CHAPTER 3

Key issues relating to the Bill

3.1 The majority of submissions and witnesses supported the Bill and its objectives.[1] This chapter discusses the key issues raised during the inquiry, including:

- the need for clarity of the Panel's powers and functions;
- the access the Panel will have to regional processing countries and the processing facilities in those countries;
- the requirement for the Panel to report to the parliament; and
- the health expertise requirements for members of the Panel.

Clarity of powers and functions

3.2 One of the specific issues raised in relation to the Bill was whether the functions and powers of the Panel, as set out in proposed new subsections 198ABA(4) and (5), are sufficiently clear. Professor Louise Newman, who is also the former Chair of the Detention Health Advisory Group (DeHAG), argued that the Bill should be 'much clearer' in terms of the power and terms of reference for the proposed Panel:

> DeHAG…[has] not had any clearly defined capacity to necessarily enter centres, have access to the sort of data that is very important to monitor health and mental health outcomes, nor to actually review any actions that might be taken about recommendations. I think our collective experience has been that over the years of existence of DeHAG we have made many recommendations about things that we thought would improve health and mental health within the centres, but we have had absolutely no mandate to review the implementation of any of those recommendations. This amendment should be much clearer in terms of the power and terms of reference of a group to really oversight in a clear way what recommendations are made, what actions are then taken and whether they actually lead to improvements in the situation.[2]

3.3 UnitingJustice also commented on the lack of specific monitoring arrangements in the Bill and argued that these details should be codified in the legislation.[3]

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1 See, for example: Dr Gillian Singleton, The Royal Australian College of General Practitioners, *Committee Hansard*, 23 November 2012, p. 1; Ms Ellisa Scott, Hotham Mission Asylum Seeker Project, *Committee Hansard*, 23 November 2012, p. 14; Mr Kon Karapanagiotidis OAM, Asylum Seeker Resource Centre, *Committee Hansard*, 23 November 2012, p. 15; Professor Gillian Triggs, Australian Human Rights Commission, *Committee Hansard*, 23 November 2012, p. 21; UnitingJustice, *Submission 5*, p. 12; Australian Lawyers Alliance, *Submission 9*, p. 1; Coalition for Asylum Seekers Refugees and Detainees, *Submission 14*, p. 8.

2 *Committee Hansard*, 23 November 2012, pp 3-4.

3 *Submission 5*, p. 11.

3.4 The committee received evidence that one aspect of the Panel's functions, as envisaged in the Bill, would be unnecessary or impractical. Proposed paragraph 198ABA(5)(c) of the Bill provides that in performing its monitoring and assessment functions the Panel may 'assess the health of an offshore entry person when he or she first arrives in a regional processing country'. Dr Singleton of The Royal Australian College of General Practitioners stated that she could not see how such assessments would practically work:

> I think ensuring that the processes are in place to ensure that people are being assessed adequately is what is important.[4]

Access to regional processing countries and facilities

3.5 The Department's submission noted that the activities of any Panel in, or in relation to, a regional processing country 'will necessarily depend on the consent and agreement of the government of the relevant regional processing country'.[5]

3.6 At the public hearing, an officer of the Department expanded on this point:

> We are very conscious that in establishing the regional processing centres that they are established within separate sovereign countries. Each time anybody, whether it be a staff member of the department or indeed somebody being transferred to the centre, is seeking permission to enter the country they need to be granted a visa and they need permission to access a centre. It is a shared arrangement. The challenge we were presenting to the committee for it to consider was the coverage of Australian law in relation to a separate sovereign country.[6]

3.7 However, some witnesses dismissed the issue of access as an obstacle to the Panel's operation.[7] For example, Mr David Manne of the Refugee and Immigration Legal Centre argued that the issues in relation to sovereignty could be addressed through further negotiation with the Nauruan and Papua New Guinean governments as part of the transfer arrangement:

> The transfer arrangement has already overcome, it appears, certain issues concerning sovereignty, such as transferring people to Nauru and setting up tents for people to live in at the moment, and so forth. We would see it as a necessary extension of the arrangements that have already been undertaken, rather than overcoming any possibly insurmountable obstacle. Were that not to be the case we would be confronting a situation where the

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4 *Committee Hansard*, 23 November 2012, p. 9. See also: Associate Professor Amanda Gordon, Australian Psychological Society, *Committee Hansard*, 23 November 2012, p. 9.

