



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: HumanRights:JD:VK:637305

16 July 2012

Professor Sally Walker  
Secretary General  
Law Council of Australia  
DX 5719 Canberra

By email: [sarah.moulds@lawcouncil.asn.au](mailto:sarah.moulds@lawcouncil.asn.au)

Dear Professor Walker,

**Asylum seeker issues and Expert Panel on asylum seekers**

I am writing on behalf of the Human Rights Committee of the Law Society of NSW ("the Law Society Committee") which is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

The Committee considered the memorandum from the Law Council dated 6 July 2012 ("Memo") seeking contributions from its constituent bodies to assist the Law Council with its engagement with the Expert Panel on Asylum Seekers ("Expert Panel").

The Committee endorses the views set out by the Law Council in the Memo. In addition, the Committee notes that the Expert Panel has been asked to consider issues including the following:

- (a) how best to prevent asylum seekers risking their lives by travelling to Australia by boat;
- (b) source, transit and destination country aspects of irregular migration;
- (c) relevant international obligations;
- (d) the development of an interrelated set of proposals in support of asylum seeker issues, given Australia's right to maintain its borders;
- (e) short, medium and long term approaches to assist in the development of an effective and sustainable approach to asylum seekers;
- (f) the legislative requirements for implementation; and
- (g) the order of magnitude of costs of such policy options.

The Committee's understanding of the current policy of the Government is to return irregular maritime arrivals (IMAs) to Malaysia (and is open to the idea of including other receiving countries). This, so it is said, would act as a deterrent to the IMAs and would prevent them risking their lives by travelling to Australia by boat. This will require amendments to be made to section 198A of the *Migration Act* 1958 (Cth) (the "Act") to overcome the High Court decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32. The policy of the opposition appears to entail returning IMAs to a Refugee Convention signatory country; reintroducing Temporary Protection Visas and preventing family reunion for IMAs. Such a policy change will require more significant amendments to the *Act*.

The difficulty with the approach of both parties, of course, is that they take the view that any such policy and/or legislative response must impose a strong deterrence to asylum seekers in order to protect them. While the Committee acknowledges the legitimate concerns for the safety of IMAs it views that any such approach is undesirable and fails to appreciate the complexities of the issues at hand.

In the Committee's view, it is not appropriate to legislate to overcome the High Court decision in *Plaintiff M70/2011*; a welcomed decision which found that the *Act* requires, *inter alia*, that a receiving 'declared country' meet certain human rights standards and provide protection for asylum seekers pending determination of their refugee status. Disturbing the decision of the High Court would diminish the current requirement for basic human rights standards and could lead to breaches of Australia's international obligations.

The preferred approach, in the Committee's view, would be for the Panel to identify the causes of the increased number of asylum seekers and the reasons as to why some take the journey to Australia by boat. Once the key reasons and causes are identified members of the Expert Panel can turn their minds to how these issues may be addressed. It is the view of the Committee that addressing these complex issues, as opposed to imposing a deterrent that may amount to a 'penalty', is the appropriate approach to assist in the development of an effective and sustainable approach to asylum seekers.

With respect to the cause of the increased numbers of asylum seekers over the past decade, Professor William Maley, a prominent academic in the field, has identified increasing 'push factors'<sup>1</sup> related to re-emerging dangers in countries such as Afghanistan and Pakistan. Imposing harsh conditions on asylum seekers to act as a deterrent cannot address this factor. In the Committee's view, the reason asylum seekers attempt to reach Australia by irregular maritime means is, in part, related to the current limitations on Australia's off-shore humanitarian program. These include the strict quota for refugee intakes; restrictions imposed to in-country humanitarian applicants and the disproportionate time taken for asylum seekers to be assessed and resettled. The Committee requests the Expert Panel give consideration to the following possible recommendations:

- stronger regional co-operation to stop boats departing for Australia;

---

<sup>1</sup> <http://www.canberratimes.com.au/opinion/need-for-mature-asylum-policy-not-political-point-scoring-20120626-210nw.html>; <http://www.theaustralian.com.au/national-affairs/opinion/we-know-what-not-to-do-about-refugees/story-e6frgd0x-1226422875558>

- stronger regional co-operation to process asylum seekers in countries outside Australia under the off-shore humanitarian program;
- increasing the current quota of refugee intakes (under visa subclasses 200 to 204);
- providing a reasonable timeframe for the making of decisions;
- requiring any such decisions to be accompanied by written reasons;
- allowing any such decisions to be subject to merits review.

While there is no simple solution to the complex issues surrounding asylum seekers, the logic behind the Committee's suggested approach is to give potential IMAs a similar process to that they would expect in Australia without the risks associated with the boat journey. The Committee's view is that the imposition of harsh policies of deterrence on vulnerable people who seek protection is unacceptable. Such an approach will ultimately not yield the desired results as it misunderstands the reasons behind the increasing numbers of IMAs. The Committee further brings the attention of the Expert Panel to Article 14 of the *Universal Declaration of Human Rights 1948* which provides for the right to seek and enjoy asylum from persecution; and that Article 6 of the *International Covenant on Civil and Political Rights 1966* sets out the right to life.

Thank you for the opportunity to provide comments. If the Law Council believes that it would be useful, the Committee would be pleased to attempt to address points (f) and (g) of what the Expert Panel has been asked to consider in light of the approach taken by the Committee on points (a) to (e).

Yours sincerely,



Justin Dowd  
President

