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SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

**Reference: Migration Legislation Amendment (Further Border Protection
Measures) Bill 2002**

TUESDAY, 6 AUGUST 2002

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SENATE
LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Tuesday, 6 August 2002

Members: Senator Bolkus (*Chair*), Senator Payne (*Deputy Chair*), Senators Greig, Kirk, Scullion and Stephens

Participating members: Senators Abetz, Bartlett, Brandis, Brown, Calvert, Carr, Chapman, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Knowles, Lightfoot, Ludwig, Mason, McGauran, Murphy, Nettle, Sherry, Tchen, Tierney and Watson

Senators in attendance: Senators Bartlett, Bolkus, Kirk, Payne, Scullion, Stephens and Tchen

Terms of reference for the inquiry:

Migration Legislation Amendment (Further Border Protection Measures) Bill 2002

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Committee met at 9.33 a.m.

ILLINGWORTH, Mr Robert Laurence Mark, Assistant Secretary Onshore Protection, Department of Immigration and Multicultural and Indigenous Affairs

KILLESTEYN, Mr Edward Victor, Acting Secretary, Department of Immigration and Multicultural and Indigenous Affairs

McMAHON, Mr Vincent, Acting Deputy Secretary, Department of Immigration and Multicultural and Indigenous Affairs

SIEGMUND, Ms Nelly, Assistant Secretary Border Protection Branch, Department of Immigration and Multicultural and Indigenous Affairs

STORER, Mr Desmond Stanley, First Assistant Secretary, Parliamentary and Legal Division, Department of Immigration and Multicultural and Indigenous Affairs

WALKER, Mr Douglas James, Assistant Secretary, Visa Framework Branch, Department of Immigration and Multicultural and Indigenous Affairs

CHAIR—I now open today's proceedings. On 25 June 2002 the Senate referred to the Senate Legal and Constitutional References Committee an inquiry into the proposed migration zone excision legislation and related matters for inquiry and report by 29 August 2002. This is the first public hearing of the committee. We have had 34 submissions to date. Before we commence taking evidence, I wish to reinforce for the record that all witnesses appearing before this committee are protected by parliamentary privilege with respect to the evidence provided. Any act by any person which operates to the disadvantage of a witness on account of evidence given by him or her before the committee is treated as a breach of privilege. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public but, under the Senate's resolution, witnesses do have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to request such a session.

We will be commencing today's proceedings with evidence from the Department of Immigration and Multicultural and Indigenous Affairs. I do not think there is anyone here who is unfamiliar with the hearing of evidence before Senate committees so I do not need to go much further in respect of that. I welcome the officers from the Department of Immigration and Multicultural and Indigenous Affairs. I invite you to make a short opening statement, at the conclusion of which, obviously, we will have some questions.

Mr Killesteyn—The [Migration Legislation Amendment \(Further Border Protection Measures\) Bill 2002](#) was introduced in response to information suggesting that people smugglers were changing the focus of their operations, with the result that persons without a visa would be brought closer to islands nearer to the Australian mainland. The bill strengthens the government's border protection policy, which was implemented in a package of acts passed in September last year. These acts included the Migration Legislation Amendment (Excision from Migration Zone) Act 2001, the Migration Legislation Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 and the Border Protection (Validation

and Enforcement Powers) Act 2001. Broadly speaking, these acts introduced measures to discourage unauthorised arrivals and people-smuggling and to enforce Australia's sovereign right to determine who will enter and remain in Australia. The barring of an unlawful non-citizen who arrives at an excised offshore place from making a valid visa application was one of those measures.

The Migration Legislation Amendment (Excision from Migration Zone) Act 2001 inserted the definition of an excised offshore place into subsection 5(1) of the Migration Act 1958. Initially the islands included in the definition of an excised offshore place were restricted to those islands that recent history indicated were the main entry points used by people smugglers. However, the definition made allowance for further islands to be prescribed as excised offshore places in the Migration Regulations 1994. This prescription device enabled the government to respond quickly where other areas were identified as being targeted by people smugglers.

The effectiveness of the government's border protection policy has led to people smugglers shifting the focus of their activities to come either through the Torres Strait or to outlying islands of Australia. Information concerning the shift in people-smuggling activities is sensitive and, as such, is not appropriate for public disclosure. Nevertheless, if necessary the information may be able to be disclosed to the committee in private session.

The government acted quickly to secure Australia's borders from the new and changing methods adopted by people smugglers. The government sought to widen the definition of an excised offshore place through an amendment to the migration regulations on 7 June 2002. Those regulations were disallowed in the Senate on 19 June 2002. Following the disallowance of those regulations, the government introduced the bill into parliament to ensure that an uncompromising message was sent to people smugglers that Australia was determined to protect its borders, and that the government would continue to take appropriate action to thwart the activities of people smugglers.

The bill combats the new threat posed by people smugglers by ensuring that a non-citizen who arrives unlawfully at one of the newly defined excised offshore places is barred from making a valid visa application. It also provides Australian authorities with greater capacity to capture and pursue people smugglers as their routes change to pass closer to the mainland and within easier reach of Australian authorities. The bill does not affect Australia's sovereignty over these islands. The islands that are defined as excised offshore places will remain integral parts of Australia. All persons on these islands who are currently Australian citizens will remain Australian citizens. The bill does not change their status. In addition, the bill does not affect the rights of Australian citizens and other persons with lawful authority under the Migration Act 1958 to move about freely in these areas and make any applications permitted by the act. In particular, the traditional inhabitants of the Torres Strait Islands will continue to be free to move within the Torres Strait in connection with the performance of their traditional activities.

The bill will not prevent Australia from fulfilling its international obligations under the United Nations Convention on the Status of Refugees and other relevant international instruments. Australia will continue to allow the protection claims of persons arriving at one of these islands to be assessed. This may be done at a place either in Australia or another country in accordance with UNHCR guidelines. While assessing protection claims, Australia will ensure

that persons are protected. Where protection claims are made out, Australia will explore appropriate relocation opportunities for each person.

Finally, it is important to see the bill in the context of a package of responses to deter people smugglers and those who seek to use smugglers to achieve a migration outcome. These measures, as outlined in the second reading speech of the bill, include IOM and UNHCR processing opportunities in Indonesia, established with the agreement of the Indonesian government; information strategies to potential illegal immigrants about the dangers of using people smugglers; Operation Relex; stronger penalties and criminal sanctions; and, offshore processing. By preventing asylum seekers from applying for protection visas, the excision provisions are an important and interrelated component of preventing people from achieving a backdoor migration outcome.

CHAIR—I would like to get an idea of what legal regime would apply if this legislation is passed, compared with if it is not. Does the department maintain that the original jurisdiction of the High Court will not be available for access by people coming in through this way?

Mr Walker—The original jurisdiction of the High Court will remain.

CHAIR—Does the extent of the migration zone in the bill fully cover the territorial seas of Australia?

Mr Walker—No. The extent of the migration zone covers all Australian land down to the low-water mark and also the waters of proclaimed ports; it does not extend into the territorial sea.

CHAIR—Therefore, it is possible that there will be people who are within in Australia but not within the migration zone.

Mr Walker—That is correct.

CHAIR—That is not on the shore side of Australia but on the other side.

Mr Walker—That is right. The purpose for the distinction of the migration zone not extending to the territorial sea goes back to the early 1990s. In effect, the migration zone is the legal term to identify the area where a non-Australian citizen requires a visa. Basically, that situation of not including the territorial sea allows ships to pass through Australian territorial waters on a voyage somewhere else, without the crew or passengers requiring a visa for that transit through those waters.

CHAIR—Is it a fact that the jurisdiction in Australian courts covering the area of Australia goes to the extent of the territorial sea?

Mr Walker—Yes, it does.

CHAIR—Therefore, it is possible that people will be able to apply to the Federal Court, subject to the privative clause, before entering the excised migration zone.

Mr Walker—They could apply to the High Court.

CHAIR—Could they apply to the Federal Court?

Mr Walker—They may well be able to apply to the Federal Court, but what for? That is the issue. They are unable to apply for a visa while they are in the migration zone at an excised offshore place; however, they could launch a visa application for an offshore visa anywhere, including in the territorial sea.

CHAIR—Yes, but once they are in the territorial sea they are within Australia and therefore, as I said, subject to the privative clause, so they would be able to apply for an onshore visa, wouldn't they?

Mr Walker—No.

CHAIR—Just offshore?

Mr Walker—Just offshore because, in the migration regulations, Australia is defined as being the migration zone. The onshore visas can be applied for only while you are in the migration zone.

CHAIR—But it is still possible for them to apply, as you say, offshore in the territorial sea.

Mr Walker—That is correct.

CHAIR—The privative clause, together with the legislation, provides that people who have gone through a safe transit place for about a week would probably mean that not many would have had an opportunity to apply for a visa, regardless of this legislation. Have you made an assessment of how effective both the privative clause and the part in the legislation—I am trying to find the precise wording of the title; you might be able to help me there—that provides a bar for those who have transited for one week in a safe country would be?

Mr Walker—There are restrictions in terms of eligibility for the granting of a visa, where people have spent seven days or more in a country where they could have sought protection. However, that does not exclude them from making an application for a visa.

CHAIR—Right. And, of course, the privative clause does not either. Regarding the proposed legislation, in the information you provided to the committee you talk about excised people, I suppose, being able to have access to admin review processes which accord with UNHCR review arrangements. Can you tell us how that will work?

Mr Illingworth—We have been liaising very closely with the UNHCR—over the last eight or so months in particular—to ensure that our processes mirror those that the UNHCR itself uses for mandating refugees. Essentially, what happens is that, where a person is in the Australian process—for example, on Nauru—and that person is found not to be a refugee by the DIMIA case manager, they get a written explanation, which is in their own language, as to the reasons for their lack of success. They are then given an opportunity to request detailed oral

face-to-face counselling on not only the reasons in more depth but also any options or other issues that they want to consider. They also have an opportunity to request a full, fresh reassessment of the refugee issue, and that is conducted by a more senior officer—a different DIMIA officer to the officer who conducted the first assessment. The asylum seeker has the opportunity to raise new claims or information to support their claims for protection, much as a person seeking review before the Refugee Review Tribunal has an opportunity to raise any new claims or information that they want to advance.