5 *Submission 19*, p. 3.

6 Mr Ken Douglas, Department of Immigration and Citizenship (DIAC), *Committee Hansard*, 23 November 2012, p. 30. See also: Ms Vicki Parker, DIAC, *Committee Hansard*, 23 November 2012, p. 38.

7 Mr Kon Karapanagiotidis OAM, Asylum Seeker Resource Centre, *Committee Hansard*, 23 November 2012, p. 16; Ms Tamara Lions, Amnesty International Australia, *Committee Hansard*, 23 November 2012, p. 17; Mr David Manne, Refugee and Immigration Legal Centre, *Committee Hansard*, 23 November 2012, p. 27.

> Australian Government was expelling people from its shores to another country without being able to provide for their care.[8]

3.8 Professor Gillian Triggs, President of the Australian Human Rights Commission (AHRC), expressed the view that sovereignty would not be a barrier to a statutory panel accessing regional processing centres:

> [It] is a matter of international law. Australia is legally responsible for all international activities over which it has effective control. That is a very broad statement, but, specifically in relation to asylum seekers, clearly there is an obligation to assess those claims and to ensure that basic humanitarian rights are preserved. By transferring people to an offshore facility, those obligations continue. Certainly they would continue in the specific instances that are in existence at the moment in Papua New Guinea and Nauru, where Australia is playing such a strong role in relation to assisting with legislation, training of those likely to undertake assessment and so on.[9]

3.9 However, Professor Triggs did indicate a problem would arise if the Australian Government were to 'determine for itself that it will not permit the jurisdiction of its agencies to extend to offshore territories, and the Australian parliament would be more than entitled to pass legislation or to make clear that point if [it] chose to do so'.[10]

3.10 An officer of the Department sought to equate efforts by the Australian Government in obtaining access for the Panel with the assistance it might provide for bodies such as Amnesty International Australia or the Australian Red Cross in negotiating access:

> What we are posing for the committee to consider is how that might be applied under Australian legislation with a foreign country. For example, over the last three weeks or so, there have been visits by both the Australian Red Cross and Amnesty International. Both of those visits required the consent of the Nauru[an] government. We did not take their agreement for those visits for granted or lightly. We sought their agreement in the first instance.[11]

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8 *Committee Hansard*, 23 November 2012, p. 27.

9 *Committee Hansard*, 23 November 2012, p. 23.

10 *Committee Hansard*, 23 November 2012, p. 23.

11 Mr Ken Douglas, DIAC, *Committee Hansard*, 23 November 2012, p. 30.

Reporting to the parliament

3.11 A number of witnesses welcomed proposed new subsection 198ABA(6) which provides for the Panel to report at least once every six months on the health of offshore entry persons taken to regional processing counties, and to provide a copy of that report to the Speaker of the House of Representatives and the President of the Senate.[12] For example, Professor Triggs noted:

> [I]f independent monitors can report publicly on their findings there will be a significant increase in transparency and accountability…
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> [R]eporting to parliament gives an element of independent oversight by parliament—that is, a direct role within the democratic system. So I would see that as a very positive improvement.[13]

3.12 Mr Adam Fletcher from the Castan Centre for Human Rights Law argued that public reporting would make the Panel a more effective body than the Immigration Health Advisory Group (IHAG):

> [W]e see that an independent body which has some sort of public reporting requirement is likely to be more effective in achieving good health outcomes than the internal bodies, such as the IHAG – which, we understand, has not yet been formed – because…the transparency and accountability of such an independent body which reported publicly would be far greater.[14]

3.13 Professor Newman spoke of the frustration faced by DeHAG members in relation to being able to follow up on the implementation of recommendations that DeHAG made:

> We share, I think it is reasonable to say, a common view and frustration that many of the recommendations we and our professional bodies have made have not necessarily been implemented, or there have been systemic barriers to implementation, that the reporting back to us has been inadequate, and that we are not provided with adequate data to actually make reasonable policy recommendations. So, part of [both the] challenge and frustration of being an independent advisory body is, of course, that you can make many recommendations and give a lot of advice that is not necessarily acted upon.[15]

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12 See, for example, Professor Louise Newman, The Royal Australian and New Zealand College of Psychiatrists, *Committee Hansard*, 23 November 2012, p. 4; Ms Tamara Lions, Amnesty International Australia, *Committee Hansard*, 23 November 2012, pp 13 and 17; Professor Gillian Triggs, Australian Human Rights Commission, *Committee Hansard*, 23 November 2012, p. 23.

