for a protection visa under the Migration Act.
7. The Law Council also urges the Committee to recommend that the Australian Government make a number of legislative and policy changes to its regional processing arrangements to ensure that they more closely reflect Australia's human rights obligations and rule of law principles. This includes giving priority to the

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<sup>1</sup> *Convention Relating to the Status of Refugees* Opened for signature 28 July 1951, NTS 137 (entered into force 22 April 1954) as amended by the *Protocol Relating to the Status of Refugees* (the Refugee Convention).

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implementation of those recommendations made by the Expert Panel to seek to provide incentives for asylum seekers to use regular migration pathways and regional and international protection arrangements.

8. This submission has been lodged by the authority delegated by Directors to the Secretary-General, but does not necessarily reflect the personal views of each Director of the Law Council of Australia.

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## Introduction

9. The Law Council is pleased to provide the following comments to the Senate Legal and Constitutional Affairs Committee (the Committee) as part of its inquiry into the provisions of the UMA Bill.
10. The introduction of the UMA Bill follows the enactment of the Regional Processing Act in August 2012. The Regional Processing Act amended the Migration Act to permit an 'offshore entry person' to be taken to a regional processing country.
11. Both the UMA Bill and the Regional Processing Act have been enacted as part of the Government's response to the recommendations of the Expert Panel, which was appointed to provide the Government with policy advice to prevent asylum seekers from taking dangerous boat journeys to seek protection in Australia.<sup>2</sup>
12. If enacted, the UMA Bill will amend the Migration Act by:
  - replacing the term, 'offshore entry person' with the new term, 'unauthorised maritime arrival' in certain provisions. This will mean that asylum seekers arriving in Australia by boat will have the same legal status regardless of where they arrive, unless they are in an excluded class or otherwise exempted;
  - making it clear that 'unauthorised maritime arrivals' may be taken to a regional processing country;
  - making it clear that such asylum seekers cannot apply for a visa in Australia unless the Minister exercises a personal discretion to allow them to do so; and
  - making it clear that such asylum seekers cannot institute certain legal proceedings in Australia.
13. An 'offshore entry person' is currently defined as including persons who have entered Australia at an 'offshore excised place' since 2001 when places such as Christmas Island were excised from the Australian 'migration zone'. The 'migration zone' is defined to include the area of the States and Territories including sea within the limits of the States and Territories and ports. 'Offshore entry persons', who do not hold visas are 'unlawful non-citizens' and cannot make valid applications for visas unless the Minister exercises a personal discretion to allow them to do so.
14. Particular restrictions regarding the institution of legal proceedings also apply to 'offshore entry persons'.
15. Asylum seekers arriving in the 'migration zone' without a visa have the right to apply for a visa and are not subject to the restrictions that apply to 'offshore entry persons' regarding the institution of legal proceedings. These asylum seekers have access

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<sup>2</sup> The Expert Panel was headed by Air Chief Marshal Houston. The other members of the panel were immigration advisor Paris Aristotle and former diplomat Michael L'Estrange. As part of its terms of reference, the Expert Panel was charged with taking into account and providing policy advice on: how best to prevent asylum seekers risking their lives by travelling to Australia by boat; source, transit and destination country aspects of irregular migration; relevant international obligations; the development of an inter-related set of proposals in support of asylum seeker issues, given Australia's right to maintain its borders; short, medium and long term approaches to assist in the development of an effective and sustainable approach to asylum seekers; the legislative requirements for implementation; and the order of magnitude of costs of such policy options.

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to a statutory process to determine their claims for protection, including access to merits review in the Refugee Review Tribunal (RRT) and some access to judicial review.

16. The Bill introduces a definition of 'unauthorised maritime arrival' as a person
  - (a) who enters Australia by sea at an excised offshore place or in any other place; and
  - (b) becomes an 'unlawful non-citizen' because of that entry; and
  - (c) is not an 'excluded maritime arrival'.
17. The Bill seeks to ensure that all asylum seekers arriving by boat are subject to the 'no advantage' principle recommended by the Expert Panel. This principle means that asylum seekers arriving by boat should not gain an advantage over other asylum seekers, who seek protection through regular migration pathways or through regional and international protection arrangements.
18. The 'no advantage' principle is one of the disincentives to boat journeys by asylum seekers recommended by the Expert Panel. The Expert Panel also recommended incentives to encourage greater use by asylum seekers of regular migration pathways and regional and international protection arrangements. However, the Government's implementation of the recommendations to date has largely focussed on disincentives. The Law Council is concerned about this focus on the recommendations relating to disincentives. In this context, the Law Council has a number of concerns about the UMA Bill and opposes its enactment.
19. The reasons for the Law Council's opposition to the UMA Bill can be summarised as follows:
  - The UMA Bill is inconsistent with the spirit and purpose of the Refugees Convention<sup>3</sup> to which Australia is party. For example, the amendments proposed in the UMA Bill extend to all asylum seekers arriving by boat, the current provisions in the Migration Act which:
    - allow offshore entry persons to be transferred to other countries;
    - seek to absolve Australia of its obligations to assess the protection claims of offshore entry persons and to grant protection to those found to be genuine refugees; and
    - undermine the internationally recognised right to claim refugee status for offshore entry persons by making the exercise of this right wholly dependent on the non-reviewable exercise of executive discretion.
  - The amendments proposed in the UMA Bill have the potential to undermine Australia's obligations under other human rights Conventions to which it is party, such as those obligations that prohibit discriminatory treatment of certain classes of asylum seekers or refugees or those that prohibit arbitrary detention.
  - There are no legally binding guarantees in the UMA Bill or other aspects of the Government's offshore processing policies that ensure that people who are transferred under these arrangements will be:

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<sup>3</sup> See note 1 above.

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- subject to fair status determination processes that adhere to human rights and rule of law principles,
  - treated with dignity and respect for the full range of internationally recognised human rights; and
  - be provided with adequate access to legal and migration assistance and other essential services.
20. Many of these concerns arise from the legal and political context in which the UMA Bill has been introduced, such as the passage of the Regional Processing Act and the Government's implementation of the 'no-advantage test' since 13 August 2012.
21. The Law Council is of the view that the introduction of the UMA Bill in this context highlights the Government selective approach to the implementation of the Expert Panel's recommendations, which focuses on those recommendations that seek to deter boat arrivals to the detriment of those recommendations that focus on the development of alternative processing and protection arrangements in the region. This approach places Australia at risk of breaching its international law obligations. It undermines rule of law principles, including the right to know the legal processes which will apply, the right to judicial review of administrative decisions and the right to access legal advice.
22. For these reasons, and those outlined below, the Law Council submits that the UMA Bill should not be passed.
23. If, contrary to the Law Council's recommendation, the Committee takes the view that the UMA Bill should be passed, the Law Council urges the Committee to recommend that:
- (a) those provisions that seek to replace the definition of 'offshore entry person' with the term 'unauthorised maritime arrival' are amended to provide that:
    - (i) the Minister is required to have regard to the full range of Australia's human rights obligations and is bound by the rules of natural justice when exercising his or her discretion under section 46A to allow asylum seekers to make an application for a visa and to allow for judicial review of such decisions;
    - (ii) the Minister is required to have regard to the full range of Australia's human rights obligations and is bound by the rules of natural justice when making decisions under section 198EA to exempt certain people from being transferred to a regional processing country, or to vary or change such an exemption, and to allow for judicial review of such decisions;
  - (b) those provisions that seek to amend the definition of 'transitory person' and exclude such persons from applying for protection visas in Australia are removed from the Bill.
24. In addition to these recommendations, the Law Council urges the Committee to recommend that the Australian Government make a number of changes to its current regional processing arrangement to ensure that these arrangements reflect the full range of recommendations made by the Expert Panel and more closely align with Australia's international human rights obligations.
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## Relevant Background and Context

25. The Law Council is of the view that the rationale and key features of the UMA Bill cannot be evaluated in isolation from a range of other significant developments that have informed the Commonwealth Government's recent policy response to asylum seekers arriving by boat. Some of these developments are described below.

### The Expert Panel on Asylum Seekers

26. The last 12 months has seen a significant number of asylum seekers arriving in Australia by boat, and a number of policy changes made in an effort to deter people seeking protection from entering in Australia in this way.
27. In August 2011 the High Court found that the Minister's declaration of Malaysia as a country to which asylum seekers could be transferred under section 198A of the Migration Act to be invalid. Since this decision, the Government has been pursuing a range of alternative legislative and policy measures to address the growing number of people arriving by boat seeking asylum in Australia. The Government had reached an agreement with Malaysia for the processing of asylum seekers there, which it had sought to implement through the Minister's declaration.
28. Having failed to pass legislation that sought to address the issues arising from the High Court's decision, on 28 June 2012 the Prime Minister announced the establishment of an Expert Panel to provide a report on the best way forward to prevent asylum seekers risking their lives on dangerous boat journeys to Australia. The Expert Panel's terms of reference included 'the development of an inter-related set of proposals in support of asylum seeker issues, given Australia's right to maintain its borders.'<sup>4</sup>
29. The Expert Panel's Report was compiled over a six week period and contained 22 integrated recommendations. It was publicly released on 13 August 2012. The Expert Panel recommended that the Government adopt a dual approach which seeks to provide incentives for asylum seekers to use regular migration pathways and regional and international protection arrangements, whilst at the same time seeking to provide disincentives for asylum seekers to risk dangerous boat journeys to reach Australia.<sup>5</sup> Some of the key recommendations included:<sup>6</sup>
- a significant and long term increase to Australia's humanitarian intake;
  - strengthened engagement with the regional cooperation framework that was agreed during the *2011 Fourth Bali Regional Ministerial Conference on People*

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<sup>4</sup> On 18 July 2012 the Law Council provided a submission to the Expert Panel that outlined the minimum requirements that it submitted should form part of any policy option or legislative response recommended by the Panel. Some of the minimum requirements outlined included: compliance with international human rights standards and relevant High Court decisions; integration with regional approaches; and the inclusion of specific legal safeguards and protections. The Law Council also emphasised the need to accompany any policy or legislative response with the provision of adequate legal assistance for asylum seekers. A copy of this submission is available at

[http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=E5B063C8-1999-B243-6E33-9754797AF377&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=E5B063C8-1999-B243-6E33-9754797AF377&siteName=lca)

<sup>5</sup> Report of the Expert Panel on Asylum Seekers (13 August 2012) (the Expert Panel Report) Foreword available at

[http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert\\_panel\\_on\\_asylum\\_seekers\\_foreword.pdf](http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert_panel_on_asylum_seekers_foreword.pdf).