CHAIR—So it would be an appeal from one officer of DIMIA to another?

Mr Illingworth—That is correct.

Mr Killesteyn—Senator, could I just make the point that the arrangements that Mr Illingworth has just described are arrangements that are already in place and have been operating in respect of all the persons who have been transferred to Nauru and Manus. Those arrangements have been under way since last November and we have now reached a point where those arrangements are fulfilling the needs of asylum seekers, in terms of having status decisions made by either UNHCR, in respect of people in Nauru, or by DIMIA, in respect of people both in Nauru and Manus. Those arrangements are now leading to processes to resettle those people. They have been operating very successfully; they have been operating in tandem with the UNHCR. In Nauru, we have worked very closely together and the processes are very closely aligned. This bill does not necessarily impact on the nature of those arrangements that have been put in place for the processing of people in either Nauru or Manus.

CHAIR—Will this be a sort of add-on to Operation Relix?

Mr Killesteyn—What will be an add-on to Operation Relix, Senator?

CHAIR—For any further boat arrivals, will that be sort of incorporated into—

Mr Killesteyn—If any further boats arrive and they arrive at an offshore excised place, then the government will make a decision about what the appropriate processing arrangements should be. If it decides that more people, in agreement with Nauru and Papua New Guinea, can be processed in those two centres, then we would seek to adopt the processing arrangements for refugee status determination as just described.

CHAIR—On page 5 of your information to the committee, Mr Killesteyn, you say:

The Bill, by extending excised offshore places to islands off the northern coast of Australia, and therefore requiring people smugglers to bring their vessels closer to mainland Australia—

Doesn't that concession acknowledge that this bill will provide an incentive for the so-called people smugglers to bring their boats closer to mainland Australia and, in fact, onto mainland Australia? That is what you are saying there, isn't it?

Mr Killesteyn—If it were easy to get to the Australian mainland, the smugglers would already have done it. There is absolutely no doubt in my mind that it would be much better for the smugglers' business if they could deliver people to the mainland. With the offshore excised

places in Christmas Island and Ashmore Reef it is now infinitely more difficult to simply drop people off at an island. The intelligence that we are gathering suggests that smugglers are now changing their tactics, not necessarily to target the mainland but to bypass the mainland on the way to New Zealand. But getting to New Zealand invariably means travelling close to Australia or travelling through the Torres Strait. It is that change in tactics that we are noting from the smugglers that this bill—and the regulations that were disallowed—is seeking to prevent. Of course, when a boat is travelling to New Zealand and it is close to an Australian territory, there is always the possibility that it could seek to change its route and head towards the mainland. These provisions enable us to prevent that circumstance.

CHAIR—But you say that you will now be ‘requiring people smugglers to bring their vessels closer to mainland Australia’. I suppose that is the incentive that you are anticipating because you go on to say—

Mr Killesteyn—But not as a strict incentive in terms of just coming to the mainland. It is more as a consequence of the focus of the smugglers to target other places. Intelligence is suggesting that New Zealand is emerging as a—

CHAIR—If that is the case, why do you go on to say that this will make it harder for people smugglers to escape detection? You must be anticipating their coming closer to Australia or coming to mainland Australia if that second part of your statement is to have any effect at all.

Mr Killesteyn—I agree with you, but, as I say, it is not necessarily an incentive to come to mainland Australia per se. It is simply a consequence of changing routes to try and target other countries, particularly New Zealand. The most efficient way to get to New Zealand is invariably through the Torres Strait.

CHAIR—I am sorry to dwell on this, but it the statement is:

... will make it harder for these people smugglers to escape detection and remove themselves without being caught and prosecuted.

You are anticipating that the immigration department net will be able to catch and prosecute people smugglers who come closer to our shores.

Mr Killesteyn—That is correct.

CHAIR—But you say it is only in transit. You do not say that they will come here to dump their cargo.

Mr Killesteyn—The intelligence we have suggests that New Zealand remains the primary target at this point.

CHAIR—I suppose the intelligence also leads you to believe that the organisers of people-smuggling are not going to be on the boats.

Mr Killesteyn—I agree. The modus operandi of the smugglers is generally to accompany the boats for a certain part of the journey and then to leave prior to a point at which it becomes unsafe for them, in the context of being captured or interdicted.

CHAIR—You do not expect any self-respecting people smuggler to come into the migration zone, do you?

Mr Killesteyn—No, not at all. I think they are clever enough to avoid that sort of risk, and, essentially, by preventing the opportunity for people to be simply dumped at outlying islands, it increases that risk.

CHAIR—How the bill make it harder for people smugglers to escape detection?

Mr Killesteyn—Because they will be forced to come closer. It is a simple matter of geography. If you remove the outlying islands from the capacity of smugglers to simply drop off their cargo, they are forced to look for other routes that will invariably bring them closer to Australia. In terms of the capacity of the passengers to steer the vessels themselves, it is likely that the smugglers will have to spend more time on the boat, sail closer to Australia and, therefore, the opportunities for interdiction, deterrence and capture are increased.

CHAIR—But you have just told us that they are not likely to come within the migration zone, which is a fair way out.

Mr Killesteyn—Yes, but we are talking about a matter of degrees and levels of certainty. I cannot describe exactly the strategies of the smugglers. The smugglers are obviously looking at what the Australian government is doing. We are trying, on the best of the intelligence that is available, to adopt particular strategies that will continue to frustrate and make it harder for smugglers. Only time and circumstance will tell how that plays out. By removing the outlying islands, this bill and the regulations will force smugglers to change their routes, which will invariably mean that they will come closer to Australia—how close, at the end of the day, I cannot say.

CHAIR—I think there is a bit of a contradiction on the record there, but I will have a look at it and maybe we will pursue it at a later stage.

Senator PAYNE—I am acutely aware that this is a references committee inquiry, not a legislative committee inquiry, which is where I usually do this, but I have a couple of drafting questions. In their submission, the UNHCR raise some concerns in relation to terminology. On page 2, they specify the terminology used in this bill and the previous legislation as having some potential to confuse in relation to ‘unlawful asylum seeker’, ‘resettlement’ and ‘safe third country’. Has the department had a chance to look at that submission? Do you have any views about their concerns about inconsistency?

Mr Walker—We really have not had a chance to look at the UNHCR submission closely; we only saw it earlier this morning. I want to make the point that, to the best of my knowledge, we have not used the terminology ‘resettlement’ or ‘unlawful asylum seeker’ in any of the legislation. The term ‘safe third country’ was certainly used in the previous legislation which was passed in September.

Senator PAYNE—They also refer to the previous legislation.

Mr Walker—But I am not aware that even in the previous legislation we used the term ‘unlawful asylum seeker’.

Senator PAYNE—I think ‘unlawful asylum seeker’ is a term they do not support as a matter of principle. Is that your understanding?

Mr Walker—I am not quite sure of the context in which they use it.

Mr Storer—I am sure they do.

Senator PAYNE—Are you saying that you are sure they do or don’t support it?

Mr Storer—They do not support it—I was agreeing with what you were saying—and nor does the government. We use the term ‘unauthorised arrivals’. I have not even seen the UNHCR submission and Mr Walker saw it only about 10 minutes before we came into this session, so we need time to go back to it. To our recollection, we would be extremely surprised if we have used that term in any previous legislation.

Senator PAYNE—I will follow that up.

Mr Walker—By way of clarification, as Mr Storer mentioned, we have certainly used the term ‘unauthorised arrival’ and we draw a distinction between asylum seekers and unauthorised arrivals: not all unauthorised arrivals are necessarily asylum seekers, nor is it necessarily true the other way around—there is a distinction.

Senator PAYNE—Albeit an occasionally confusing one.

Mr Walker—That is right.

Senator PAYNE—What about the term ‘resettlement’? They argue, for example, that resettlement is not the appropriate term to be used for the movement of refugees within a state’s territory; rather, it is about the transfer of refugees from the country where they have sought refuge to another state which has agreed to admit them. They raise a concern about the use of that term.

Mr Illingworth—From our quick reading of the submission from the UNHCR it appears that the point they are making relates to an announcement about the inclusion of the numbers relating to people being brought from the offshore processing areas to Australia for protection through our annual resettlement program. Because we work with it quite closely, we in the department generally refer to the resettlement program as a pool of places. When some of those places are assigned for the specific purpose of providing protection to people being brought to Australia from these processing places, we talk about it as being included in our resettlement program.

I think the point that the UNHCR is making is that resettlement relates more, for example, to a situation where somebody is being brought from a third country a long way away with no obligation on the receiving state and with no other connection to the country that is taking them. In this case there is some connection.

Senator PAYNE—I am not sure that I heard the end of your answer to Senator Bolkus's question about the procedures for assessing claims for refugee status. In their submission the UNHCR advise that they have been verbally advised by the department that the procedures are being finalised. Did you comment on that in answer to Senator Bolkus's question?

Mr Illingworth—No. I did not quite catch the last part of your question about the procedures.

Senator PAYNE—Let me just read paragraph 14 of the UNHCR submission. It states:

DIMIA has noted that all persons who seek asylum in the excised areas will have their claims for refugee status assessed against the criteria contained in the Refugee Convention, which would include an internal administrative review of a negative decision. UNHCR has been verbally advised by DIMIA that they are finalizing these procedures.

I wonder where that is up to.

Mr Illingworth—Essentially, those procedures are finalised. The reason they have not been issued in their final form is that, as with all new processes, particularly a process that we have been at some pains to align with the UNHCR's processes, we have kept our core documentation as works in progress to enable us to respond quickly should there be any need for fine-tuning as we bed the processes in. But we have processes and they are essentially finalised.

Senator PAYNE—Are those essentially finalised processes in a document that can be made available to the committee?