13 *Committee Hansard*, 23 November 2012, pp 21 and 23.

14 *Committee Hansard*, 23 November 2012, p. 27.

15 *Committee Hansard*, 23 November 2012, p. 7.

3.14 Witnesses suggested that, in addition to the Panel providing reports to the parliament, there should be a requirement for the Minister to respond to the reports within a mandated timeframe.[16] Mr Kon Karapanagiotidis OAM of the Asylum Seeker Resource Centre argued for a response from the Minister within 45 days of the Panel's report being presented to parliament:

> We need statutory obligations on the part of the government when these recommendations are put forward. We need the government to be bound to provide a mandated written response within 45 days of this report being tabled by the panel. We need to ensure we have a panel that has clout, standing, rights and, most critically[,] independence – so it can call it like it is, hold the government to account and have binding recommendations, genuine oversight and resourcing[.][17]

Expertise of the Panel

3.15 The committee received some evidence on the range of expertise of the Panel, as provided for in proposed subsection 198ABA(3) of the Bill.[18] For example, Dr Singleton outlined the expertise that key health organisations consider should be represented on the Panel:

> [The] expert panel should include health professionals with experience in health needs of refugees and asylum seekers, including professionals with specific expertise in psychiatry, psychology, general practice, public health, infectious diseases, paediatrics, dentistry and nursing. Representatives with health expertise from the countries in which the centres are located should also be involved in an advisory capacity.[19]

3.16 The inclusion of human rights expertise on the Panel was also raised in some submissions.[20] In relation to this issue, Professor Triggs stated:

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16 Mr Kon Karapanagiotidis OAM, Asylum Seeker Resource Centre, *Committee Hansard*, 23 November 2012, p. 16; Mr David Manne, Refugee and Immigration Law Centre, *Committee Hansard*, 23 November 2012, p. 28. See also: Asylum Seeker Resource Centre, *Submission 2*, p. 1.

17 *Committee Hansard*, 23 November 2012, p. 16.

18 See, for example, Asylum Seeker Resource Centre, *Submission 2*, p. 1; Commissioner for Children and Young People WA, *Submission 7*, p. 4; Victorian Refugee Health Network and Refugee Health Network of Australia, *Submission 15*, p. 1.

19 *Committee Hansard*, 23 November 2012, pp 1-2. See also: Victorian Refugee Health Network and Refugee Health Network of Australia, which suggested that refugee health experience and nursing should be part of the required expertise of the Panel (*Submission 15*, p. 1); and Asylum Seeker Resource Centre, which suggested that psychiatry expertise should be included in the Panel's expertise (*Submission 2*, p. 1).

20 Hotham Mission Asylum Seeker Project, *Submission 10*, p. 4; Asylum Seeker Resource Centre, *Submission 2*, p. 1. See also: Coalition for Asylum Seekers Refugees and Detainees, which recommended that there should be a 'certain proportion of non-government organisations representing refugees and asylum seekers and human rights organisations in the Panel' (*Submission 14*, p. 8).

> [I]t would be extremely helpful if a member of the commission had some reasonable competence and understanding of international human rights law…One of the reasons I would encourage you to make a recommendation in relation to this is that so frequently we find in our work here at the commission that we are met with the answer, 'Well, that's not what Australian domestic law provides.' Our benchmark provisions are international human rights treaties that may not have been implemented directly into Australian law. With the scrutiny process that you would be aware of and other increased awareness of international human rights, it would be very helpful if a commission member were at least competent in this area.[21]

3.17 The committee also sought the view of witnesses on whether the Panel should include a representative from a disability organisation. Associate Professor Amanda Gordon of the Australian Psychological Society suggested that such expertise is present within a number of organisations – such as The Royal Australian College of General Practitioners, The Royal Australian and New Zealand College of Psychiatry, the Australian Psychological Society and the Australian Medical Association – which would be nominating representatives to the Panel. However, Associate Professor Gordon did not believe there would be any objection to including a specific reference to such expertise in the Bill.[22]

Committee view

3.18 In the committee's view, the oversight and monitoring of health services provided to asylum seekers transferred to regional processing countries is currently inadequate. Despite this view, however, the committee does not support the establishment of a panel of health experts as proposed by the Bill as the appropriate mechanism to address this deficiency.