<sup>6</sup> Expert Panel Report Summary of Recommendations available at

[http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert\\_panel\\_on\\_asylum\\_seekers\\_summary\\_of\\_recommendations.pdf](http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert_panel_on_asylum_seekers_summary_of_recommendations.pdf)



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*smuggling, Trafficking in Persons and Related Transnational Crime (the Bali Process)*<sup>7</sup>;

- strengthened bilateral arrangements with Indonesia;
- the amendment of the Migration Act to allow for the transfer of persons from Australia to another location for the purpose of processing their asylum claims; and
- the provision of certain legal safeguards and assistance for people transferred to such locations.

30. The Expert Panel also recommended that:

*the Migration Act 1958 be amended so 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*<sup>18</sup>

31. The Panel went on to explain that:

*all possible measures should be implemented to avoid creating an incentive for [asylum seekers arriving by boat referred to by the Expert Panel as Irregular Maritime Arrivals or IMAs] taking even greater risks with their lives by seeking to reach the Australian mainland. As a complement to facilities in Nauru and PNG, the Panel recommends the Government bring forward legislative amendments to the Migration Act 1958 so that arrival on the Australian mainland by irregular maritime means does not provide individuals with a different lawful status than those who enter at an excised offshore place, such as Christmas Island (Attachment 10).*

*Such an amendment will be important to ensure that introduction of processing outside Australia does not encourage asylum seekers to avoid these arrangements by attempting to enter at the Australian mainland. Such attempts would increase the existing dangers inherent in irregular maritime travel. Legislative change would ensure that all IMAs will be able to be processed outside Australia, regardless of where they first enter the country.*<sup>19</sup>

#### The Government's Response to the Expert Panel's Recommendations

32. The Commonwealth Government quickly committed to accepting each of the Expert Panel's 22 recommendations<sup>10</sup> and has since commenced making legislative and policy changes.
33. The Law Council has particularly welcomed the steps taken by the Government to increase Australia's humanitarian intake to 20,000 per year, and to invest in a number of capacity building initiatives in the region.<sup>11</sup>
34. Despite these positive steps, the Law Council is becoming increasingly concerned that the Government's response to the Expert Panel's recommendations is focused strongly on those recommendations designed to deter asylum seekers from

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<sup>7</sup> See <http://www.baliprocess.net/>

<sup>8</sup> Expert Panel Recommendation 14.

<sup>9</sup> Expert Panel Report [3.72]-[3.73].

<sup>10</sup> Joint Press Conference with Prime Minister Julia Gillard 'Houston Expert Panel on Asylum Seekers' 13 August 2012, Canberra available at <http://www.minister.immi.gov.au/media/cb/2012/cb189223.htm>

<sup>11</sup> See "Government Announces Increase in Refugee Intake", ABC News 23 August 2012, available at <http://www.abc.net.au/news/2012-08-23/government-announces-increase-in-humanitarian-intake/4217962>

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reaching Australia without giving similar attention to those recommendations to provide incentives for asylum seekers to use regular migration pathways, or regional or international protection arrangements.

35. Of particular concern is the Government's emphasis on implementing the 'no-advantage test' which contemplates a time frame for the processing of protection claims that is assessed against and consistent with the period a refugee might face had she or he been assessed by the United Nations High Commissioner for Refugees (UNHCR) 'within the regional processing arrangement', the establishment of which was also recommended by the Expert Panel.<sup>12</sup>
36. The 'no-advantage' test has raised concerns among a range of relevant Non-Government Organisations (NGOs), the Australian Human Rights Commission (AHRC)<sup>13</sup> and the UNHCR. The UNHCR has explained that the time it takes for resettlement referrals by the UNHCR in South East Asia or elsewhere 'may not be a suitable comparator for the period that a Convention State whose protection obligations are engaged should use.'<sup>14</sup> It has further explained that it is difficult to identify such a period with any accuracy, given that there is no 'average' time for resettlement, and due to the fact that the UNHCR seeks to resettle people on the basis of need and special categories of vulnerability, rather than on the basis of a 'time spent' formulation.<sup>15</sup>
37. Other significant disincentives adopted by the Government since 13 August 2012 include:
- the introduction of the Regional Processing Act which amends the Migration Act to allow the Minister to declare a third country to be a regional processing country by way of legislative instrument;
  - the signing of a legally non-binding Memorandum of Understanding (MOU) Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues, with Nauru on 29 August 2012;
  - the confirmation of a legally non-binding MOU Relating to the Transfer and Assessment of Persons in PNG, and Related Issues, with PNG which has been in place since 19 August 2011;
  - designation, by way of legislative instrument, of Nauru as a regional processing country in September 2012.
  - designation, by way of legislative instrument, of PNG as a regional processing country in October 2012;
  - the transfer of asylum seekers to Nauru and PNG for the purpose of processing their asylum claims, including the transfer of families with children to PNG;

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<sup>12</sup> Expert Panel Recommendation 1.

<sup>13</sup> Australian Human Rights Commission *Human rights issues raised by the transfer of asylum seekers to third countries* (October 2012) available at

[http://www.humanrights.gov.au/human\\_rights/immigration/transfer\\_third\\_countries.html](http://www.humanrights.gov.au/human_rights/immigration/transfer_third_countries.html) ('the AHRC Paper')

<sup>14</sup> UNHCR Letter to the Minister for Immigration, 5 September 2012 p. 3 cited in Australian Human Rights Commission *Human rights issues raised by the transfer of asylum seekers to third countries* (October 2012), *ibid.*

<sup>15</sup> *Ibid*

- the voluntary and involuntary removal of over 500 asylum seekers from Australia, Christmas Island and Nauru, who have been 'screened' as persons who do not have any claims for protection;<sup>16</sup>
  - the use of restrictive bridging visas for people who have arrived by boat since 13 August 2012 and who have been detained in Australia awaiting possible transfer to Nauru or PNG, which allow these people to be released into the community while their protection claims are being assessed, but which prevent them from working and provide only limited access to accommodation services and financial support; and
  - changes to family reunion concessions and the removal of access to family reunion under the Special Humanitarian Program for asylum seekers arriving by boat.
38. As will be discussed later in this submission, unless all of the Expert Panel's recommendations are implemented in an integrated way, the Law Council is concerned that the Government's approach is at risk of being characterised as punitive and contrary to international human rights standards.
39. The Law Council also holds concerns regarding the absence of adequate scrutiny of these measures for compliance with human rights standards. For this reason, on 2 November 2012 the Law Council wrote to the Attorney-General urging her to exercise her powers under section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (the Human Rights Scrutiny Act) to refer the Government's response to the Expert Panel's recommendations to the Parliamentary Joint Committee on Human Rights (PJCHR) for review and report. Attached to the letter was an Issues Paper outlining the Law Council's key concerns with the Government's response to the Expert Panel's recommendations.<sup>17</sup>
40. The Law Council is pleased to note that the PJCHR has recently announced an inquiry into the Regional Processing Act and related Bills and Instruments, which includes the provisions of the UMA Bill.<sup>18</sup>

#### Past Efforts to Excise Areas from the Migration Zone

41. The Law Council,<sup>19</sup> along with a number of its Constituent Bodies,<sup>20</sup> has expressed concerns at previous attempts - such as the *Migration Amendment (Designated*

<sup>16</sup> Australian Human Rights Commission Media Release 'Commission raises strong concerns over developments in Australia's response to asylum seekers' (22 November 2012).

<sup>17</sup> A copy of this Issues Paper will shortly be available from the Law Council's website at <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/detention.cfm>

<sup>18</sup> Other Bills and legislative instruments forming part of this inquiry include Migration Act 1958 - Instrument of Designation of the Republic of Nauru as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958 - September 2012; Migration Act 1958 - Instrument of Designation of the Independent State of Papua New Guinea as a Regional Processing Country under subsection 198AB(1) of the Migration Act 1958 - October 2012; Migration Amendment Regulation 2012 (No. 5); Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012; Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 1) 2012-2013 and Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 2) 2012-2013; Migration Regulations 1994 - Specification under paragraphs 050.613A(1)(b) and 051.611A(1)(c) - Classes of Persons - November 2012. Further details about the inquiry are available at [http://www.aph.gov.au/joint\\_humanrights/](http://www.aph.gov.au/joint_humanrights/).

<sup>19</sup> See for example Law Council Media Release "Law Council Opposed to Migration Legislation" (19 September 2001) available at <http://www.lawcouncil.asn.au/media/news-article.cfm?article=B55F53AC-1E4F-17FA-D22D-FCBA01C61111>; Law Council Media Release 'New Migration Detention Laws Could Create Our Own Guantanamo Bay' (20 June 2006) <http://www.lawcouncil.asn.au/media/news-article.cfm?article=B55FDEE4-1E4F-17FA-D270-D981A5E1E508>

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*Unauthorised Arrivals) Bill 2006* (Cth), the (DUA Bill) - to introduce amendments to the Migration Act that were designed to exclude all asylum seekers arriving by boat from having their protection claims processed and to limit their rights to have their refugee status recognised under Australian law.

42. The UMA Bill has a number of similarities with the DUA Bill which was introduced by the Howard Government on 11 May 2006 and sought to amend the Migration Act to expand the offshore processing regime introduced by the 'Pacific Solution' in 2001. Under this regime, Nauru and Manus Island in PNG were declared countries under section 198A of the Migration Act and offshore processing facilities were established on those islands on 19 September 2001 and 21 October 2001 respectively.<sup>21</sup> People whose protection claims were processed offshore had no access to the RRT or Australian courts for judicial review and were only eligible for certain visa categories, such as temporary visas with limited family reunion rights. People whose claims were processed offshore also received no professional application assistance and limited access to legal advisers, media, visitors and charitable or religious assistance.<sup>22</sup>
43. Like the UMA Bill, the DUA Bill did not itself seek to excise territory, but rather to prevent non-citizens arriving in Australian waters from accessing the statutory visa application process under the Migration Act. The DUA Bill also sought to ensure that all such arrivals were subject to being removed to a declared country. If enacted, the DUA Bill would have meant that all people arriving at mainland Australia unlawfully by sea (even those airlifted to Australia at the end of a sea journey) on or after 13 April 2006 would be treated as if they had landed in an excised place.<sup>23</sup>
44. On 11 May 2006, the provisions of the DUA Bill were referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 13 June 2006.
45. With the exception of the Department of Immigration and Multicultural Affairs, all of the 136 submissions and witnesses appearing before the Committee expressed the view that the DUA Bill should be withdrawn.<sup>24</sup> Many of these submissions raised concerns that the DUA Bill:<sup>25</sup>
  - resulted in all asylum seekers who arrived by boat no longer having access to the Australian system of refugee processing, with all the reviews and safeguards it entailed;
  - breached Australia's obligations under international law, particularly the Refugees Convention;

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<sup>20</sup> For example submissions were made to the Senate Legal and Constitutional Affairs Inquiry into the DUA Bill in April 2006 by the Law Institute of Victoria, the Law Society of New South Wales and the Victorian Bar Association. Copies of these submissions are available at [http://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=legcon\\_ctte/completed\\_inquiries/2004-07/migration\\_unauthorised\\_arrivals/index.htm](http://www.apf.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2004-07/migration_unauthorised_arrivals/index.htm)

<sup>21</sup> See the Bills Digest to the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (Cth), (22 May 2006) p. 1 (the DUA Bill Digest) available at [http://parlinfo.apf.gov.au/parlInfo/search/display/display.w3p;query=BillId\\_Phrase%3A%22r2559%22%20DataSet%3Abillsdgs:rec=0](http://parlinfo.apf.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3A%22r2559%22%20DataSet%3Abillsdgs:rec=0)

<sup>22</sup> DUA Bills Digest p. 1.