Mr Illingworth—The documents that record the processes are in the final stages of drafting.

Senator PAYNE—The documents that record the processes—do you mean you can show us the process on a document?

Mr Illingworth—We have a process, and the documentation has not been finalised because of the need to keep open the prospects of short-term changes and modifications as we go through the implementation of that process in close consultation with the UNHCR. So we have a document that is very close to final, but it is a work in progress.

Senator PAYNE—And would you provide that to the committee?

Mr Illingworth—We can make that available to the committee, yes.

Senator BARTLETT—A number of submissions have talked about Australia's obligations not to refoule people. I recognise that you and the government have given repeated commitments that we would uphold our obligations in relation to that, but what legal protections are there within not just this bill but the legislative regime, including the measures

that were passed last year, to ensure that that occurs? If anybody, including the people involved, has concerns that they may end up being returned to an unsafe situation, what is the legal protection to ensure that that does not occur?

Mr Killesteyn—In the context of offshore excised persons who are removed to a processing facility in Nauru and/or Manus, under section 198A of the Migration Act the minister is able to declare that a country meets the basic core criteria of the convention. One of those core criteria relates to the obligation not to refoule. Our agreements with the Republic of Nauru and the government of Papua New Guinea for the establishment of the processing facilities have a clause inserted in them which goes to that question of non-refoulement. As signatories to those agreements, both of those countries have made commitments to provide protection to those people pending an assessment of their refugee status.

Senator BARTLETT—There are a couple of questions arising from that. Firstly, is the ministerial declaration under section 198A appealable in any way if someone believes that the minister's assessment is wrong?

Mr Walker—It may be possible for a person to challenge the legality of the declaration in the High Court in its original jurisdiction, but there is no mechanism within the act itself specifically relating to that declaration.

Senator BARTLETT—It would not necessarily be on the legality of it. The minister obviously has the power—it is in the act. But is there no clear ability for someone to challenge the merits of his decision—that is, whether or not it is correct?

Mr Walker—Not the merits, no.

Senator BARTLETT—Under agreements such as the current ones you have with PNG and Nauru, if our government, future governments—obviously this measure will empower future governments as well—or any governments that we reach agreements with act in a way that appears to breach those agreements, whether it is refoulment or something else, is there any legal redress or mechanism for redress for a third party to pursue, or do we just have to rely on our government making sure that the agreement is upheld?

Mr Killesteyn—It is not obvious to me that there is any legal redress. But bear in mind that these agreements have been in place since September last year, when the first agreement was reached with Nauru, and since October with Papua New Guinea. We have now almost completed the processing of 1,500 offshore entry persons and refoulment is not an issue. It has never been raised and there has never been any indication that either government wishes to do anything other than to afford an opportunity for these people to have their asylum claims heard, processed and determined and then for subsequent processes of resettlement or return to take place. As I said, it is certainly a commitment that both governments have made in the context of signing the processing centre agreements.

Senator BARTLETT—I am pleased to hear that. I am thinking of legal protections for future governments. That does raise another issue: it is probably a bit early, but is the change of government in Papua New Guinea likely to impact at all on the future operations of this policy?

Mr Killesteyn—At this stage we have continuing agreement for the processing centre on Manus. We would expect that agreement to continue.

Senator BARTLETT—Both today and in other forums you have spoken about the assessment procedure that is followed offshore by the departmental officers who do the assessments on Nauru and Manus Island. Could you clarify that again? As I understand it, you follow the UNHCR handbook, procedures or whatever. What matters do you assess in relation to people's claims?

Mr Illingworth—We apply the convention, which is the same test that is generally applied around the world. We are looking for people who are outside their country of nationality owing to one of the five convention grounds, which includes those who have a well-founded fear of persecution should they return to their homeland.

Senator BARTLETT—What about the convention against torture? Is there an assessment in relation to that?

Mr Illingworth—Yes. While we mirror our processing very closely on the UNHCR convention, this is an additional element in our consideration. In our review processes, if a person is not meeting the test for refugee protection we also formally consider whether they meet the test for protection under other conventions such as CAT. That is documented.

Senator BARTLETT—What happens if they meet that test?

Mr Illingworth—Those issues are then referred to the minister for consideration.

Senator BARTLETT—Is that process different from what happens if they meet the refugee convention test?

Mr Illingworth—The processes are essentially the same. Visas can be applied for offshore. Australia has the same visa structure available to it to provide protection to a person in an offshore processing country if it wants to bring them to Australia for reasons under the convention against torture as it would have if it wanted to bring them to Australia for refugee convention reasons. We also look at other issues. As the minister has flagged publicly, issues such as family connections are considered by government when looking at the priorities for bringing people to Australia.

Senator BARTLETT—Does a different range of prospects apply to somebody who meets the protection criteria under the CAT as opposed to the refugee convention? In effect, would both go to the minister and be in the same pool for potential resettlement wherever we can find a spot?

Mr Illingworth—Essentially the same issues and considerations apply. Having identified an individual in need of protection, the same avenues are open to government: either to pursue resettlement in some other country or to bring them to Australia to protect them.

Senator BARTLETT—In answers to previous questions mention was made of how we pursue appropriate relocation opportunities for people who meet protection obligations. It was

suggested that this process is working quite successfully. I recognise that there is no specific time limit on how long people can wait for relocation, but is there any general goal as to how quickly people can be settled or resettled once they have been determined to have protection needs?

Mr Killesteyn—The best answer I could give is ‘as soon as possible’. We are as keen as the individuals are to ensure that they can be resettled and can get on with their lives. I cannot give you any specific time frame. Processes have started already; a number have already been resettled. For instance, a group has already proceeded to New Zealand. We have prospects for further resettlement in New Zealand, and we are continuing to pursue prospects of resettlement in other countries. We are going very fast at it.

Senator BARTLETT—The first batch of decisions were handed down back in April. Is that right?

Mr Illingworth—That is correct.

Senator BARTLETT—Are there still people in the camps on Nauru or Manus Island from that period who are awaiting resettlement?

Mr Killesteyn—We would have to do a precise reconciliation for you. There are movements already, but at this point I cannot correlate the first decisions with the subsequent resettlement. I do not know whether Mr McMahon has any further details on the precise correlation.

Mr McMahon—I do not know definitively, but I suggest that there would be, yes.

Senator BARTLETT—That is four months or so in addition to the time they were there prior to being assessed, which ranged from September onwards. You have a group of people who have been detained, in effect, for close to a year, including four months after they were assessed as meeting protection obligations. Surely that does not compare terribly well with the process which would have followed if they had simply been brought to Australia and processed here. For starters, once they are assessed as meeting protection obligations here, they are out in the community straight away. Surely it is one of the negatives of this approach if the processing time and, in particular, the resettlement time are longer than for people who have been processed in Australia.

Mr Killesteyn—Lots of comparisons can be made in this issue. I could compare the resettlement opportunities for these people with the resettlement prospects of others in refugee camps offshore. On the basis of that comparison, I could probably claim that this is a much shorter period. The more important issue is that people have had an opportunity to have their claims assessed. It has been done in accordance with a process which is consistent with UNHCR processes. The Australian government and other governments are working fast to secure resettlement places for these people. There is a clear intention to have an approach which is around international burden sharing in relation to resettlement, and that is what we are seeking to achieve.

Senator BARTLETT—You said before that the original jurisdiction of the High Court remains. I presume that only applies whilst people are within Australian territory. It does not apply once they are in New Guinea or Nauru. Is that right?

Mr Walker—We would leave it to the High Court to determine where its jurisdiction lies, but basically that would be my understanding.

Senator BARTLETT—I recognise what you said about sensitive intelligence et cetera, but is the estimated number of people who are potentially going to be smuggled here based on the number of people already in Indonesia and surrounding countries or on assessments of more people moving in?

Ms Siegmund—It is difficult to get an exact number or a headcount, if you like, of people who are potentially in the pipeline. We have tried to make an assessment of those whom we know, for example, are currently in Indonesia who may currently be looked after by IOM or UNHCR, plus information we have received from the post and, as you quite rightly said, from surrounding countries such as Malaysia and other areas. But we are also trying to look further afield, looking back towards source countries. One thing we are aware of, though, is that to some extent the pipeline has slowed. Word has got back, basically, that it has become a lot harder to travel to Australia since the excision of Christmas Island and Ashmore Islands.

Senator BARTLETT—Based on what was told to me when I was in Indonesia about three weeks ago—certainly by a number of Indonesian officials from various parts of the department and, from memory, by some of our officials as well, but I might be wrong—the number of people coming through into Indonesia is basically now a trickle.

Ms Siegmund—Yes.

Senator BARTLETT—There are obviously still people there who are looking for somewhere to go, whether or not they include those who have been approved by UNHCR but still cannot get resettled. That being the case, why is there the belief that we need to take this extra step, if you like, when the extra numbers coming through are down to such a small level?

Ms Siegmund—The main reason is that the situation could change very rapidly—literally overnight. One thing that has not changed is that the criminal networks that support this industry—the organisers—are still looking for low risk, high profit. From the information we have, they are still interested in finding alternative routes to take paying passengers illegally into Australia, New Zealand or elsewhere—to Europe, Canada or whatever destination. Their main interest is making money. If they thought for one moment that the situation in Australia had changed and that it was again a lot easier for them to enter, they would certainly do that. I do not think they would have any difficulty finding paying passengers. Whilst at the moment we believe that the numbers may have slowed to, as you described it, a trickle, that is not to say that that situation could not change, and change very rapidly, given that the push-pull factors are potentially still there in terms of the passengers who might seek out these criminal organisations.

Mr Killesteyn—The committee should be under no illusion that there is no possibility of further boat arrivals. Notwithstanding that the pipeline may have, as you say, slowed to a

trickle, intelligence still suggests that there are a significant number of people who are willing to engage smugglers. The numbers are still in the hundreds, if not in excess of a thousand. It is not as if there is no-one there and that no-one wants to come to Australia. It is clear on the basis of intelligence that there is a still a high demand for people to come to either Australia or New Zealand.