3.19 Fundamentally, it is not clear to the committee where the Bill's proposed panel would be administratively and operationally located within the framework of government or, alternatively, how it is to be funded if it is to be a body entirely independent from government. In this context, the committee notes the answer to a question on notice from the Office of the Commonwealth Ombudsman, which stated:

> The Ombudsman is open to further consideration of the establishment of an independent expert panel located within the Ombudsman's Office to monitor and evaluate the well-being of asylum seekers sent to offshore regional processing centres. There are possible benefits to this proposal depending on its construction…[However, the] independent panel would

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21 *Committee Hansard*, 23 November 2012, p. 22.

22 *Committee Hansard*, 23 November 2012, p. 11. See also: Associate Professor Karen Zwi from The Royal Australasian College of Physicians, who outlined some of the work that the Detention Health Advisory Group (DeHAG) had done, and recommendations it had made to address issues in relation to disability, and particularly to prevent further disabilities manifesting in detainees (*Committee Hansard*, 23 November 2012, pp 11-12).

> require appropriate expertise and may need a legislative power to undertake inspections in regional processing centres.[23]

3.20 The President of the Australian Human Rights Commission indicated that, while that organisation would be 'very happy to have the [Panel proposed in the Bill]…linked in some way with the Human Rights Commission', it lacked the resources and expertise to support such a panel, and would need a designated legislative function and associated funding in order to have an operational role.[24]

3.21 The committee notes the evidence of an officer of the Department that the Joint Advisory Committee and IHAG will be providing scrutiny of health services in regional processing countries. Clearly the Joint Advisory Committee lacks the necessary expertise to perform the specific role envisaged by the Bill's proposal. Further, it is obvious from the evidence the committee has received that IHAG, if merely a reincarnation of DeHAG, would not be able to carry out independent oversight of health services in regional processing countries.

Establishing IHAG as an independent oversight and monitoring body

3.22 In the committee's view, however, if IHAG is constituted with appropriate expertise, powers and reporting functions to ensure transparency and accountability in relation to the work it undertakes, then it would be able to perform the functions proposed for the Panel. While the committee appreciates that DeHAG is in a 'transition phase' to IHAG,[25] IHAG should be made fully operational as soon as possible and as a matter of urgency.

3.23 In terms of IHAG's remit, the committee has been told that the group will 'take a broader, more systemic look at health policy and service delivery across not only the detention environment but also the whole of the immigration environment' than was the case for DeHAG.[26] In addition, there appears to be some anticipation within the Department that IHAG will provide advice in relation to regional processing centres,[27] but this may not be clear in the current draft of IHAG's terms of reference.[28]

3.24 In addition to clarifying at the most basic level that IHAG will have responsibility for oversight and monitoring of health services for asylum seekers in regional processing countries, the evidence to the committee highlighted the

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23 Office of the Commonwealth Ombudsman, answer to question on notice, received 30 November 2012, p. 2.

24 *Committee Hansard*, 23 November 2012, pp 22 and 23.

25 Mr Martin Bowles PSM, DIAC, Senate Legal and Constitutional Affairs Legislation Committee, Supplementary Estimates 2012-13, *Committee Hansard*, 15 October 2012, p. 99.

26 Mr Ken Douglas, DIAC, *Committee Hansard*, 23 November 2012, p. 31.

27 Mr Ken Douglas, DIAC, *Committee Hansard*, 23 November 2012, pp 36-37.

28 Dr Gillian Singleton, The Royal Australian College of General Practitioners, *Committee Hansard*, 23 November 2012, p. 4.

importance of having the powers and functions of an independent oversight body clearly articulated.

Negotiating access for IHAG in regional processing countries

3.25 The Department put to the committee that one of the matters in the Bill requiring further clarification is acknowledgement that access by the expert health panel would depend on the consent and agreement of the government in the relevant regional processing country.