<sup>23</sup> DUA Bills Digest p. 3.

<sup>24</sup> Senate Committee on Legal and Constitutional Affairs Committee's Report on its inquiry into the Provisions of the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (13 June 2006) (the Senate Committee's Report on the DUA Bill) Executive Summary available at [http://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=legcon\\_ctte/completed\\_inquiries/2004-07/migration\\_unauthorised\\_arrivals/report/index.htm](http://www.apf.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2004-07/migration_unauthorised_arrivals/report/index.htm)

<sup>25</sup> Senate Committee's Report on the DUA Bill Executive Summary.

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- was incompatible with the rule of law, for example by denying natural justice to boat arrivals; failing to ensure access to independent merits and judicial review; and failing to provide access to legal advice and other assistance for such asylum seekers; and
  - had retrospective application.
46. During the hearing, the majority of the Senate Committee commented on the absence of adequate information provided by the Department and recommended that the DUA Bill should not proceed.<sup>26</sup> It did, however, also make a number of further recommendations in the event that the DUA Bill did proceed. These included recommendations designed to ensure that time periods were prescribed for processing of claims occurring offshore, and guarantees that people found to be refugees as a result of offshore proceeding would be resettled in Australia if no other resettlement options were available.<sup>27</sup>
47. In a dissenting report, Labor Senators expressed their strong opposition to the DUA Bill and to its broader policy objects 'in absolute terms'. The Labor Senators agreed with concerns raised in relation to:
- uncertainty about how the proposed arrangements will work in practice and the lack of accountability mechanisms; domestic policy issues such as the Bill's flagrant incompatibility with the rule of law and the principles of natural justice; and the clear breach of Australia's obligations under international law in several significant areas.*<sup>28</sup>
48. The DUA Bill lapsed with the proroguing of Parliament on 12 December 2008.

## The UMA Bill

49. If passed, the UMA Bill will amend the Migration Act to provide that:
- all arrivals in Australia by irregular maritime means will have the same status regardless of where they arrive, unless they are an excluded class or otherwise exempted. 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. Those people are also subject to mandatory immigration detention, are to be taken to a designated regional processing country and cannot institute or continue certain legal proceedings.*<sup>29</sup>
50. The UMA Bill will do this by replacing the term, 'offshore entry person' with a new term, 'unauthorised maritime arrival' in certain provisions of the Migration Act. This term will apply to any person who enters Australia by sea at an excised offshore place, or at any other place, and becomes an unlawful non-citizen because of that entry, unless he or she is excluded from this definition.
51. The Minister has said that, by introducing the UMA Bill, the Government is attempting remove the incentive for people seeking asylum to try and make it all the

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<sup>26</sup> Ibid.

<sup>27</sup> Senate Committee's Report on the DUA Bill Summary of Recommendations.

<sup>28</sup> Senate Committee's Report on the DUA Bill ALP Senator's Dissenting Report.

<sup>29</sup> Explanatory Memorandum *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* p. 1.



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way to Australia by boat, in line with the recommendations made by the Expert Panel.<sup>30</sup> The Minister described the relevant Expert Panel recommendation as requiring that the Migration Act be amended so that any person who arrives anywhere in Australia by irregular maritime means should be provided the same status as offshore entry persons. That is, arrival anywhere in Australia in these circumstances may make the person liable to regional processing arrangements.<sup>31</sup> The rationale behind this recommendation was described as:

*the need to reduce any incentive for people to take even greater risks with their lives by seeking to reach the Australian mainland to avoid being subject to regional processing arrangements.*<sup>32</sup>

52. The key features of the UMA Bill are described below:

New definition of 'Unauthorised Maritime Arrivals'

53. Currently, any person who is not an Australian citizen and who enters Australia without a valid visa through an 'excised offshore place' (such as Christmas Island) is considered an 'offshore entry person'. Such persons cannot apply for refugee status under the usual statutory process which applies to asylum seekers who arrive on the Australian mainland by air.
54. 'Offshore entry persons' may be allowed to apply for a visa if the Minister exercises his or her personal discretion to allow them to do so. The only criterion for the exercise of this discretion is that the Minister 'thinks that it is in the public interest to do so'. In recent years, if the Minister exercised this discretion, such persons were processed according to a process which mirrored the statutory process in providing for initial assessment of their protection claims by an officer of the Department of Immigration and Citizenship (DIAC) followed by an independent review by an external reviewer. However this process did not allow access to merits review in the Refugee Review Tribunal.
55. Following a number of policy changes made as a result of the M70 decision in August 2011, the Government announced that from 24 March 2012, it would allow access to the statutory process for asylum seekers arriving by boat.<sup>33</sup> However, this access has now been affected by the provisions of the Regional Processing Act, which subject asylum seekers arriving by boat since 13 August 2012 to the possibility of transfer to a regional processing country.
56. Under the Regional Processing Act, 'offshore entry persons' are currently subject to regional processing arrangements and are liable to be transferred to Nauru or PNG.
57. As noted above, the UMA Bill will expand the scope of this regime by providing that all noncitizens who arrive in Australia by boat will be known as 'unauthorised maritime arrivals' and be subject to the regional processing framework provided under the Regional Processing Act unless they are excluded.<sup>34</sup>
58. Under the UMA Bill, a person is an 'unauthorised maritime arrival' if he or she:

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<sup>30</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2012, 8 (Chris Bowen, Minister for Immigration and Citizenship).

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> See Minister for Immigration and Citizenship, "New Single Protection Visa Process Set to Commence", 19 March 2012, available at <http://www.minister.immi.gov.au/media/cb/2012/cb184344.htm>

<sup>34</sup> UMA Bill Schedule 1, Item 8, see also Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2012, 8 (Chris Bowen, Minister for Immigration and Citizenship).

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- entered Australia by sea at an excised offshore place or at any other place after the commencement of this provision;
  - became an unlawful non-citizen because of that entry;<sup>35</sup> and
  - is not an excluded maritime arrival.
59. Proposed subsection 5AA(2) will provide that a person 'entered Australia by sea' if:
- the person entered the migration zone<sup>36</sup> except on an aircraft that landed in the migration zone; or
  - the person entered the migration zone as a result of being found on a ship detained under section 245F and being dealt with under paragraph 245F(9)(a);<sup>37</sup> or
  - the person entered the migration zone after being rescued at sea.
60. Proposed subsection 5AA(3) of the Migration Act will provide that a person is an 'excluded maritime arrival' if he or she:
- is a New Zealand (NZ) citizen who holds and produces a valid NZ passport; or
  - is a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or
  - is included in a prescribed class of persons.<sup>38</sup>
61. The UMA Bill also includes provisions that ensure that the restriction on instituting certain legal proceedings that currently applies to offshore entry persons continues to apply to 'unauthorised maritime arrivals'. This includes proceedings relating to:
- an offshore entry;
  - the status of an offshore entry person as an unlawful non-citizen; and
  - the lawfulness of the detention of an offshore entry person.<sup>39</sup>
62. The effect of these amendments is that people who fit within the definition of 'unauthorised maritime arrivals' will not be able to make a valid application for a visa in Australia.
63. However, if the Minister thinks it is in the public interest to do so, the Minister may use his discretion in section 46A of the Migration Act to determine that the

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<sup>35</sup> Subsection 14(1) of the Migration Act provides that a non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen. Subsection 13(1) of the Act provides that a non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen.

<sup>36</sup> The 'migration zone' is defined in subsection 5(1) of the Migration Act. It provides that the migration zone means the area consisting of the States, the Territories, Australian resource installations and Australian sea installations, and to avoid doubt, includes: land that is part of a State or Territory at mean low water; and sea within the limits of both a State or a Territory and a port; and piers, or similar structures, any part of which is connected to such land or to ground under such sea; but does not include sea within the limits of a State or Territory but not in a port.

<sup>37</sup> Paragraph 245F(9)(a) of the Migration Act provides that if an officer detains a ship or aircraft under section 245F the officer may detain any person found on the ship or aircraft and bring the person, or cause the person to be brought, to the migration zone.

<sup>38</sup> Paragraph 5AA(3)(c) inserts a regulation making power to prescribe further classes of persons as excluded maritime arrivals in the *Migration Regulations 1994*

<sup>39</sup> Migration Act s 494AA.

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prohibition on making an application does not apply to an application by an 'unauthorised maritime arrival'. This power can only be exercised by the Minister personally and is non compellable.<sup>40</sup>

64. The term 'unauthorised maritime arrival' will also replace the term 'offshore entry person' in sections 198AA to 198AH, which were inserted by the Regional Processing Act.
65. Section 198AD provides for the taking of 'offshore entry persons' from Australia to a regional processing country. However, section 198AE provides the Minister with the power to determine that section 198AD does not apply to a particular person if the Minister thinks that it is in the public interest to do so. Section 198AE further provides that this decision can only be made by the Minister personally, is non compellable and that the rules of natural justice do not apply.<sup>41</sup>
66. The UMA Bill also includes a clarifying amendment to section 198AE of the Migration Act to provide an express power for the Minister to vary or revoke a determination that a person is not subject to regional processing, if it is in the public interest to do so.<sup>42</sup> In his Second Reading Speech, the Minister said that '[t]he government's view is that this power is already implied but, for avoidance of legal doubt, it is preferable to make this power explicit.'<sup>43</sup>

#### New Definition of 'Transitory Person'

67. Currently, 'transitory person' is defined in subsection 5(1) of the Migration Act to mean an 'offshore entry person' who has been taken to another country for the purpose of having his or her protection claim processed pursuant to section 198AD or its predecessor provisions, or a person taken to a place outside of Australia in other prescribed circumstances. It does not include a person who has been transferred to another country and has been assessed to be a refugee for the purposes of the Refugees Convention.
68. The UMA Bill will amend this definition to provide that a person does not cease to be a 'transitory person' if he or she has been assessed to be a refugee.<sup>44</sup>
69. Section 198AH of the Migration Act will also be amended to confirm that a 'transitory person' can be taken to a regional processing country whether or not the 'transitory person' has been assessed to be a refugee under the Refugees Convention.
70. The UMA Bill also repeals sections 198C and 198D of the Migration Act<sup>45</sup> so that a 'transitory person' cannot seek an assessment of their refugee status from the RRT or seek to 'lift the section 46B bar' on making a valid visa application where the RRT considers the transitory person is covered by the definition of refugee in the Refugees Convention.