Ms Siegmund—As Mr Killesteyn said, as well as the passengers who are still wanting to come, the other important element is that there are organisers who are still wanting to succeed—they want the profit—and they are trying to find ways to get around the mechanisms and strategies that we have put in place. They are still there; they have not disappeared.

Senator BARTLETT—I have a final question and I recognise the indulgence of my colleagues in letting me have so much time. Is there any logical distinction between excising islands and excising part of the mainland? I recognise that it would need further legislative change, but is there any logical reason why, down the track, you could not also excise parts of the mainland or, indeed, all the mainland?

Mr Killesteyn—Ultimately, I do not know whether that is a legal issue or an issue of strategy around how to deal with people-smuggling. At this point, the strategy is clearly aimed at the way in which the smugglers, on the basis of the intelligence that we have, are intending to engage in their trade. The bill and the regulations are intent on removing those outlying areas of Australia. That is what we are on about; that is what we are trying to deal with here in terms of the smugglers' strategies.

CHAIR—Isn't that, in a sense, an unbalanced focus? You are talking about the smugglers who, as you said earlier, probably will not come here but, amongst the people we are getting here, there are some pretty legitimate asylum seekers and refugees. Shouldn't we be thinking about them as well?

Mr Killesteyn—Indeed, we are. If I could describe it again, we have had 1,500 people in the offshore processing centres, where their legitimate claims to asylum have been heard in accordance with procedures that have been aligned very carefully with the UNHCR. We now have several hundred people—again, Mr McMahan would have the precise figures—who have established clearly, to the satisfaction of UNHCR and DIMIA, that they have genuine asylum claims and can be regarded as refugees, and they are now being resettled.

CHAIR—Mr Killesteyn, I acknowledge that. I think my argument is more with your political masters and their rhetoric rather than with what you are saying.

Senator SCULLION—Mr Storer, I received a call on the 6th—as did others around the top of Australia, I understand from your questions on notice—to say that on the following day there would be some amendments to the effect of the excision of islands. With the best will in the world, I think some of us ran around and made some phone calls to inform those who may be impacted on. Last week I spent some time visiting both islands on the Torres Strait and a number of the islands off the coast of Australia, and, pretty much, the people who are there either did not know anything about it at all or expressed concerns that the small amount of information they had was on the news. They expressed what I thought were some very legitimate concerns and questions about what was happening. Obviously there was some sort of

haste in the process. Can you tell me why there was haste? Why did we have to proceed so quickly? Secondly, what will you do about this sort of lack of understanding, particularly in the Indigenous communities that inhabit these islands?

Mr Storer—The haste was due to the fact that the People Smuggling Task Force, who were assessing the information, were preparing reports for government. Eventually, a final report was prepared on about 5 June, I understand, and that was the first time that the government ministers had seen the report. On the basis of that report, they decided they had to introduce the regulations very quickly. It is my understanding that the intelligence was that potentially there could be a boat on the way soon. For that reason, the regulations had to be introduced very quickly.

Doug Walker and I were trying to prepare the regulation changes, the legislation and so forth. We got letters provided to regional authorities, premiers et cetera and I understand the opposition spokesperson was informed the next day and a briefing was set up for her. A series of calls were put in to all relevant people and information was provided in the form of a letter about precisely what this excision means. This excision does not mean excising land; it means excising the right of a person, if they arrived as an unauthorised arrival in these excised places, to apply for a visa unless the minister lifts the bar. All that was put in the information and I think we agree that, given the haste of the regulation based upon the report and the government's decision at the time, it was the best we could do.

I take your second point, I suppose, that perhaps more information could be provided in a targeted form for the particular communities that could be affected by such changes. We will go back and talk to the minister and others about ways that we might be able to do that more effectively. I understand, Senator, that, as you have said, you have been going out and talking to the various communities and trying to put forward this information in your own way, but I think we will try to do that in a more systematic way.

Senator SCULLION—While this legislation has been very much a focus—what are we doing all this for?—it is not new at all. This legislation is for further protection measures so you have obviously had a great opportunity—and hindsight that we rarely get—to measure the impact of the non-compliance that the previous legislation had when you excised Christmas Island, Cocos (Keeling) Islands and Ashmore Reef. You have had that opportunity to have a look at the response in two ways so can you make your answer in two points? First of all, what was the impact on the people smugglers and on associated issues of excising those islands? Secondly, what was the actual impact on the inhabitants of those islands? We have had a lot of humbug each way about what is going to happen and we have had discussions about sovereignty. Could you just share the effects of those issues with us?

Mr Killesteyn—In terms of assessing an impact of the excision bill, I make the point that this is part of a comprehensive strategy that the government has put in place. We are talking about a strategy which operates in the full continuum from source countries right through to processing people's claims for asylum. We have arrangements and discussions going on with source countries about how we can prevent outflows. We have arrangements and discussions with transit countries in terms of instituting procedures to increase their vigilance with regard to preventing the activities of people smugglers. We have arrangements with Indonesia in terms of encouraging people to present their claims in Indonesia, and about allowing those claims to be heard and

subsequent resettlement to take place from Indonesia in relation to that. We then have the range of protection and deterrence measures that are put in place in relation to Australia, and the bill is one of those protection measures. When you put it all together and look at the fact that we have not had a boat since last November, I think the assessment would have to be that the full range of strategies—including the excision measures—has been very successful in terms of preventing people-smuggling.

There are two elements to consider in relation to the impact on people who inhabit the excised places. Firstly, there is no direct impact. Those people who are Australian citizens or who are in those excised places lawfully are not affected by this particular bill. It does not change their rights, their Australia citizenship or what they can and cannot do as far as living, working or just touring in those particular areas goes. I think the issue that you are alluding to is potentially an indirect impact where people perceive something more than the bill actually provides for. That goes to the issue of informing and explaining to those people so that they can precisely understand that the bill has no impact on them. Mr Storer has suggested that there is more that we can do there, but, at the moment, there are no further excised places. No bill is about to be passed and there are no regulations. So, in one sense, there is nothing further we can do unless action is taken to actually pass the bill.

Senator SCULLION—Are you telling me that you have not received any complaints whatsoever from the original excised places—from any of the inhabitants of those places—about any impact?

Mr Killesteyn—Not to my knowledge. I could speculate that there are letters to the minister seeking some clarification, but we would have responded in those terms—that there has been no impact directly on those who are Australian citizens or lawfully in those excised places.

Mr Storer—I am in charge of the ministerial area, so I see all the ministerials that come in. To supplement what Mr Killesteyn said, there have not been any complaints from inhabitants. There has been some correspondence with premiers but not with the inhabitants or their associations.

Senator SCULLION—Perhaps this question can be addressed to Ms Siegmund. We have had a bit of a run-around and an emergency, and I, like most Australians, get all this information straight from the newspapers. I have not seen photos of boatloads of people, so what has happened to this issue in terms of the intelligence? What sort of validation can you give me? We were all leaving in a hurry, and we needed to do things. Within your constraints, can you tell me what happened?

Ms Siegmund—As you would be aware, unfortunately intelligence is not evidence. We make the best assessments we can at the time based on all the information we have, and we value add to it as much as we can with our own analysis. The intelligence we had at the period of time to which Mr Storer alluded was very strong that several boats, and one in particular, were intending to travel to the stated designation of New Zealand and possibly through the Torres Strait. We needed to do something about that because we thought that the intelligence was reliable at that time. The difficulty in this area is that the situation can change from day to day. There are vagaries such as the weather, particularly in this part of the world. A very wide range of issues can occur at any time: engines break down; passengers panic and want to leave boats,

or they do not get on boats in the first place; and there are fights amongst organisers over money or whatever. We have endeavoured to make the very best assessment, on an ongoing basis, of whatever information we have before us.

The information that we do have, as I think I stated earlier, was that the organisers themselves became aware very rapidly that there was not much point travelling to Christmas Island or Ashmore Islands because it would no longer bring them the success rate they wanted. So they have been looking for alternative routes and alternative modus operandi. It is important that we try to stay one step ahead of them or to make it difficult. We need to look at something that will make it at least harder, if not impossible, for the organisers to reach the Australian mainland. We need to ensure that it is harder for them to try to use Australia—or abuse Australia, if you like—as an end destination point or a transit point. We need to knock out their success rate. These are criminal syndicates that are also using and abusing the passengers. They have very little if any regard for the safety of their passengers. We have seen that, very sadly, in the past months. They do not particularly care who the passengers are or what happens to them once they leave. All they care about is their profit margin. From our perspective, we have to do everything we can to stop them and to disrupt them as best we can. That means trying to pull together that intelligence as best we can too.

Mr Killesteyn—Senator, you said again that there has been no boat. I think there is a clear and present risk. Already a vessel with asylum seekers has arrived in Dili, East Timor. It is not as if there is nothing going on out there; it is clear that there is plenty of activity of a smuggling nature. In one sense we were fortunate that the vessel arrived in Dili. Although the New Zealand government, in consultation with UNHCR and IOM, have been able to establish a processing regime for that group of people, it illustrates that a boat does not necessarily have to land in Australia or on one of the excised places, and that there is still plenty of activity going on.

Senator SCULLION—Outside of those people who are now on the boat in Dili, are there still a number of other people in other places—for example, in Indonesia and elsewhere—who are seeking to come?

Mr Killesteyn—We have very clear and credible intelligence that preparations continue for vessels for asylum seekers, and in a particular case, targeting New Zealand.

Senator SCULLION—Intelligence is often a two-way thing. If you are in any business, intelligence is usually a big part of it and no doubt people smugglers will be getting all the information they can. Do you think they are getting the message? Do you have any way of telling whether or not they understand that we have amended our legislation as part of a suite of movements in that area? For example, do they know that we have raised the bar at the punitive end if you are caught in Australia and that the penalty is much more serious than it used to be? Do they understand that?