3.26 The committee appreciates the matter of sovereignty raised by the Department, and accepts the evidence that all workers, visitors, and asylum seekers going to regional processing countries require visas and permission to enter the processing facilities from the relevant country. However, the committee also notes that the Department is already expecting that IHAG will request to visit the regional processing centres and that the Department will 'facilitate' that access.

IHAG reports to be made public

3.27 In terms of IHAG undertaking a review and monitoring role, the committee takes seriously the evidence it received of numerous examples of DeHAG, and other professional health representative organisations, putting recommendations to the Department that have not been implemented or actioned;[29] as well as apparent uncertainty as to whether particular recommendations have been, or are to be, implemented.[30] There also appears to have been ineffectual feedback and communication in relation to the implementation of recommendations.[31]

3.28 While the committee appreciates that, at present, IHAG is intended to have an 'internal' role providing advice to the Department, in the committee's view the Department should make the reports and recommendations of IHAG publicly available. In addition, the committee considers that there would be substantial value in the Minister tabling a response to IHAG's reports and recommendations within three months. Making IHAG's reports and recommendations publicly available, and requiring a ministerial response to those reports and recommendations, will provide transparency and accountability in terms of the implementation of recommendations by IHAG.

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29 See, for example, Associate Professor Karen Zwi, The Royal Australasian College of Physicians, *Committee Hansard*, 23 November 2012, p. 7, regarding recommendations in relation to child and youth health and guardianship of unaccompanied minors.

30 See Dr Gillian Singleton, The Royal Australian College of General Practitioners, *Committee Hansard*, 23 November 2012, p. 3, referring to DeHAG recommendations in relation to general and pediatric health screening in offshore facilities.

31 See Professor Louise Newman, The Royal Australian and New Zealand College of Psychiatrists, *Committee Hansard*, 23 November 2012, discussing the lack of defined capacity for DeHAG to review actions taken in relation to recommendations.

Expertise represented on IHAG

3.29 The evidence that the committee received in relation to the expertise represented on the expert health panel proposed in the Bill indicates that the expertise on that panel should be augmented. The committee understands that the membership of DeHAG covered a much broader cross-section of professional health organisations, and expects that IHAG would cover a similar cross-section of health expertise.[32] However, the committee believes that there would be significant benefit in appointing to IHAG a specialist representative from a disability organisation.

3.30 As a final point, the committee encourages the Department to consider whether the Australian Human Rights Commission should be granted observer status on IHAG in order to address concerns raised during the inquiry in relation to the need for human rights expertise to be represented.

Recommendation 1

3.31 The committee recommends that the terms of reference for the Immigration Health Advisory Group (IHAG) should explicitly state that IHAG's role includes the oversight and monitoring of health services to offshore entry persons in regional processing countries.

Recommendation 2

3.32 The committee recommends that the terms of reference for IHAG should include provision for IHAG to:

- **access processing facilities in regional processing countries to conduct monitoring and oversight activities;**
- **meet with offshore entry persons in processing centres in regional processing countries (with the consent of those people); and**
- **review the implementation of recommendations it makes, or other professional health organisations make, and provide further advice on the implementation of those recommendations.**

Recommendation 3

3.33 The committee recommends that the Department of Immigration and Citizenship should be required to consult with IHAG on the development and design of all aspects of the Australian Government's policy to send asylum seekers to regional processing countries.

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32 In an answer to a question on notice, DIAC indicated that the organisations invited to provide nominations for membership on IHAG include: The Royal Australian College of General Practitioners, The Royal Australian and New Zealand College of Psychiatrists, the Australian Psychological Society, The Royal Australian College of Physicians, the Australian College of Nursing, and the Australian Medical Association (DIAC, answer to question on notice, received 29 November 2012, p. 3).

Recommendation 4

3.34 The committee recommends that IHAG's terms of reference should include the requirement that IHAG provide the Minister with a report on its work at least every six months, and that the Minister make that report publicly available.

Recommendation 5

3.35 The committee recommends that the Minister table in the parliament a response to all reports by IHAG, within three months of those reports being made public.

Recommendation 6

3.36 The committee recommends that the health expertise represented on IHAG should also include a representative from a disability organisation.

Recommendation 7

3.37 The committee recommends that the Senate should not pass the Bill.

Senator Trish Crossin

Chair