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<sup>40</sup> Migration Act s46A (3) and (7).

<sup>41</sup> Migration Act s198AE (2), (3) and (7).

<sup>42</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2012, 8 (Chris Bowen, Minister for Immigration and Citizenship).

<sup>43</sup> *Ibid.*

<sup>44</sup> UMA Bill Schedule 1, Item 6.

<sup>45</sup> Section 198C of the Migration Act provides that certain transitory persons are entitled to an assessment of refugee status if the transitory person is brought to Australia under section 198B and remains in Australia for a continuous period of 6 months. The person may make a request to the Refugee Review Tribunal (RRT) for an assessment of refugee status. However, an assessment by the RRT cannot commence, or continue, when a certificate by the Secretary is in force under section 198D. Section 198D of the Migration Act provides if the Secretary is satisfied that a transitory person has engaged in uncooperative conduct, either before or after the person was brought to Australia, then the Secretary may issue a certificate to that effect to the Tribunal.



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71. As a result of these amendments:

- (a) a transitory person, who has been assessed as a refugee, can be transferred between a regional processing country and Australia. Those transitory persons brought back to Australia would be unlawful non-citizens;<sup>46</sup>
- (b) transitory persons brought to the Australia under section 198B will not be entitled to request an assessment of refugee status if they remain in Australia for a continuous period of six months.<sup>47</sup>

72. These amendments are said to be consistent with the 'no advantage' test outlined above as it ensure that no benefit is gained through circumventing regular migration arrangements.<sup>48</sup> During the second reading speech for the UMA Bill the Minister stated that:

*a transitory person from a regional processing country who remains in Australia for a continuous period of 6 months could access merits review and judicial review processes and remain in Australia for a longer period of time. This would create an advantage for such persons in having the ability to access these processes, and, depending on the result, make an application for a visa.*<sup>49</sup>

73. The Law Council notes that these amendments will apply to asylum seekers such as the one who has been transferred from Nauru back to Australia recently for medical treatment related to a hunger strike. Following treatment, the asylum seeker was transferred back to Nauru.<sup>50</sup>

#### Amendments to section 189 to permit discretionary detention in certain circumstances

74. Section 189 of the Migration Act deals with the detention of unlawful non-citizens and currently prescribes mandatory or discretionary detention depending on whether the person is in or seeking to enter the migration zone, or is in or seeking to enter an excised offshore place.

75. Detention is currently mandatory if an officer knows or reasonably suspects that a person:

- (a) in the migration zone (other than an excised offshore place) is an unlawful non-citizen (s189(1)); or
- (b) in Australia but outside the migration zone 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 (s189(2)).

76. Detention is currently discretionary if an officer knows or reasonably suspects that a person

- (a) in an excised offshore place is an unlawful non-citizen (s189(3)); or

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<sup>46</sup> Explanatory Memorandum [71].

<sup>47</sup> Explanatory Memorandum [75].

<sup>48</sup> Explanatory Memorandum [30], [36].

<sup>49</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2012, 8 (Chris Bowen, Minister for Immigration and Citizenship)

<sup>50</sup> See "Treated Hunger Striker Returned to Nauru", ABC News, 10 December 2012, available at <http://www.abc.net.au/news/2012-12-10/asylum-seeker-on-hunger-strike-returned-to-nauru/4419370>

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- (b) 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.
77. Schedule 1, Item 15 of the UMA Bill amends subsection 189(2) of the Migration Act to provide for discretionary immigration detention for some people who are seeking to enter the migration zone and who are not at an excised offshore place.<sup>51</sup> It does this by replacing the words 'must detain' with the words 'may detain' in subsection 189(2). As a result, it aligns the power to detain in subsection 189(2) with that in subsection 189(4).
78. The Law Council notes that, if enacted, the UMA Bill will remove the distinction between excised offshore places and the migration zone for the purposes of this section. As explained in the submission by Associate Professor Alexander Reilly, Dr Matthew Stubbs and Ms Gabrielle Appleby of the Adelaide University Law School:
- If the 2012 Bill is passed in its current form, subs 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 ...*<sup>52</sup>
79. Accordingly, Associate Professor Reilly, Dr Stubbs and Ms Appleby have suggested that subsections 189(3) and (4) should be repealed, that the words 'other than an excised offshore place' should be removed from subsection 189(1) and that subsection 189(2) should be amended to replace the words 'must detain' with 'may detain'.

## Law Council Concerns

80. The Law Council opposes the passage of the UMA Bill and holds particular concerns regarding the provisions of the Bill that seek to replace the term, 'offshore entry persons' with the term, 'unauthorised maritime arrivals' in a number of provisions. The Law Council is also concerned about the proposed changes to the provisions in the Migration Act relating to 'transitory persons'.
81. As noted above, these amendments will result in all asylum seekers who arrive by boat, including those who reach Australia's coastline, being treated differently to those who arrive by air.
82. 'Unauthorised maritime arrivals' will have no right to have their protection claims processed in Australia. They will also be subject to restrictions on instituting certain proceedings in Australian courts.
83. By making *all* asylum seekers who arrive by boat subject to the possibility of transfer to a regional processing country, the UMA Bill broadens the scope of the Government's offshore processing policy and leaves in no doubt the Government's intention to avoid a number of its human rights obligations at international law, and in particular its obligations under the Refugees Convention.

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<sup>51</sup> Explanatory Memorandum to the UMA Bill p. 13.

<sup>52</sup> Senior Lecturer Gabrielle Appleby, Associate Professor Alexander Reilly, Dr Matthews Stubbs, Adelaide University Law School, Submission to the Senate Committee on Legal and Constitutional Affairs Inquiry into the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* (5 December 2012).

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84. The Law Council submits that it is critical that this Committee consider the UMA Bill in light of the amendments made to the Migration Act by the Regional Processing Act, which were rapidly passed without being subject to scrutiny by the Committee or the PJCHR. The Law Council is pleased that PJCHR has recently announced an inquiry that will include consideration of these amendments and the provisions of the UMA Bill.
85. In this section of the submission, the Law Council will outline its concerns relating to these features of the UMA Bill, and the other relevant policies adopted by the Government in response to the Expert Panel's recommendations, that:
- conflict with and undermine Australia's obligations under the Refugees Convention;
  - conflict with and undermine Australia's obligations under the other human rights Conventions to which Australia is party; and
  - undermine rule of law principles and fail to ensure that 'unauthorised maritime arrivals' will have their protection claims processed in accordance with clearly defined legal processes and procedures that comply with human rights standards.

#### Statement of Compatibility with Human Rights

86. When raising these concerns, the Law Council notes that a Statement of Compatibility with Human Rights (the Statement) was prepared in relation to the UMA Bill.<sup>53</sup> The Statement concludes that the UMA Bill is compatible with the human rights and freedoms listed in section 3 of the Human Rights Scrutiny Act<sup>54</sup> because it does not engage any obligations under relevant human rights treaties.
87. This Statement has been considered by the PJCHR which expressed the view that, while it is difficult to assess the UMA Bill in isolation from the complex set of legislative and administrative arrangements of which it is a part, on its face the Bill 'gives rise to issues of compatibility with human rights, in particular in so far as it involves the holding of children in detention and may involve transferring them to other countries as part of a regional processing framework.'<sup>55</sup> The PJCHR also considered that 'there may be issues of compatibility with the right not to be arbitrarily detained under article 9 of the ICCPR, if persons are detained while their refugee claims are processed in order to give effect to the 'no-advantage test' and

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<sup>53</sup> This Statement was made in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

<sup>54</sup> These are the rights and freedoms contained in the *International Convention on the Elimination of all Forms of Racial Discrimination* done at New York on 21 December 1965 ([1975] ATS 40); the *International Covenant on Economic, Social and Cultural Rights* done at New York on 16 December 1966 ([1976] ATS 5); the *International Covenant on Civil and Political Rights* done at New York on 16 December 1966 ([1980] ATS 23); the *Convention on the Elimination of All Forms of Discrimination Against Women* done at New York on 18 December 1979 ([1983] ATS 9); the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* done at New York on 10 December 1984 ([1989] ATS 21); the *Convention on the Rights of the Child* done at New York on 20 November 1989 ([1991] ATS 4); and the *Convention on the Rights of Persons with Disabilities* done at New York on 13 December 2006 ([2008] ATS 12).

<sup>55</sup> Parliamentary Joint Committee on Human Rights, Seventh Report of 2012 (28 November 2012) p. 20-21 *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012*, 1.63 (PJCHR 7<sup>th</sup> Report) available at [http://www.aph.gov.au/parliamentary\\_business/committees/senate\\_committees?url=humanrights\\_ctte/reports/7\\_2012/index.htm](http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=humanrights_ctte/reports/7_2012/index.htm)

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the detention involved deliberate delays to what would otherwise have been the reasonably expeditious processing of such claims.’<sup>56</sup>

88. The Law Council shares these views and considers that the Statement takes an overly restrictive view of the range of human rights engaged by the UMA Bill. The Statement also does not adequately address the interaction of the amendments proposed by the Bill with the recently introduced amendments contained in the Regional Processing Act. For example, the Statement asserts that, as the UMA Bill ‘does not propose to make any amendments to the regional processing scheme or the legislative, policy and procedural protections which already exist’, it does not breach rights relating to children or to families, or rights relating to arbitrary detention.
89. The Law Council considers that this approach fails to provide an adequate analysis of how the key components of the Government’s offshore processing arrangements, which are extended by the UMA Bill, impact on particular human rights that Australia is obliged to uphold. This approach is particularly problematic in light of the fact that the Regional Processing Act, which contains the legislative mechanisms that authorise the establishment of regional processing, was not introduced with a Statement of Compatibility and has not, until recently, been the subject of review by the PJCHR.