Ms Siegmund—Absolutely and, in two ways: one you have already alluded to, which is the intelligence they pick up themselves in their own communication networks. There are also, very pointedly, the information campaigns we have run ourselves in Indonesia, with the cooperation of the Indonesian government, and in other countries as well. So they have been getting it from two different avenues. The other point I would make is that it is very clear to us that the campaigns have been successful. They know that Christmas Island and the Ashmore Islands are

not worth going to, so they will look for other ways of doing it. I think that also indicates that they are very well aware that there is no point going to those places that have become excised areas.

Senator SCULLION—As a member of the government I am obviously very supportive of some of these measures, but the question has been put to me, quite legitimately: what about the unintended effect for people who fall outside that net? Much of the legislation we have put in place is to prevent people from risking their lives and making secondary movements. But what about those people who come directly to Australia on a boat from Sri Lanka to genuinely and legitimately seek protection in a country? They have come from Sri Lanka to here, and this is their first stop. What capacity do we have for dealing with that? Will they be taken to an offshore place? Do we have the capacity to treat them as people who are making their first application?

Mr Killesteyn—It is important to emphasise once again that the excision provisions are accompanied by processing arrangements that provide an opportunity for people to present their claims. None of the full range of measures that have been adopted since last September have in any way denied an opportunity for any individual to make an asylum claim and for those claims to be heard. The clear obligation on Australia is non-refoulement. Beyond that, we have put in place arrangements, in cooperation with Nauru and PNG, to ensure they have their asylum claims heard. Where they are processed is, in many respects, almost irrelevant because the processing provides that opportunity. Again, the clear evidence comes from the 1,500-odd people who have been processed at Manus Island and Nauru over the last six to nine months. The other thing that my colleagues are giving me notes about is to indicate to you that discretion is provided for the minister to lift the bar and allow an application to be made on the basis of an individual's circumstances.

Senator SCULLION—Has he ever done that?

Mr Killesteyn—Not to my knowledge.

Senator SCULLION—Have we ever had a vessel come to Australia on its very first movement?

Ms Siegmund—Do you mean have we had a vessel hit the mainland?

Senator SCULLION—I mean have we had a vessel come directly from a country to Australia as its first movement?

Ms Siegmund—Ever?

Senator SCULLION—Over the last six months would be fine.

Mr McMahon—I wish to make a correction. I am sure the minister has lifted the bar in respect of a couple of humanitarian cases. There were some earlier cases that came to Australia where the people were ill and had family links in Australia, and the minister did make a decision to lift the bar.

CHAIR—Was that under the excision legislation of last year?

Mr McMahon—Yes.

CHAIR—Has he reported to parliament on that?

Mr McMahon—No, he has not reported to parliament.

CHAIR—Isn't there an obligation to do so?

Mr Walker—I think the obligation is to report every six months. That obligation will be met.

Senator SCULLION—The chair asked some questions in regard to people who were perhaps going to make application to the High Court, the Federal Court or wherever it was. Clearly, it is in everybody's interest that these people have every opportunity to make an application from somewhere that is relatively safe. One would hope that the last port of call before reaching Australia would be the important one. In Indonesia they will be hanging around Kupang. What have you done to make application easier in Indonesia?

Mr Killesteyn—We have had arrangements in place with the government of Indonesia for, I think, almost two years; it may even be longer. They go under the general description of a regional cooperation model. We fund those arrangements. Essentially, they provide for people who have come to Indonesia ostensibly on the basis of seeking asylum to be looked after by the International Organisation for Migration while their claims are processed by the UNHCR. Arrangements are then put in place to seek resettlement in other countries for any persons found to be refugees by the UNHCR. Australia has accepted some. Importantly, the issue there is not necessarily to simply deliver the outcome that the people were originally seeking—that is, a migration outcome to Australia. An important element of the principle of the regional cooperation arrangements is to share the resettlement burden across a whole range of countries other than just Australia. As I said, those arrangements have been in place for some two years. We could probably provide the committee with statistics on how many people have been processed and the extent of those people who have been resettled in countries throughout the world. I can take that on notice if you wish. I do not have those figures with me now.

Senator SCULLION—I just want the assurance that those people who are currently in Indonesia and surrounding countries have every opportunity to seek protection in that country before leaving to Australia.

Mr Killesteyn—Indeed they do. If they have genuine asylum claims, there is no need for them to hop on a dangerous boat and risk their lives and the lives of their families to come to Australia. There is absolutely no reason at all.

Senator SCULLION—Many of the submissions allude to this international community feeling that, with the general treatment of refugees, Australians are not perhaps as nice as they thought we were, and perhaps these further excisions of offshore places may add to more criticism. Are we unique in this process? Is there anywhere else in the world that you can point to and say that they have the same process of interdiction?

Mr Illingworth—There are a number of countries around the world that undertake similar sorts of activity of disrupting flows of people being smuggled or coming unlawfully to their borders and which put in place arrangements where people are either held in situ or taken to another place outside their territory and processed there with a view to resettling people elsewhere if possible. The broad outline is not unique. It is something which occurs on a number of different continents and has occurred for some considerable time.

Senator KIRK—I notice from the answers that you have provided to us that approximately 5,000 islands will be excised as a consequence of this proposed legislation. I also note that you say that the department does not have any idea how many of these islands are inhabited. Why is that? Do we not have any figures as to at least the number of Australian citizens?

Ms Siegmund—We were provided with information from the national mapping division of Geoscience Australia that there were approximately 4,981 islands. But an island could be anything from a sandbar to what we might think of as an island. Not all of these islands are in fact named—a lot of them are simply listed by their longitude and latitude. We have been working with the mapping division of Geoscience Australia to get a list of these islands, both named and unnamed, and to try and identify with them which ones would be inhabited and which would not. We have been advised that a large number of them are inhabited. As you can imagine, because of the sheer weight of the numbers we are still working to try and finalise the whole list. I have it here, but we are still working through it.

Senator KIRK—You must have an approximate idea, though, as to how many are inhabited and the approximate number of inhabitants in these islands?

Ms Siegmund—I am advised by Geoscience Australia and other agencies that a number of the islands are only used at certain times of the year—persons may use them as fishing bases or for cultural or other activities. So there is also an issue for us in trying to get clear in our own minds what the definition of ‘inhabited’ is and whether these are simply islands that are being used at certain times of the year or for certain purposes for certain periods of time.

Senator KIRK—How many would be inhabited by Australian citizens who are resident in these islands? We must have some figures on that, at least.

Ms Siegmund—I have a list of some of the larger ones. I will not go through the one I have here—I will save you that. We certainly have a very clear idea, for example, of the islands within the Torres Strait that are inhabited. I have a list of names of those islands, if that is of use, or I could provide them to you separately.

Senator KIRK—No, I was just wondering how many inhabitants would be Australian citizens and how many are not Australian citizens presently.

Ms Siegmund—I do not have that information in front of me—we are still trying to get that ourselves.

Senator KIRK—Would it be the case that some people are lawfully there while others are unlawfully in these islands?

Ms Siegmund—I am not sure of the legal definition, from our perspective, of ‘unlawfully’ because, as I said, we do have people who utilise these islands for fishing, cultural and other purposes. I would have to defer to my legal colleagues, but I do not think we would term them as unlawful under the arrangements in the Torres Strait.

Senator KIRK—So they would just be visiting at that point—is that what you are saying?

Ms Siegmund—Yes. As I said, they would be using the islands for varying traditional activities or for fishing. If they use an island as a way station while they are out fishing then they use that island for a temporary purpose.

Mr Killesteyn—I think that the best we can probably do is take the question on notice. We are working through the details. I suspect that it is always going to be a rough estimate, given all those sorts of exigencies of traditional movements and so forth, but we will take it on notice. The point I would emphasise, though, is that none of those people, either Australian citizens or those who are otherwise lawful, are affected by the legislation. There is no impact on them whatsoever.

Senator KIRK—I understand that. What about those who may be there unlawfully at present, though? I guess this is what I am trying to get at. Are there likely to be some people in these islands at the moment who are there unlawfully on your definition? I guess I am trying to work out what the definitions of ‘lawful’ and ‘unlawful’ are in this context. How will they be affected?

Ms Siegmund—We have not been advised that there are any there. We have a reasonable network of communications in that area. Coastwatch is also interested in any movements there. As you would be aware, we are also concerned about illegal fishing. In the past we have had good reports—people have rung up the 24-hour Coastwatch number to say ‘I have seen a person over there and I don’t know if they are meant to be there’ et cetera. At the moment I am not aware of any reports of unlawful persons in these islands.

Senator KIRK—I guess that was my other question. What processes or policing arrangements are in place to determine whether someone is lawfully or unlawfully—particularly unlawfully—on an island at present?

Mr McMahon—Are you concerned about traditional movements?

Senator KIRK—What do you mean by traditional movements?

Mr McMahon—The movement of people in the region who are indigenous and who may not be Australian residents. The Migration Act does allow that to happen, and as I understand it, those people would not be regarded as unlawful. But if other people were arriving unlawfully, then we would expect that this legislation would operate in the way it was intended to. That is, it would essentially make them unauthorised arrivals.

Senator KIRK—What process is presently in place for policing the arrival of such people, say, people coming for fishing or what have you? I suppose I am asking whether there is any process in place and what is the policing arrangement.

Mr Killesteyn—There are arrangements in place—throughout the Torres Strait, for example—which provide for what we call movement monitoring officers. These are 32 or 33 people who are in part funded by the department. They are traditional inhabitants of those areas and they act as cops on the beat. Their role is to detect irregular movements and to pass that information on to departmental officers stationed on Thursday Island.

Senator KIRK—That is only in the Torres Strait though, not in the other islands that we were referring to?

Mr Killesteyn—In the Torres Strait, yes. That is primarily because of the significant number of traditional movements that occur in that area, particularly between the Torres and Papua New Guinea. Generally, those people who move between Papua New Guinea and Torres Strait do so under arrangements made by the relevant council chief, if you like, of the particular islands. They are generally people who have relations living throughout the Torres. There is certainly a clear process for managing those movements. They are legal movements and certainly would not be covered by this particular legislation. Other unauthorised arrivals on any of the excised places after the date of effect of the excision legislation would be prevented from applying for a valid visa.

