

Law Council of Australia

Policy Post Border Protection Legislation

In the light of the *Tampa* crisis and the subsequent enactment of the Border Protection legislative package, the Law Council supports the following policy positions, to be publicly advocated by the Law Council:

1. The Law Council recognises that Australia has the power to decide who may or may not enter or reside in Australia. This sovereign right is, however, not absolute, and is tempered by international legal obligations assumed by Australia.
2. Decisions in individual cases on entry and residence should be made according to law.
3. The Executive government must observe in good faith its obligations under Australian and international law.
4. In discharging the obligations referred to in paragraph 3, the Commonwealth Government should commit to the following as general principles, which should be departed from only for clearly articulated and compelling reasons:
 - (a) that legislation should operate uniformly across all Australian territory; and
 - (b) that legislation should not be retrospective.
5. The Law Council calls on the Commonwealth Government to remove privative clauses in relation to the judicial review of migration decisions.

6. The Law Council calls on the Commonwealth Government to reintroduce “class actions” for the judicial review of migration decisions.
7. The Law Council calls on the Commonwealth Government to return judicial review of migration decisions to the *Administrative Decisions (Judicial Review) Act 1977*, along with the introduction of the following measures designed to prevent baseless applications and to “weed out” those that are made:
 - (a) undertaking further empirical study of applications for judicial review;
 - (b) introducing a requirement in migration matters to demonstrate a prima facie case, or obtain leave from the court, in order to proceed with a judicial review application;
 - (c) improving the quality of decision making in the migration tribunals; and
 - (d) restoring legal aid funding for eligible applicants in migration cases.
8. With respect to legal aid, that the power of the Commonwealth Government to award contracts for the tendering of legal services be removed from DIMA (the Department of Immigration and Multicultural and Indigenous Affairs – which had come into existence on 26 November 2001) and restored to appropriate Legal Services Commissions.
9. The Law Council calls on the Commonwealth Government to adopt a policy that it should not seek costs against unsuccessful applicants in public interest litigation where:
 - (a) the action or application has been brought in the public interest and not for the financial gain of the applicant;
 - (b) the court does not criticise the action as having been unreasonably brought.