## **Undermining Australia’s obligations under the Refugees Convention**

### Non-refoulement obligations and the objects and purpose of the Refugees Convention

90. While the Law Council acknowledges that Australia has a sovereign right to determine who enters its territory, it also recognises that this right is limited by certain obligations which Australia has voluntarily accepted under international law, including the human rights Conventions to which it is a party. These obligations recognise that under international law, individuals have a right to seek and enjoy asylum from persecution.<sup>57</sup>
91. The Law Council is concerned that, by introducing these amendments - which mean that all asylum seekers who arrive by boat are subject to transfer to regional processing countries - Australia is undermining the international protection regime reflected in the objects and purpose of the Refugees Convention.
92. At the outset, the language of the UMA Bill represents a significant shift away from the key principles and concepts underpinning the Refugees Convention. Those people who seek protection in Australia and arrive by sea are described as ‘unauthorised’ and their right to seek asylum can only be given effect if the Minister uses his discretionary powers under the Migration Act to intervene to prevent a person from being transferred or to allow a protection visa application to be made. As Professor Saul has submitted, these provisions transform refugee status ‘from a claimable ‘right’ to a discretionary grant’, and ‘undermine the normative status and legal protection of refugees’ on which the Refugees Convention is based.’<sup>58</sup>

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<sup>56</sup> PJCHR 7<sup>th</sup> Report p. 20-211.64.

<sup>57</sup> For example under Article 14 of the 1948 *Universal Declaration of Human Rights*, everyone has the right to seek asylum and Article 31 of the Refugee Convention prohibits states from imposing penalties on those entering ‘illegally’ who come directly from a territory where their life or freedom is threatened.

<sup>58</sup> Professor Ben Saul submission to the Senate Legal and Constitutional Affairs Committee inquiry into the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* (4 December 2012).

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93. In addition, the system of international protection envisaged by the Refugees Convention is premised on the understanding that States will protect refugees in their territories, or cooperate with other States to find durable solutions. This system of protection obliges States to undertake not to return refugees (either directly or by virtue of deflection or interception policies) 59 to territories in which they face persecution on account of race, religion, nationality, political opinion or membership of a particular social group; torture; or cruel, inhuman or degrading treatment or punishment. This is known as the obligation of non-refoulement. Similar principles are recognised under other conventions such as the Convention on the Rights of the Child and in customary international law.
94. The Refugees Convention does not specifically prohibit the excision of territory for migration purposes or expressly mandate that States process asylum seekers within their borders. However, the non-refoulement obligations contained in the Refugees Convention require State parties to provide access to a refugee status determination process that considers the individual circumstances of the person seeking protection and that complies with international standards and the object and purpose of the Refugees Convention. 60
95. The Refugees Convention has also been understood as providing that States are responsible for ensuring that refugees within their territory, as well as those whom they subject to enforcement action beyond their territorial jurisdiction, have access to durable solutions. As the UNHCR has stated in its advisory opinion on the extraterritorial application of non-refoulement obligations in the Refugees Convention:
- States are bound by their obligations not to return any person over whom they exercise jurisdiction to a risk of irreparable harm. In determining whether a State's human rights obligations with respect to a particular person are engaged, the decisive criterion is not whether that person is on the State's national territory, or within a territory which is de jure under the sovereign control of the State, but rather whether or not he or she is subject to that State's effective authority and control. 61
96. When responding to the introduction of the UMA Bill, the UNHCR has stated that Australia's non-refoulement obligations under the Refugees Convention cannot be avoided by excising territories or by transferring asylum seekers to other countries to have their refugee status determined.<sup>62</sup> The UNHCR explained that, in such cases, the legal responsibility for those asylum-seekers may in some circumstances be shared with that other country, but such an arrangement would not relieve Australia of its own obligations under the Refugees Convention. 63
97. A range of international law principles support these observations. For example:
- (a) Under international law, Australia is responsible for the actions of its officials both within and outside of Australian territory, including within the territory of

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<sup>59</sup> See UNHCR Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (26 January 2007) available at <http://www.unhcr.org/refworld/pdfid/45f17a1a4.pdf>

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> United Nations High Commissioner for Refugees Statement: *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012* (31 October 2012).

<sup>63</sup> Ibid (31 October 2012) at [35].



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other sovereign States such as Nauru or PNG.<sup>64</sup> While it remains unclear under which legal framework protection claims will be processed in Nauru and PNG,<sup>65</sup> it appears from recent media reports that Australian officials are currently involved in 'screening' interviews and are likely to be involved in other aspects of the claim determination processes conducted offshore.<sup>66</sup>

- (b) Liability for breaches of international law can be both joint and several.<sup>67</sup> Given Australia's assumption of control over the asylum seekers to be held in such places, Australia will remain responsible for any violations of international law relating to their treatment.
- (c) States have a responsibility to implement their treaty obligations in good faith.<sup>68</sup> As the Australian Human Rights Commission has explained, this duty is breached if a combination of acts or omissions have the overall effect of rendering the fulfilment of treaty obligations obsolete, or of defeating the object and purpose of a treaty.<sup>69</sup>

- 98. The Law Council is concerned that the UMA Bill, when coupled with the offshore processing regime implemented under the Regional Processing Act, does not provide the type of protections necessary to comply with these principles or the full range of Australia's obligations under the Refugees Convention.<sup>70</sup>
- 99. Australia fulfils many of its obligations under the Refugees Convention through the grant of protection visas under section 36 of the Migration Act.
- 100. Under the UMA Bill, unless they fall within one of the limited statutory exemptions, all asylum seekers arriving by boat are excluded from making an application for a visa and are liable to be transferred to a regional processing country to have their protection claims processed.
- 101. Once a person has been transferred to an offshore location under the provisions introduced by the Regional Processing Act, there are no legally binding guarantees that the person's claim will be assessed under a process that adheres to the full range of human rights obligations to which Australia is a party, including those contained in the Refugees Convention. For example, the Regional Processing Act invests the Minister with largely unfettered discretion to designate countries as regional processing countries, without requiring that these countries adhere to the full range of Australia's obligations under international law or otherwise provide

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<sup>64</sup> See Australian Human Rights Commission, *Human rights issues raised by the transfer of asylum seekers to third countries* (15 November 2012) p. 10.

<sup>65</sup> For example, the Law Council notes that the Nauruan Government has passed the *Refugees Convention Act 2012*, but it remains unclear whether the processing of protection claims of unauthorised maritime arrivals will occur under this framework and if so whether it will be done by Australian or Nauruan officials.

<sup>66</sup> See for example ABC Radio AM Program 'Immigration Minister defends 'screening out' asylum seekers' Interview with Chris Bowen MP (6 December 2012) available at <http://www.abc.net.au/am/content/2012/s3648509.htm>

<sup>67</sup> See for example Article 47 of the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts adopted in 2001 and available at [http://untreaty.un.org/ilc/texts/9\\_6.htm](http://untreaty.un.org/ilc/texts/9_6.htm)

<sup>68</sup> Vienna Convention on the Law of Treaties, adopted 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) Articles 26 and 31.

<sup>69</sup> See Australian Human Rights Commission, *Human rights issues raised by the transfer of asylum seekers to third countries* (15 November 2012) p. 10.

<sup>70</sup> Further details about the human rights concerns arising from these instruments is contained in an Issues Paper prepared by the Law Council and attached to letter to the Attorney General on 2 November 2012 urging the Attorney to use her powers under section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to refer the Government's response to the Expert Panel's recommendations to the Parliamentary Joint Committee on Human Rights for Inquiry.

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protection for the rights of people whose protection claims will be processed in this way. The only condition which must be met if the Minister makes a designation is that he or she believes that it is in the 'national interest' to do so.

102. The Minister is required to provide certain documents to Parliament, such as assurances provided by the designated country outlining the arrangements for the treatment of people subject to transfer and advice from the UNHCR about the designation. However, the content of these documents, or a failure to table them, does not affect the validity of the designation. These requirements do little to limit the very broad discretion of the Minister to designate a country as a processing country, and provide no legally binding standards for the treatment of asylum seekers in designated countries consistent with Australia's obligations under international law.
103. In addition, there is nothing in the legislative instruments that designate Nauru and PNG as regional processing countries that would operate to give legal protection for the full range of internationally recognised human rights of people whose claims are processed in those countries. There is also no sunset clause in the Regional Protection Act or other review mechanism that would allow these designations to be reconsidered after a certain period of time. This means, for example, that even if people transferred were shown to be at risk of refoulement, the designation of the particular country as a regional processing country would remain valid.
104. The Memorandums of Understanding (MOUs) currently in force between the Australian Government and the Governments of Nauru and PNG that relate to the transfer and assessment of asylum seekers contain inadequate protection for the rights of people whose claims are processed there, despite containing commitments by the Governments of Nauru and PNG to:
- not expel or return a transferee to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and
- make an assessment, or permit an assessment to be made, of whether or not a transferee is covered by the definition of refugee in Article 1A of the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees; and
- not send a transferee to another country where there is a real risk that the transferee will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty.<sup>71</sup>
105. While these commitments are welcome, the Law Council suggests that the ability of the MOUs to provide meaningful protection against non-refoulement remains highly dependent upon matters such as:
- (a) the political will and administrative capacity of the relevant Governments that are parties to the MOUs to comply with and implement their terms;
  - (b) the nature of the legal framework and related processes that apply to refugee status determination in the host countries,

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<sup>71</sup> For example see Article 14 in Nauru MOU available at <http://www.minister.immi.gov.au/media/media-releases/pdf/australia-nauru-mou-regional-processing.pdf>

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- (c) the provision of appropriate legal advice and assistance to ensure that asylum seekers are able to understand and exercise their rights;
  - (d) the level of independent oversight of the refugee status determination process; and
  - (e) the nature of any durable solutions, including local integration or resettlement in Australia, which are available once refugee status has been confirmed.
106. The protective value of the commitments outlined in the MOUs must also be considered in the context of the other undertakings and principles contained in the MOUs, some of which reflect the Australian Government's 'no-advantage' test outlined above, such as the reference to 'the need to ensure, so far as is possible, that no benefit is gained through circumventing regular migration arrangements'.<sup>72</sup>
107. This means that, even if the host country has a legal framework in place that provides a refugee status determination process that adheres to international standards, it remains unclear how long a person will have to wait to receive the outcome of that process and what visa and/or resettlement options exist for a person found to be refugee.
108. Some limited mechanisms exist that have the potential to provide some protection for the non-refoulement rights of individuals subject to transfer under these arrangements – such as the Minister's discretion under section 198AE Migration Act to exempt classes of persons or individuals from the offshore processing regime<sup>73</sup> or to 'lift the bar' on applications for protection visas under section 46A. However, the Law Council is of the view that these non-compellable, non-reviewable powers are not sufficient for Australia to fulfil its protection obligations regarding people who it transfers to offshore locations.
109. Despite the potential protection of these provisions, families with children have already been transferred to PNG to have their protection claims processed, although it is not clear that the refugee status determination process in PNG will adhere to international standards, or that any durable solutions are available for those found to be refugees.<sup>74</sup>
110. A significant number of 'offshore entry persons' have recently been returned involuntarily to their countries of origin after being 'screened' as persons who have not raised protection claims. These people have not received independent legal advice before being 'screened' and removed. This has given rise to concerns that such people may be at risk of persecution or other harm upon their return, and the suggestion that Australia may be in breach of its non-refoulement obligations.<sup>75</sup>

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<sup>72</sup> See for example, Nauru MOU Preamble, PNG MOU Preamble.