CHAIR—Before we proceed to questions from Senator Tchen, I indicate, after consultation with the deputy chair, that we will take up the offer of a private session. We may even consider having a public session with you as well.

Senator TCHEN—I have only five very brief questions—although I do not know how brief the answers might be. All my questions either arise from answers you have given to other senators which I would like clarified or from issues raised by later submissions. Mr Killesteyn and Ms Siegmund have mentioned that the people smugglers now appear to be specifically targeting New Zealand. What do you see as their rationale for that?

Senator PAYNE—Inexplicable!

Mr Killesteyn—That is a question best addressed to the smugglers themselves, but I would speculate by suggesting it is primarily because of the actions that have been taken by the Australian government; the full range of measures that I have described before. Essentially, they are making assessments about the ability to successfully deliver their smuggled people load to Australia. They are clearly looking for other targets where they perceive—and I only speculate as to their perception—it may be easier to have people dropped off and allowed to stay. You really have to look at it from the perspective of what the Australian government has done as distinct from what other countries may or may not have done.

Senator TCHEN—What about the New Zealand government?

Mr Killesteyn—I cannot speak for the New Zealand government.

Senator TCHEN—I mean that, from the perspective of the smuggler from Indonesia, New Zealand society will not be visibly different from Australian society, so why go further?

Ms Siegmund—From what we understand, as Mr Killesteyn has said, the organisers believe that New Zealand will deliver the outcome they want. Their passengers will have somewhere to go and resettle, albeit having arrived there unlawfully, and that they will be allowed to stay. Australia is not providing that, so they are looking for an alternative.

Senator TCHEN—One of the issues raised in a number of the submissions concerns children in detention—although this legislation does not actually refer to that. I note that in more recent times arrivals of children in family groups seem to be more notable than one or two years ago. Do the statistics bear that out? Is that a trend?

Mr Killesteyn—I do not know about the statistics, but certainly we would agree with that particular trend. Essentially it arises as a consequence of the inability of those people who are granted asylum in Australia, or have been hitherto granted asylum through the temporary protection visa arrangements, to subsequently apply to bring their family to Australia. I suspect it is a direct consequence of the entitlements that temporary protection visa holders have in terms of family migration.

Senator TCHEN—Some of the later submissions compare the department's efforts to control or apprehend overstayers with its efforts with unauthorised arrivals. Do you have anything to say about that? Is the department softer on overstayers than on unauthorised arrivals?

Mr Killesteyn—Not at all. We are equally concerned about anybody who either arrives illegally or who, as a consequence of breaching their visa conditions, subsequently becomes an unauthorised arrival or an illegal in Australia. So our efforts are consistent. In comparison to most other countries, the level of overstaying in Australia is much lower. We certainly have a great deal of dedicated resources to locate those people who are here illegally and who are potentially working illegally. In fact, just this morning another 22 people were located who were working illegally in the Hunter Valley. Again, I am not quite sure of the statistics, but I think 14,000 people were located in Australia as overstayers either working illegally or as being here in breach of their visa conditions. Generally, once they are located, the arrangements are to remove or deport them.

Ms Siegmund—Just to clarify, there really are two groups. It is not just about overstayers, as Mr Killesteyn has said; it is also about persons we find who might be here within the period of their visa, but who are working illegally and without permission and who are therefore having an impact on the Australian economy by taking jobs away from others. We are just as concerned about that group as we are about overstayers.

Senator TCHEN—A number of the later submissions question the government's efforts to seek international cooperation to deal with people-smuggling. I know you mentioned that Australia has a full spectrum of treatments or actions to deal with this, so would you dispute that assertion as well?

Mr Killesteyn—Indeed. I think one of the most active elements of the government's strategy is to try to deal with the whole problem rather than just the problem at the end of the food chain, so to speak. So much of the government's activities, and in particular the minister's efforts, are being directed at countries at source to try to find more durable solutions to the incentives or the push factors that are moving these people out of those countries. It is not an effort that we make

alone; it certainly is an effort made in cooperation with UNHCR and IOM and it is a strategy that goes right through from prevention to deterrence.

CHAIR—As I said, we will have you back for a private session and probably for a public session, but can I put some questions on notice before that? Can you provide us with details of how many applications have been made to the Federal Court in regard to asylum seeker matters this calendar year? Can you tell us whether there are any islands within the territorial sea of Australia, but not within the migration zone?

The Senate Legal and Constitutional Legislation Committee last year, in an exceptional report under the hand of Senator Payne, recommended that the department confer directly with RILC in respect of a number of matters. Regarding paragraphs 2.3.3 to 2.3.9 of that report, can you tell us what you have done in respect of that? Has any contingency plan been made in the event that any boat coming into the migration zone has sick people on board? At last call, New Zealand was a friendly country. Were any discussions held? Given the fact that officers this morning have indicated that this does accommodate more boats going to New Zealand, what discussions had been had with New Zealand before the legislation was made public, when and by whom? What are the closest islands to the mainland within the zone? We have agreements in place with PNG regarding people movements. How are they affected by the excision? Does any other migration legislation apply within the zone? I note that we are only removing the application of selected legislation, but what other legislation does apply within the zone? What are the impacts of that? Why are the UN procedures, which you have promised to give us, not incorporated in the legislation, by way of either legislation or regulations?

I put those questions on notice. I also indicate that we have received written responses to questions placed on notice from the department prior to the hearing. Is it the wish of the committee to receive these answers as public documents? There being no objection, it is so ordered. Thank you very much, Mr Killesteyn and your staff, for your assistance this morning. We will see you soon.

[11.03 a.m.]

KEELTY, Commissioner Michael Joseph, Commissioner, Australian Federal Police

McDEVITT, Federal Agent Brendan Joseph, General Manager National Operations, Australian Federal Police

CHAIR—Welcome. Commissioner Keelty, I gather we may have a problem in terms of your time, about which the committee has been advised for quite some time. The AFP has lodged submission No. 32 with the committee. Do you wish to make any amendments or alterations to that submission?

Commissioner Keelty—No, Senator.

CHAIR—I now invite you to make a short opening statement, at the conclusion of which, obviously, there will be questions.

Commissioner Keelty—Thank you, Senator. For the benefit of members of the committee, I will briefly cover the role and functions of the Australian Federal Police prior to providing the committee with the AFP's view of the [Migration Legislation Amendment \(Further Border Protection Measures\) Bill 2002](#). The AFP's functions are set out in section 8 of Australian Federal Police Act 1979. Within that framework, under section 37(2) of the Australian Federal Police Act 1979, the AFP receives a ministerial direction that outlines the government's priorities and expectations of the AFP for a given period.

On 27 September 2000, the Minister for Justice and Customs issued a supplementary ministerial direction under section 37(2) stating that the government expects the AFP to give special emphasis to countering and otherwise investigating organised people-smuggling. The direction went on to state that the AFP should also ensure that it provides an effective contribution to the implementation of the government's whole of government approach to unauthorised arrivals.

The AFP has a responsibility to enforce the criminal provisions of the Migration Act 1958. The translation of these responsibilities into operational arrangements is supported by an appropriate service level agreement with the Department of Immigration and Multicultural and Indigenous Affairs. The AFP's role is to conduct investigations under the relevant legislation with a view to obtaining evidence for prosecutions. In particular, the AFP engages in targeting the facilitators of people-smuggling ventures. These are the people who arrange for the marketing of opportunities for potential passengers, organise their travel to embarkation points, coordinate and provide vessels and employ crews. To a lesser extent, the AFP also investigates and attempts to bring to court the crews of the suspected illegal entry vessels arriving in Australian waters. The AFP does not investigate the passengers on board these vessels who are variously described as unlawful non-citizens, refugees, asylum seekers or illegal immigrants.

Upon arrival in Australia's migration zone, the responsibility for dealing with these people lies with DIMIA and the Australian Customs Service. Since July 2000 a joint AFP-DIMIA

strike team was established as a result of increasing concerns about a number of potential unauthorised arrivals bound for Australia. As well as this, an expansion of the AFP and DIMIA overseas liaison officer networks has increased law enforcement assistance to the Middle East and Asia-Pacific countries in addition to targeted assistance to Indonesia.

The flow of illegal immigrants may be described in three phases. The first phase involves the departure from their home country, the second phase being the transit point and the third phase being their journey to Australia. As we have seen in the past, not one of these phases remains constant. The AFP does not have a border protection role in the same way that the committee would understand that the Customs Service, DIMIA, Coastwatch or the Australian Defence Force have.

Our role in protecting Australia's borders lies in our provision of an investigative function for offences that occur across national borders and the collection and provision of intelligence relating to such offences. The AFP maintains a very strong focus on fighting these crimes offshore—now commonly referred to as transnational crimes. The committee would be aware that the AFP has no criminal jurisdiction—that is, police powers—beyond Australia's borders and, as such, we do not have an operational role in other countries. The AFP makes up for this limitation by seeking the assistance of, and collaboration with, overseas law enforcement agencies. The processes we have in place offshore combined with investigative efforts in Australia have been successful in bringing people responsible for organised people-smuggling before overseas and Australian courts.

In conclusion, based on previous experience the AFP has already anticipated that the current successes in preventing, deterring and arresting those involved in seaborne people-smuggling will drive the people smugglers to either evolve new methodologies to evade detection or return to more covert means of illegal arrival in Australia. It is not foreseen that changes accompanying the introduction of the proposed amendments will affect the ability of the AFP to fulfil its role. In fact, the AFP views the proposed changes as potentially beneficial in the wider context as they are designed to send a deterrent message to potential smugglers and traffickers. Resultant changes should be understood to be, in effect, target hardening in terms of the ability of smugglers to get illegal immigrants to Australia and into the immigration process, and a deflection of illegal immigrants to regional centres with better infrastructure.