<sup>73</sup> Department of Immigration and Citizenship *Departmental Guidelines for Assessment of Persons Prior to Transfer pursuant to section 198AD(2) of the Migration Act* (October 2012) (the DIAC Guidelines) A copy of these Guidelines is available at <http://www.immi.gov.au/visas/humanitarian/pdf/s198ad-2-guidelines.pdf>

<sup>74</sup> *The Australian* 'Seven asylum families sent to Manus Island' 8 December 2012 available at <http://www.theaustralian.com.au/news/breaking-news/seven-asylum-families-sent-to-manus-island/story-fn3dxiwe-1226532704896>; see also Radio International New Zealand 'Refugee advocates want end to sending children to PNG asylum seeker camp' (26 November 2012) <http://www.rnzi.com/pages/news.php?op=read&id=72460>

<sup>75</sup> See for example Radio Australia 'Australian refugee advocates vow to keep fighting involuntary returns' 6 December 2012, available at <http://www.radioaustralia.net.au/international/radio/program/connect-asia/australian-refugee-advocates-vow-to-keep-fighting-involuntary-returns/1056998>; see also Minister for Immigration and Citizenship Media Release 'Involuntary returns to Sri Lanka' (6 December 2012) available at <http://www.minister.immi.gov.au/media/cb/2012/cb192233.htm>



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111. In addition to these concerns, the Law Council considers that the UMA Bill, the Regional Processing Act and the current implementation of the Government's response to the Expert Panel's recommendations put Australia at risk of breaching other obligations under the following articles of the Refugees Convention:

Article 3 – Prohibition on discriminatory treatment of refugees

112. Article 3 of the Refugees Convention prohibits discrimination on the basis of race, religion and country of origin.
113. This obligation is engaged due to the fact that the UMA Bill and the Regional Processing Act operate to subject those asylum seekers who arrive by boat to a different refugee status determination process than those arriving by air. This obligation is discussed below in the context of Australia's obligations under the ICCPR.

Article 31 – Prohibition on penalising refugees

114. Article 31 of the Refugees Convention provides that State parties must not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened, enter their territory without authorisation, provided they present themselves without delay to the authorities and show good cause<sup>76</sup> for their illegal entry or presence.
115. Article 31 recognises the right of people in distress to seek protection, even if their actions constitute a breach of the domestic laws of a country of asylum. It also recognises that, due to circumstances beyond their control, refugees are often forced to travel without passports, visas or other documentation and that restrictive immigration policies may mean that refugees are likely to be ineligible for visas sought through official migration channels.<sup>77</sup>
116. The term 'penalties' is not defined in Article 31, however, the UNHCR Department of International Protection has explained that:

Any punitive measure, that is, any unnecessary limitation to the full enjoyment of rights granted to refugees under international refugee law, applied by states against refugees who would fall under the protective clause of Article 31(1) could, arguably, be interpreted as penalty. Such punitive measure could also be the denial of an appropriate standard of treatment under the 1951 Convention if amounting to an arbitrary or discriminatory restriction of rights foreseen under international refugee and human rights law. If, for instance, a State resorted to a different standard of treatment for refugees arriving in a manner covered by Article 31, then Article 31, in combination with Article 3

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<sup>76</sup> Having a well-founded fear of persecution is generally recognized in itself as constituting 'good cause'. This protection applies not only to persons ultimately accorded refugee status, but also to persons claiming asylum in good faith, including those travelling on false documents. See Guy S. Goodwin-Gill, Professor of International Refugee Law, University of Oxford Member of the English Bar, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection' A paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations October 2001 available at

<http://www.spottiswood.com/ftp/sarah/back%20up/PACS%20127%20Human%20rights%20and%20Global%20Politics/document%20about%20detention.pdf>

<sup>77</sup> Ibid.

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and those provisions of the Convention linked to lawful stay, would need to be examined with a view to possible violation.<sup>78</sup>

117. The Law Council is concerned that subjecting asylum seekers who arrive by boat to a different, potentially inferior offshore processing regime constitutes a penalty in violation of the Refugees Convention. While the details of the legal frameworks operating in respect of those asylum seekers whose claims are processed offshore remain unclear, there are very real concerns that these systems may be characterised by serious delays in the commencement of processing; the holding of asylum seekers in sub-standard facilities while their refugee status is being determined; inadequate access to legal advice; and the absence of durable solutions for recognised refugees.
118. The changes to the term 'transitory person' in the UMA Bill may also constitute punitive measures contrary to Article 31. These amendments will operate to preclude a person from making an application for a protection visa in Australia, even if he or she has been found to be a refugee under an offshore status determination process, and has been transferred back to Australia for some other reason. This could include, for example, people who are transferred from Nauru to Australia for medical treatment. For a long-term detainee, such trips back to Australia could become frequent, particularly if appropriate mental health services are not available in places such as Nauru. To deny these people the opportunity to make an application for a protection visa in Australia could amount to punitive treatment contrary to Article 31.

## Undermining Australia's obligations under other human rights Conventions

119. In addition to the above concerns, the UMA Bill has a number of features that, when combined with the changes introduced under the Regional Processing Act, fail to adhere to Australia's obligations under other human rights Conventions to which it is a party. These concerns are particularly acute in light of the adoption of the 'no-advantage test' as what appears to be the dominant feature of the Government's response to the Expert Panel's recommendations.

### Discriminatory treatment of asylum seekers based on mode of arrival

120. As noted above, the UMA Bill effectively creates two classes of refugees based on mode of arrival. Under the approach endorsed by the UMA Bill, a temporary visa holder arriving by air who becomes unlawful after visa expiry and subsequently applies for protection will have access to the Migration Act provisions and be able to access legal or migration assistance, merits review and judicial review in Australia. In contrast, a person who arrives by boat seeking protection will be liable to be transferred to an offshore location. If this occurs, he or she will be dependent upon whatever legal frameworks and processes apply in that location for his or her protection claim. As noted above, boat arrivals will also be subject to the 'no-advantage' test which has resulted in significant delays in the processing of protection claims and inadequate access to legal or migration assistance. The 'no-

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<sup>78</sup> See UNHCR Department of International Protection internal note 2000 as referred to in Guy S. Goodwin-Gill, Professor of International Refugee Law, University of Oxford Member of the English Bar, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection' A paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations October 2001 at footnote 15.

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advantage' test is also likely to result in prolonged periods in regional processing countries or prolonged detention or highly restricted community release in Australia.

121. Given the fact that those asylum seekers who have recently arrived by boat seeking protection in Australia have almost exclusively originated from Sri Lanka, Afghanistan, Iraq and Iran, it can be argued that the features of the UMA Bill that discriminate on the basis of mode of arrival also discriminate on the basis of race or country of origin.<sup>79</sup> This places Australia in breach of Article 3 of the Refugees Convention.
122. However, this is not the only obligation Australia has assumed under international law to protect against discriminatory treatment of asylum seekers. Article 26 of the ICCPR and Article 2 of the Convention on the Rights of the Child (CROC)<sup>80</sup> prohibit discrimination of any kind.

#### Arbitrary detention

123. The Law Council holds strong concerns that if enacted the UMA Bill will compound the impact of the existing provisions of the Migration Act that authorise prolonged detention of asylum seekers and refugees on arbitrary grounds.
124. The right not to be arbitrarily detained is contained in Article 9(1) of the ICCPR. The AHRC has explained that:

To avoid being arbitrary, detention must be necessary and reasonable in all the circumstances of the case, and a proportionate means of achieving a legitimate aim. If that aim could be achieved through less invasive means than detaining a person, their detention will be arbitrary. <sup>81</sup>

125. In line with this definition, the AHRC has acknowledged that use of immigration detention may be legitimate in some circumstances for a strictly limited period of time, but it has noted that this would demand an individual assessment of each person to determine whether he or she is posing an unacceptable risk to the Australian community and that risk cannot be met in a less restrictive way. The AHRC has expressed the view that

Australia's mandatory detention system fails to provide a robust and transparent individual assessment mechanism to determine whether the immigration detention of each person is necessary, reasonable or proportionate. The detention of unlawful non-citizens is not an exceptional step, but the norm – and it is often for lengthy periods.<sup>82</sup>

126. Under the UMA Bill and the Regional Processing Act, 'unauthorised maritime arrivals' may be subject to transfer to regional processing countries and effectively detained there without any clear limits on the duration of such detention. There is no set time in which a person who is determined to be a refugee must be re-settled in a third country. In addition, the no-advantage test actively encourages long delays in processing of claims and the exploration of resettlement options, which

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<sup>79</sup> Expert Panel Report Table 1, p. 23.

<sup>80</sup> *Convention on the Rights of the Child* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>81</sup> See AHRC Immigration detention and human rights

[http://humanrights.gov.au/human\\_rights/immigration/detention\\_rights.html#8](http://humanrights.gov.au/human_rights/immigration/detention_rights.html#8)

<sup>82</sup> See AHRC Immigration detention and human rights

[http://humanrights.gov.au/human\\_rights/immigration/detention\\_rights.html#8](http://humanrights.gov.au/human_rights/immigration/detention_rights.html#8)

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gives rise to the real risk of subjecting men, women and children to prolonged, or even indefinite, detention.

127. As the AHRC has also noted, even if those people transferred to offshore locations have the freedom to move around once certain checks have taken place, the conditions under which people are transferred to third countries under these policies could be characterised as deprivation of liberty amounting to detention.<sup>83</sup>
128. Not only does this risk undermining Australia's obligation under Article 9(1) of the ICCPR, it also contrasts sharply with much of the Government's New Directions in Detention Policy<sup>84</sup> which included the commitment that 'detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review'.

#### Transfer of vulnerable people and children

129. The UMA Bill further exacerbates the Law Council's concerns that the offshore processing regime authorised under the Regional Protection Act undermines and risks breaching Australia's obligations under the CROC.
130. These obligations include the requirement to treat the best interests of the child as a primary consideration in all actions concerning children<sup>85</sup> and to protect against unlawful or arbitrary interference with the family.<sup>86</sup>
131. Since the enactment of the Regional Processing Act, families with children have already been transferred to regional processing facilities on PNG and, although provision for certain children's services has been made, these children are being held in isolated and restrictive conditions similar to those that have previously been shown to be damaging to development and mental health. These children remain subject to uncertain legal processes and procedures and delays in the processing of their protection claims under the no-advantage test.
132. Under the UMA Bill and the Regional Processing Act, any child who arrives by boat – whether accompanied by an adult family member or guardian or not – will be liable to be transferred to an offshore processing location.
133. This will expose children to prolonged periods in remote offshore processing centres while they await the processing of their claims in line with the no-advantage principle. It may also expose children to substandard conditions that could threatened their mental and physical health and well-being and undermine a range of other rights protected under the CROC. The deleterious impact of offshore immigration detention on children has been well documented and suggests that even short term exposure to these types of conditions can have lasting impacts.<sup>87</sup>

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<sup>83</sup> Australian Human Rights Commission *Human rights issues raised by the transfer of asylum seekers to third countries* (15 November 2012) p. 15.

<sup>84</sup> New Directions in Detention - Restoring Integrity to Australia's Immigration System, Australian National University, Canberra, Tuesday 29 July 2008  
<http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>

<sup>85</sup> Article 3 of the *Convention on the Rights of the Child* (CROC).

<sup>86</sup> Articles 17 and 23 of the ICCPR.

<sup>87</sup> For example, a summary of these impacts is provided in the Australian Parliamentary Library's publication *Immigration Detention in Australia* (23 January 2012) available at  
[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2011-2012/Detention#\\_Toc341774459](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/Detention#_Toc341774459)

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134. Particular concerns arise in the context of unaccompanied minors,<sup>88</sup> given the Minister's role as both guardian of such children and decision maker regarding their transfer. The Regional Processing Act amends the Immigration (Guardianship of Children) Act 1946 (Cth) to make it clear that, although the Minister is the guardian of unaccompanied children who arrive in Australia, he or she ceases to be the guardian of any such children who are transferred to a regional processing country under the Migration Act. As a result, the Minister no longer needs to consent in writing to the removal of unaccompanied children from Australia to a regional processing centre.
135. This amendment intensifies concerns that, under the transfer arrangements being pursued by the Government, Australia may be in breach of its international law obligations, particularly those under the CROC. These obligations require the best interests of the child to be the primary consideration in decisions that affect a child's rights and interests and provide that unaccompanied children are entitled to special protection by the State.
136. The AHRC has queried what arrangements have been made for the guardianship of any unaccompanied children transferred to a third country.<sup>89</sup>
137. The UNHCR has also warned that, despite the recent legislative amendments, Australia will remain accountable for children sent to offshore locations and should undertake 'vulnerability' assessment for the welfare of under-age asylum seekers in these places.<sup>90</sup> In its paper on maritime interception and the processing of international protection claims, the UNHCR explains that children, particularly unaccompanied and separated children, may require special consideration in terms of reception and processing arrangements and may require: the appointment of guardians; systematic 'best interest' determinations; assistance with access to asylum procedures and preparation of their claims; and alternative accommodation arrangements.<sup>91</sup> It remains unclear whether these features are in place in respect of the reception arrangements in Nauru and PNG.
138. The Law Council also notes that the Government has yet to fully implement the Expert Panel's recommendations regarding temporary visas for asylum seekers to be transferred back from Nauru or PNG if they have special needs or are highly vulnerable. Their conditions and entitlements during the period in Australia should be similar to those that apply to asylum seekers living in the Australian community on bridging visas. <sup>92</sup> This recommendation has not been incorporated into either the Nauru or PNG Instruments, or the MOUs, although the MOUs include a commitment by both Governments to develop 'special arrangements' for vulnerable cases including unaccompanied minors.<sup>93</sup>
139. The Law Council notes that, on 13 October 2012, DIAC published pre-transfer assessment guidelines, along with guidelines for the exercise of Ministerial

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<sup>88</sup> For example, see Law Council of Australia submission to the Expert Panel on Asylum Seekers (July 2012) available at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=E5B063C8-1999-B243-6E33-9754797AF377&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=E5B063C8-1999-B243-6E33-9754797AF377&siteName=lca)

<sup>89</sup> Australian Human Rights Commission *Human rights issues raised by the transfer of asylum seekers to third countries* (15 November 2012) p. 15.

<sup>90</sup> *Ibid.*

<sup>91</sup> UNHCR, Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing (November 2010) para 28 available at <http://www.unhcr.org/refworld/pdfid/4cd12d3a2.pdf>

<sup>92</sup> Expert Panel Recommendation 8, paragraph 3.48.

<sup>93</sup> Nauru MOU clause 13.



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discretion under section 198AE of the Migration Act to exempt a person from transfer to a designed 'regional processing country' (the Guidelines).<sup>94</sup>

140. The Guidelines allow an assessor to consider matters such as the mental and physical health of the person, whether the person has a history of torture or trauma, and the person's age when determining whether it is 'practical' to transfer the person from Australia.<sup>95</sup> The Guidelines also outline particular inquiries that must be undertaken in respect of unaccompanied minors; these include having regard to the best interests of the child. They also require cases to be referred to the Minister where people claim that they may be subject to persecution or other human rights breaches in the regional processing country.<sup>96</sup> Despite these positive features, the Guidelines do not incorporate the full range of Australia's human rights obligations, nor do they appease the range of human rights concerns relating to the transfer of vulnerable people, such as unaccompanied minors.

## Rule of Law Concerns

141. As noted above, ensuring access to fair and efficient refugee status determination processes in PNG or Nauru and ensuring access to durable solutions for those found to be refugees or otherwise owed protection, are fundamental to Australia adhering to its obligation of non-refoulement under the Refugees Convention and other human rights Conventions. These assurances are also critical to respecting rule of law principles. Relevantly, these principles include that:<sup>97</sup>
- The law must be both readily known and available, and certain and clear.
  - The law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds.
  - Everyone should have access to competent and independent legal advice.
  - The Executive should be subject to the law and any action undertaken by the Executive should be authorised by law.
  - States must comply with their international legal obligations whether created by treaty or arising under customary international law.
142. The Law Council is concerned that the UMA Bill, when considered in light of the changes made to the Migration Act by the Regional Processing Act, fails to adhere to these principles. In particular, the UMA Bill:
- subjects 'unauthorised maritime arrivals' to the possibility of transfer to regional processing countries and, therefore, to the laws and processes of these countries, without containing any guarantees that these process will be 'readily known and available, and certain and clear' or that they will comply

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<sup>94</sup> Department of Immigration and Citizenship *Departmental Guidelines for Assessment of Persons Prior to Transfer pursuant to section 198AD(2) of the Migration Act* (October 2012) (the DIAC Guidelines) A copy of these Guidelines is available at [http://www.immi.gov.au/visas/humanitarian/\\_pdf/s198ad-2-guidelines.pdf](http://www.immi.gov.au/visas/humanitarian/_pdf/s198ad-2-guidelines.pdf)

<sup>95</sup> DIAC Guidelines p. 5.

<sup>96</sup> DIAC Guidelines p. 6-7.

<sup>97</sup> For further discussion of these principles see Law Council of Australia's Policy Statement on Rule of Law Principles (March 2011) that is intended to act as a guide to the framework often employed by the Law Council and its committees in evaluating the merits of government legislation, policy and practice, available at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=485A3C37-B2E2-7BAB-8531-E5322450F23B&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=485A3C37-B2E2-7BAB-8531-E5322450F23B&siteName=lca)

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with international standards of fairness regarding refugee status determination;

- subjects all boat arrivals to a different legal process because of their mode of arrival;
- results in ‘unauthorised maritime arrivals’ not having access to competent and independent legal advice as asylum seekers arriving by air;;
- excludes ‘unauthorised maritime arrivals’ from applying for visas in Australia unless the Minister exercises a personal discretion to allow such an application and not to transfer them to regional processing countries; and
- fails to adhere to Australia’s obligations under international law, particularly those under the Refugees Convention.

143. The Law Council also notes that none of the legislative mechanisms authorising offshore processing, nor the amendments proposed in the UMA Bill, implement the range of recommendations made by the Expert Panel that set out what should be the minimum requirements of the legal framework that governs processing of protection claims in Nauru and PNG. For example, the Expert Panel recommended that arrangements for processing of asylum seekers in Nauru and PNG should be consistent with Australian, Nauruan and Papua New Guinean responsibilities under international law, including the Refugees Convention and include:

- treatment consistent with human rights standards (including no arbitrary detention);
- appropriate accommodation and physical and mental health services;
- access to educational and vocational training programs;
- application assistance during the preparation of asylum claims;
- an appeal mechanism against negative decisions on asylum applications that would enable merits review by more senior officials and NGO representatives with specific expertise;
- monitoring of care and protection arrangements by a representative group drawn from government and civil society in Australia and Nauru; and
- provision of case management assistance to individual applicants being processed.<sup>98</sup>

144. While some of these requirements are reflected to some extent in the MOUs governing the transfer of asylum seekers to PNG and Nauru, it remains unclear whether and to what extent each of these requirements will be reflected in the legal processes that are applied to the determination of protection claims in these locations. Further, as noted above, because these requirements have not been reflected in the Migration Act or the legislative instruments designating PNG and Nauru as regional processing countries, compliance with these requirements is dependent upon the political will and administrative capacity in those countries.

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<sup>98</sup> Expert Panel’s Recommendations 8 and 9.

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### Legal uncertainty in respect of offshore processing of protection claims

145. Of particular concern to the Law Council is the level of uncertainty surrounding the legal framework that will apply to the processing of the protection claims of 'unauthorised maritime arrivals' transferred to regional processing countries and whether they will have access to legal advice.<sup>99</sup> These concerns have been exacerbated by the application of the 'no-advantage' test which has resulted in an effective 'freeze' on the processing of the protection claims of all asylum seekers arriving by boat since 13 August 2012.
146. Some information regarding the planned processing of protection claims has recently been provided in relation to Nauru. The Refugees Convention Act 2012 has been passed in Nauru. It sets out a refugee status assessment process that contains review mechanisms. The Nauruan Foreign Minister has committed to providing legal assistance to asylum seekers transferred from Australia.<sup>100</sup>
147. However, serious questions remain regarding the capacity of the Nauruan Government to undertake the massive task of processing claims in a fair and efficient way and to recruit appropriate legal representatives in a timely manner. The extent to which Australian officials may be involved also remains unclear and, to date, access to legal advice by asylum seekers appears to be very limited. These concerns also apply in relation to the processing of claims on Manus Island which, unlike Nauru, does not even appear to have appropriate legislative provisions in place.
148. These concerns give rise to the following questions that the Law Council considers should be answered by the Australian Government:
- When will processing of protection claims made by persons transferred to regional processing countries commence?
  - Under what law will these claims be assessed and which officials will be involved in processing their claims? For example:
    - Will the claims of people who have been transferred to Nauru be processed in accordance with Nauruan law, such as the Refugees Convention Act 2012?
    - If so, how will the current lack of capacity within the Nauruan Government to undertake the assessment of protection claims of a large number of asylum seekers be addressed? How will these same issues be addressed in the proposed processing facility in Manus Island?
    - What avenues for independent merits review of the assessment of protection claims will be available to people in regional processing countries?
  - What steps have been undertaken to support commitments made by the Government of Nauru to ensure that people transferred to Nauru since 13 August 2012 have access to appropriate legal advice and other assistance to understand their legal rights and to make their protection claims?