Senator PAYNE—Commissioner, as you know—and as you have acknowledged in your submission and this morning—this has become, if you like, the second phase of this excision process. What was the impact on the AFP of the changes that were made in the excision legislation last year, if there was any?

Commissioner Keelty—We could not be definite about the impact of the excision changes alone—obviously Operation Relex has had some impact as well. But to give you an indication, in 1999, 47 boats arrived at Ashmore Reef; in 2000, 39 boats arrived at Ashmore reef; and, in 2001, 20 boats arrived at Ashmore Reef. In addition to that 20, about four were handled by the Operation Relex teams. Each time one of those vessels arrived at Ashmore Reef, anything up to three AFP officers would have to go out to Ashmore Reef to enforce the migration zone legislation. It had quite a substantial resource impact on the AFP prior to the first phase of the excision legislation. As I say, it is difficult to put an actual figure on it because Operation Relex was operating at the same time.

Senator PAYNE—The focus of the AFP’s submission is about addressing transnational organised crime—understandably, I suspect. That is essentially because the AFP does not have a role in the observation of international obligations and things like that, isn’t it? Your role is in the criminal aspects of this entire process?

Commissioner Keelty—That is correct.

Senator PAYNE—Do you envisage that, if the proposed excision goes ahead, it will have an impact on AFP resourcing? If so, what would that impact be?

Commissioner Keelty—For example, there is only one Australian Federal Police officer stationed in the Torres Strait, based on Thursday Island. The Torres Strait consists of many islands. We would see the application of the excision legislation assisting us to monitor the movements of the people smugglers and the crews who, if they still intended on arriving in Australia, we would hope would come to places where there is better infrastructure to facilitate their arrival.

Senator PAYNE—What does that do to your resourcing?

Commissioner Keelty—If we are resourcing it, it assists us because they do not arrive in remote locations where we would have to deploy our resources. For example, Thursday Island is two hours by air from Cairns, so the infrastructure there is minimal.

Senator PAYNE—In your submission and your observations this morning you made a point about there being three phases in the flow of the unlawful arrivals process: departure from home country, the transit point and the journey to Australia. Is there any evidence that there are people who come in two phases—that is, departure from the home country straight to Australia, without a transit point? Can you tell us what the balance in numbers is?

Commissioner Keelty—I cannot give you the balance in numbers, but there are examples of where they do that—those are arrivals by air.

Senator PAYNE—Of course.

Commissioner Keelty—Prior to people being smuggled by boat, that was the most common way of illegal immigrants arriving in Australia. I do not have the figures, though. But one of the things that is now public knowledge is this event that has occurred in East Timor. It has been reported in the press in recent days. We have always been concerned about East Timor being used for its infrastructure and about the development of the criminal justice system in East Timor as being exposed to operations by transnational crime figures. A boat has arrived in East Timor—and I can talk about this because there is never likely to be a prosecution in Australia on this matter—with Sri Lankans on board but, interestingly enough, the Sri Lankans who appear to have organised it have gone from the point of embarkation and arrived in East Timor to facilitate the arrival of the vessel to East Timor en route to New Zealand. We have not seen that strategy used by the people smugglers before. From our own perspective, this is an indication of the flexibility of the people smugglers to now try and reassure people that they can get them to their point of destination more so now than they might have been able to do before.

Senator PAYNE—Does the AFP have any involvement in that circumstance in East Timor at the moment?

Commissioner Keelty—It is obviously a matter for the East Timorese authorities under the new regime there, but we have provided some assistance by sending members of the people-smuggling team to impart to them the knowledge and skills that they might need to investigate the matter. That was done as a request of the East Timorese Police.

Senator PAYNE—In conclusion, you mentioned then the People Smuggling Task Force again. Could you give us an update on the AFP's activity in that area? I will then go back to the chair.

Commissioner Keelty—I might hand over on that point to Mr McDevitt.

Federal Agent McDevitt—In broad terms, Senator, we continue to maintain a people-smuggling strike team, which is staffed by DIMIA and AFP. We have 10 staff in it; DIMIA have five staff in it. It is a combination of investigators, intelligence analysts and specialists. They continue to be actively engaged in their primary role, which is to participate in activities designed to target high-level facilitators of people-smuggling activities.

Senator PAYNE—Is that task force consulted in the development of legislation such as this?

Federal Agent McDevitt—That is correct.

Senator PAYNE—Thank you.

CHAIR—Following on from that—and I know DIMIA are not here now—

Senator PAYNE—I am sure they are listening.

CHAIR—They will get notice of it. I would like to place on record a question on notice, asking DIMIA for details of who is on the task force, when the task force has met since May this year and who has been present at the meetings. I suppose we can pass those questions on to them. Is the boat that you mentioned that landed in East Timor the same boat, from what you understand, as the boat that was mooted publicly, at about the start of June, as being a boat coming to Australia?

Commissioner Keelty—No, Senator. That is a different vessel.

CHAIR—What happened to the 'ghost boat'?

Commissioner Keelty—That is currently the subject of continuing investigations, Senator.

CHAIR—Sure. There were suggestions at the time that it was full of Vietnamese people. Is that something that has been confirmed since?

Commissioner Keelty—I do not have any detail. I am not sure if Mr McDevitt has detail about the passengers on board the vessel.

Federal Agent McDevitt—We had had reports from time to time, over recent months, about a vessel which allegedly had departed Vietnam and apparently contained up to 34 Vietnamese people on board. I am not sure what the latest state of play is in terms of intelligence or sightings of that particular vessel.

CHAIR—Right. But the reports that you had were initially from Vietnam, weren't they? They were not from the Indonesian end?

Federal Agent McDevitt—I would have to take that on notice, Senator.

CHAIR—Could you take on notice that question, together with the question of when those first reports came to your attention and the task force's attention. We have not had a Vietnamese boat for quite a few years—I think since 1994 or thereabouts. You say you do not know where that boat is now but, at some stage, over the last month or so, you must have lost contact with information about that boat. There must have been a stop in the update of intelligence that you might have had on that boat. Can you tell us when you last had a sighting of the boat?

Federal Agent McDevitt—We will take that on notice, Senator.

CHAIR—Do you always work on single source information?

Federal Agent McDevitt—Wherever possible, we try to seek corroboration of single source information. The unfortunate reality is that, at times, that is all we have.

CHAIR—In this particular case, the minister's briefings to the media were that it was single source information. Would that single source have been from Vietnam or would it have been from further down the track?

Federal Agent McDevitt—It is probably preferable that we did not actually give that sort of detail.

CHAIR—I do not know about that. I am sensitive to this issue, but we all know that you have sources in Vietnam and we all know you have sources in Indonesia. I am just asking: which leg of the operation was the source of the information? Could you take that on notice and get back to us?

Commissioner Keelty—Yes. The sensitivity is in possibly identifying where the source is. Perhaps we can answer the question by saying that the source is not in Vietnam.

CHAIR—Thank you.

Federal Agent McDevitt—I would like to offer one point of clarification in relation to your earlier question about the People Smuggling Task Force. There are two very distinct entities that the AFP contributes to: one is the People-Smuggling Strike Team, the joint team between the

AFP and DIMIA that I described earlier. The other is the People Smuggling Task Force, which is a high-level government task force that, obviously, the AFP participates in but which is a very separate entity to the strike team. I would like to make sure that is clarified.

CHAIR—Thank you for that. Who chairs the task force? Is it PM&C?

Federal Agent McDevitt—I would have to take that on notice. My understanding is that it was initially chaired by PM&C and that, at this point in time, the chairmanship has now moved across to DIMIA.

CHAIR—Would you take that on notice as well and give us an answer. Commissioner Keelty, you have confirmed what Immigration told us. In their answer they said:

The Bill, by extending excised offshore places to islands off the northern coast of Australia, and therefore requiring people smugglers to bring their vessels closer to mainland Australia ...

Are you anticipating that the vessels will now come closer to mainland Australia?

Commissioner Keelty—That would be what we anticipate for those vessels intending to arrive in Australia: rather than leave the passengers to the unknown fate of arriving on a remote island or reef, they would be forced to come to the mainland.

CHAIR—If people smugglers get more creative, that would make the job almost impossible for you, wouldn't it? You have a fairly extensive mainland to protect.

Commissioner Keelty—That is right—and when I say that I mean that you are right about the mainland of Australia—but, as pointed out in the figures I gave in the previous answer, it is more difficult for us to send resources to remote areas, because of the lack of infrastructure. At least if they come to the Australian mainland there is the potential for us to do something about them. The idea is to force them into the mainstream activity, and this is a deterrent to leaving passengers to their own fate on remote islands, where we have had people die.

CHAIR—It is good to see that someone cares.

Commissioner Keelty—We do care, and it does not matter whether they are the people smugglers themselves or whether they are the passengers. This is a far preferable way for us to go, instead of having them left on a remote island.

CHAIR—So, basically, you are saying you would prefer them on the mainland, that you think this legislation will bring them there and that they will then be more manageable for you.

Commissioner Keelty—Yes. In a nutshell, and I think you touched upon it, as we advance any policy in law enforcement, whether that be Immigration policy or otherwise, the flexibility of the people smugglers is the flexibility of most transnational criminals, which is the ability to work around the current legislation. We see this legislation as being a useful deterrent. The whole object is to force people to come to Australia through the correct procedures but, if they are going to commit a crime in the way they are sending people to Australia, we can at least try to get them sent to where there is a some infrastructure support for them.

CHAIR—Does that mean you will have to very quickly shift resources from one part of the coast to another?

Commissioner Keelty—We may do, but we do that in one sense for other types of transnational crime, such as drug trafficking.

CHAIR—The focus of your submission seems to be on the people smugglers as opposed to those who are keen to get here. Do you anticipate them actually arriving on boats as well, or do you think their practice has been to send the boat along and they themselves do not come within our territorial zone?