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<sup>99</sup> Law Council of Australia Media Releases 'Reports highlight why legal uncertainty needs to end: Law Council' (23 November 2012); 'Legal uncertainty must end for asylum seekers' (8 November 2012) available at [http://www.lawcouncil.asn.au/media/media\\_home.cfm](http://www.lawcouncil.asn.au/media/media_home.cfm)

<sup>100</sup> ABC News Radio PM 'Nauru accepts Amnesty Advice' (21 November 2012) transcript available at <http://www.abc.net.au/pm/content/2012/s3637939.htm>



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### Exclusion of natural justice from amendments to section 198EA

149. The Law Council also notes that, when the UMA Bill was considered by the Senate Scrutiny of Bills Committee, it questioned whether the exclusion of the rules of natural justice in proposed changes to section 198EA of the Migration Act would result in an undue trespass on personal rights and liberties.
150. Subsection 198AE(1) currently provides that, if the Minister thinks that it is in the public interest to do so, he or she may, in writing, determine that section 198AD does not apply to an 'offshore entry person'. Section 198AD requires that, subject to the conditions outlined in the section, an officer must, as soon as reasonably practicable, take an 'offshore entry person' from Australia to a regional processing country. Determinations made under subsection 198AE(1) are currently not to be subject to the rules of natural justice.<sup>101</sup>
151. Proposed subsection 198AE(1A) will invest the Minister with the authority to revoke or vary a determination made under subsection 198AE(1), if the Minister 'thinks that it is in the public interest to do so'. The Bill will also amend subsection 198AE to provide that the rules of natural justice will not apply to a determination made under the new subsection to vary or revoke a determination made under subsection 198AE(1).
152. The effect of these amendments is to invest the Minister with a broad power to reverse a decision that prevents a person from being transferred offshore – without requiring that this decision be made in accordance with the rules of natural justice. Any individual subject to these provisions will be placed in a precarious situation where decisions that could have a highly significant impact on their visa status and well-being can be made and changed without regard to basic principles of fairness and justice. As the Scrutiny Committee explained:
- Although such a declaration is conditioned on the Minister's consideration of the public interest, the revocation of a determination under subsection 198AE(1), that the provisions for taking an offshore entry person to a regional processing country not apply, will operate to frustrate expectations such a person may reasonably hold based on the initial determination. In such circumstances it may be thought that fairness should require that persons affected be entitled to rely on the common law rules of natural justice that would entitle them to a fair, unbiased hearing.<sup>102</sup>
153. The Scrutiny Committee noted that the Explanatory Memorandum to the UMA Bill offers no justification for this approach. As a result, the Scrutiny Committee has sought the Minister's advice as to the rationale for this approach, 'so that it is able to form a view as to the appropriateness of the exclusion of natural justice in relation to the exercise of the power under subsection 198AE(1A)'.<sup>103</sup>
154. The Law Council shares the Scrutiny Committee's concerns in respect of these amendments. It submits that the Senate Committee on Legal and Constitutional affairs should recommend that, if the UMA Bill is to proceed, the proposed amendment excluding the application of the rules of natural justice under section 198AE should be removed from the Bill.

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<sup>101</sup> Migration Act s198AE(3)

<sup>102</sup> Senate Standing Committee for the Scrutiny of Bills Alert Digest No.14 of 2012 (21 November 2012) (Scrutiny of Bills Committee Alert Digest) p. 13 available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=scrutiny/alerts/2012/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/alerts/2012/index.htm)

<sup>103</sup> Scrutiny of Bills Committee Alert Digest p. 14

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## Law Council's Recommendations

155. The Law Council strongly recommends that the UMA Bill not be passed. When considered in light of the changes made to the Migration Act by the Regional Processing Act, its provisions do not adhere to rule of law principles or give effect to Australia's obligations under international law.
156. If, contrary to the Law Council's recommendation, the Committee takes the view that the UMA Bill should be passed, the Law Council urges the Committee to recommend that:
- (a) those provisions that seek to replace the term 'offshore entry person' with the term 'unauthorised maritime arrival' are amended to provide that:
    - (i) the Minister is required to have regard to the full range of Australia's human rights obligations and is bound by the rules of natural justice when making decisions under section 46A to determine that the prohibition on making an application does not apply to an application by the unauthorised maritime arrival for a visa of a class specified in the determination, and that these decisions are subject to judicial review;
    - (ii) the Minister is required to have regard to the full range of Australia's human rights obligations and is bound by the rules of natural justice when making decisions under section 198EA to exempt certain people from being transferred to an regional processing country, or to vary or change such an exemption, and that these decisions are subject to judicial review;
  - (b) those provisions that seek to amend the definition of 'transitory person' and exclude such persons from applying for protection visas in Australia after being determined to be a refugee within the meaning of the Refugee Convention are repealed.
157. In addition to these recommendations, the Law Council urges the Committee to recommend that the Australian Government:
- (a) immediately clarify the legal framework that will apply to the assessment of protection claims made by those transferred to offshore locations, and ensure that such persons have access to adequate legal advice and other assistance for all stages of their refugee status determination process (as well as prior to removal regardless of whether a protection claim has been made) ;
  - (b) take immediate steps to ensure that all processing facilities in regional processing countries adhere to human rights standards; provide access to appropriate medical and health services; and are readily accessible to independent scrutiny, including by domestic and international human rights bodies and journalists;
  - (c) amend the Regional Protection Act, the legislative instruments designating Nauru and PNG as regional processing countries, and the MOUs to include a requirement that any regional processing arrangements comply with the full range of Australia's obligations under international law and contain the features outlined in Expert Panel's report;

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- (d) take action to implement all 22 recommendations made by the Expert Panel, and give priority to implementing those recommendations that seek to provide durable regional solutions for irregular migration, including investing in capacity building within the region to improve the speed and quality of refugee status determinations and increasing the number of resettlement places available in Australia and in other countries; and
  - (e) re-consider the application of the 'no-advantage test' and take steps to ensure that clear limits are placed on the time taken to process the protection claims of 'unauthorised maritime arrivals', and ensure that people are not detained for prolonged periods; and
  - (f) ensure that any further policies in this area comply with the New Directions in Detention policy and have regard to the relevant recommendations made by the Parliamentary Joint Committee on Australia's Immigration Detention Network.

## Conclusion

158. The Law Council is concerned that the UMA Bill will have a punitive impact on asylum seekers arriving anywhere in Australia by boat and will reinforce a discriminatory approach to the assessment of asylum claims on the basis of mode of arrival. As a result of these features, the UMA Bill and the Regional Processing Act undermine Australia's obligations under the human rights Conventions to which it is a party, particularly those contained in the Refugees Convention. Not only does the legislation place at risk the rights and wellbeing of vulnerable men, women and children seeking protection from persecution, it also risks jeopardising Australia's regional and international reputation as a nation that takes its international obligations seriously and is genuine about seeking a durable regional solution to irregular migration.

159. As the Refugee and Immigration Legal Centre explained in respect of past efforts to excise Australian territories from the migration zone:

If every signatory to the Refugees Convention decided to impose additional requirements on asylum seekers or to divert direct responsibility for protection according to its own domestic agendas, the Convention would become unworkable. Such an approach would be inconsistent with the protective intent of the Refugees Convention and would have the effect of retarding the UNHCR's objective of encouraging a consistent and humanitarian approach to the refugee crisis, particularly amongst wealthier nations.<sup>104</sup>

160. These views were also once shared by the Australian Labor Party and this Committee. Both opposed past attempts to exclude all asylum seekers who arrived by boat from accessing the provisions of the Migration Act. This can be most dramatically illustrated by the Minister's comments (then in Opposition) on the DUA Bill when it was debated in Parliament in 2006:

If the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 passes the parliament today, it will be the day that Australia turned its back on

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<sup>104</sup> Refugee and Immigration Legal Centre "Response to Proposed Legislative Changes: *Border Protection (Validation and Enforcement Powers) Bill 2001*; *Migration Amendment (Excision from Migration Zone) Bill 2001*; and *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001*" (14 March 2002).

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the refugee convention and on refugees escaping circumstances that most of us can only imagine. This is a bad bill with no redeeming features. It is a hypocritical and illogical bill. If it is passed today, it will be a stain on our national character. The people who will be disadvantaged by this bill are in fear of their lives, and we should never turn our back on them. They are people who could make a real contribution to Australia.

...

Someone who makes it to the Australian mainland and has their case as a refugee accepted may not be able to gain a protection visa in this country, and that is a national disgrace. 105

161. As noted above, since 13 August 2012, the Government's approach to dealing with boat arrivals has been characterised by the re-introduction of processing in other countries and the application of no-disadvantage test, which has resulted in significant delays in the processing of protection claims; the transfer of many hundreds of people to offshore locations; and the removal of many hundreds of asylum seekers who have been 'screened out' as not having raised protection claims. It has also left people who are seeking protection in a situation where they are unable to be certain as to which legal framework or processes will apply to their claims, what legal rights to which they will have access and whether they will have access to migration or legal assistance.
162. The UMA Bill exacerbates the Law Council's concerns regarding the Government's selective approach to the implementation of the Expert Panel's recommendations. As the Minister himself acknowledged in the Second Reading Speech of the UMA Bill, '[t]o be effective in discouraging asylum seekers from risking their lives, the incentives and disincentives the panel recommended must be pursued in a comprehensive manner.'<sup>106</sup> This means implementing those recommendations that seek to demonstrate to potential boat arrivals that their claims to refugee status can and will be processed in a timely fashion in locations such as Indonesia and that alternative resettlement options or local integration options will be available. Without the development of these types of arrangements under a regional protection framework, the 'no-disadvantage test' loses the meaning prescribed by the Expert Panel and becomes a means of justifying the introduction of measures that threaten the rights and well being of those who have sought protection in Australia, without improving the circumstances of those awaiting refugee status determination elsewhere.
163. For these reasons, and those discussed above, the Law Council strongly urges this Committee to recommend that the UMA Bill not be passed.

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<sup>105</sup> Chris Bowen MP Media Centre 'Coalition attempts to excise Australian mainland from migration zone' Posted August 10, 2006 at <http://www.chrisbowen.net/media-centre/speeches.do?newsId=2061>

<sup>106</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2012, 9 (Chris Bowen, Minister for Immigration and Citizenship).

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

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