Commissioner Keelty—I will break them down into two areas. I think you are right: the main people who are organising this are offshore. However, in 2000-01, we arrested and prosecuted 178 crew; in 2001 to February this year, we prosecuted 67 crew. The crews are complicit in the crime. I want to point out to you that the boat with Sri Lankan passengers that arrived in East Timor is significant for another reason—with the publicity surrounding the fate of SIEVX, it would seem that those people who have paid money to be facilitated to Australia are demanding much more reassurance from the people smugglers about their safe arrival into Australia. We are now seeing a bit of a trend forming—and it is too early to say how much of a trend it is—with the people smugglers having to escort the passengers, albeit at each point of destination, to reassure them that they will be properly and safely facilitated.

CHAIR—It would not surprise you, however, that asylum seekers—the passengers we are talking about—are more than likely to be of middle class with a bit of a profile in the country, and that they are fleeing from persecution because of that profile?

Commissioner Keelty—They come in different grades. Some of them arrive in Indonesia on first-class plane tickets. Mixed amongst the legitimate asylum seekers are some people who are trying to get to Australia. That is the real problem; that is the real dilemma.

CHAIR—My point to you, though, is that it is not surprising that those with the resources could also be asylum seekers. I think history shows that they are the one most likely to be in conflict with oppressive governments.

Commissioner Keelty—I accept what you are saying. I would only add that obviously there is a mix of people.

CHAIR—You say in your submission that you have not had occasion to investigate or prosecute any of the asylum seekers. No evidence of criminality with respect to any of them over the last couple of years has been brought to your attention?

Commissioner Keelty—Not in terms of the Migration Act. If they have come to our attention for criminal investigation, it is more likely to have been once they have arrived in Australia and any issues that might have occurred at a detention centre.

CHAIR—But with all the security checking, police checking and so on that is pretty comprehensively done in this country, there has not been occasion for you to check, to

prosecute or to determine that someone who has come on the boat, other than crew, has a criminal record?

Commissioner Keelty—Generally speaking I would say the answer is no, but I will take it on notice in case there are some notable exceptions.

CHAIR—There might be the odd one. I am bemused now. You talk about this legislation driving people onshore but, by doing that, the legislation does not have any effect on them. So in a legal sense it is your preference to have the people onshore—and, in those circumstances, they have some very limited rights of access to the Australian legal system—but, in doing so, the excision zone concept is not available to the government to remove them. At the end of a few hours of hearings, I am still trying to work out whether the excision legislation does anything more than satisfy your direct interests—and, consequently, Australia's—by having people driven onshore. You would prefer to see that they are driven here, and I presume you can handle them.

Commissioner Keelty—If they are left to the vagaries of tidal and weather changes, as well as there being no food or fresh water available on many of the islands covered by the proposed legislation, there is a humanitarian factor as well as a law enforcement factor.

CHAIR—That is good. I suppose the final question I have before going to other senators is: in terms of shifting people on to the Australian coast, do you need to enhance any links you have with Indigenous communities along the north, north-west coast? Do you need to resource them anymore? Is that something that is a part of continuing programs?

Commissioner Keelty—It would be a part of continuing programs as we look to see what trends develop. Certainly we have a very good relationship with the Indigenous communities of the Torres Strait and we have a relationship with the Indigenous communities in north-western Australia, where we have an AFP presence, but we would need to watch the trend on that and see where else we need to focus our activities.

CHAIR—But there have not been consultations thus far?

Commissioner Keelty—That is correct, Senator—not beyond what I just described.

CHAIR—I have taken up too much time. Senator Scullion?

Senator SCULLION—Thank you, Mr Chairman. I put part of this question to some officers from DIMIA, with regard to appreciation of how intelligence flows—what the people are aware of. Clearly, the proposed excision legislation is to put in place a disincentive package, to principally say, 'Look, this isn't really the way to go.' I would like an appreciation of how well aware they are of the circumstances in Australia. You would be very well aware of the activities of Norforce, Topwatch and Northwatch. They have effectively empowered thousands of people—people within recreational fishing communities, people who use the water for recreation, such as yachties, and Indigenous communities—with knowledge. At the mere sight of a vessel that is inappropriate or in the wrong place or the wrong shape, those people will now immediately report to the authorities, and there is an immediate reporting process. Clearly we know that, in those circumstances, the closer they come to Australian mainland the higher the

likelihood of detection and, therefore, the possibility of being arrested and apprehended. It is basically a function of how far away they are from the mainland. Do you think that the people smugglers in Indonesia would be aware of that situation? Do you think they avail themselves of intelligence to that degree about what happens in Australia?

Commissioner Keelty—Yes, they do. We have clear evidence that people smugglers are changing their activities in response to policy that is delivered here in Australia. A glowing example is the intelligence that we have received about New Zealand suddenly becoming a destination as opposed to Australia, and also the very tangible example in recent days of the vessel that has arrived in East Timor.

Senator SCULLION—Along the same lines, Commissioner, you say you do not have a great deal to do with investigating actual asylum seekers; your role is to deal with the people who smuggle people. You may have some information on this; you may be able to assist us. You have said that the people who are seeking a migration outcome in Australia—*asylum seekers*—have an understanding. They are aware of *SIEVX* and they now seek assurances on safe arrival and those sorts of things. If they are aware of that, do you think they would be aware that they can no longer gain a migration outcome by landing on those islands if this excision legislation takes place? Do you think they would then be insisting that that is not where they end up? Do you think they would be able to avail themselves of that level of information? That has been widely reported here.

Commissioner Keelty—Yes, I do. Some of it is through deliberate strategies on behalf of the Australian government agencies, where we promote the need to come through legitimate channels to migrate to Australia. There is a campaign that is, in fact, put in place in Indonesia to advise potential passengers that islands have been excised. There is no doubt in my mind that that would be promulgated amongst the people. One of the things that operates, I guess, in our favour, in terms of the intelligence aspects of this, is that the people who are waiting to move out of Indonesia are often grouped in various locations. The information gets back to them very quickly about events that have occurred. We have seen good examples of that through the intelligence interchanges that we have had through the successful or otherwise arrival of vessels during *Operation Relex*.

Senator SCULLION—Since September, since the first excision took place, do you think that has had a substantive impact on the fact that we have not had people leave? Do you think it is because people are saying, ‘We don’t want an outcome in those places, because it doesn’t give us what we want’? Do you think that has had an impact?

Commissioner Keelty—I think it has. In terms of measurement, it goes back to the answer I gave to the deputy chair: *Operation Relex* happened at around the same time, so to give you some empirical data about it would be difficult. If I quickly add up those figures I gave you, from 1999 to 2001 there were in the order of 100 boats arriving at Ashmore Reef. That is a lot of boats arriving at Ashmore Reef in what, ostensibly, is a two- to three-year period, and then now, suddenly, there are none.

Senator SCULLION—When the chair asked a question previously, I think he was leading towards the idea that this is not really a disincentive package—that is, that this is something where people will just avoid the islands and come to the mainland if they are seeking a

migration outcome. Do you think the intelligence that you gather indicates that it is actually working as a disincentive package so people will be choosing to go elsewhere? Or do they simply say, 'We now have to go to the mainland.' What is your appreciation of that?

Commissioner Keelty—I do not think it will change the fact that there will be people trying to get to Australia per se. It will be a deterrent, but there will always be people who are trying to beat the system. This will, however, eliminate that option for them. I think that is important strictly on humanitarian grounds, because of what we have seen at Ashmore Reef; I do not know how some of those people have survived there without water or food. If the people smugglers had to change their operations to find a small atoll or a small deserted island that was part of Australia's territory then they would—that is clear. This is because, unlike the drug smuggler, who has to get the product ashore and then distribute it, the people smuggler only has to get their commodity—and I use that word sensitively—to an Australian territory where the people can put their hand up and claim asylum. That is what they are doing, and that is what this is about from a criminal perspective; it is about getting them to the nearest point to put their hand up. That is why the excision of the islands would be of assistance to us.

Senator SCULLION—From a practical point of view—and I ask you this simply because you said you have had a lot of exposure to the boats and the people who facilitate these operations—what would the differences be between the sort of boat you would need to get from Kupang to Ashmore Reef and the sort of boat you would need to get from Kupang to mainland Australia?

Commissioner Keelty—Those boats would have to be substantially different; Ashmore Reef is still a long way from Australia's mainland. Perhaps a better example is the Torres Strait. The journey between New Guinea and the first and most northern island in the Torres Strait can almost be made at low tide—you can almost walk it. Throughout the Torres Strait, we see the use of banana boats, which are not much of a vessel whatsoever; in fact, a banana boat is a runabout. If you go up to the Torres Strait, the way you get around is by runabout. So very little in terms of the sophistication of vessel or means of travel is required in some of these places. In answer to your question, you would certainly need a much more substantial vessel to get from parts of Indonesia to mainland Australia than you would need to get to Ashmore Reef.

Senator SCULLION—We have seen an awful lot of boats—substantial vessels—arrive on mainland Australia in earlier times, and they have subsequently been destroyed or disposed of; I am assuming they do not boomerang back and get used again. I am going to the availability of the sort of resources you would need to get from, let us say, Indonesia or Kupang to mainland Australia. Would there be lots of vessels that could do that? There might, for example, be a lot of vessels you could use to get to Ashmore Reef, but would there be the same amount of vessels in which you could, for example, then steam from there to mainland Australia? Do you know much about that sort of situation?

Commissioner Keelty—I do not know specific details but, if I can compare it to other types of crime that we see, you would need different vessels. The vessels are probably not as plentiful in a place like Kupang. If you travel further west to some of the more substantial Indonesian islands you might find better vessels available, and any number of vessels are available in other parts of Asia. But you would certainly be limited. You would have to change your tactics yet again.

Senator SCULLION—What I am going to is that this proposed excision will make the percentage of those vessels available that are actually able to make the voyage far lower. Would that be right?

Commissioner Keelty—That would be right. The people smugglers would have to rethink their strategies, and the cost involved—the infrastructure cost to them in committing the crime—would increase.

Senator SCULLION—Mr McDevitt, could you share with me the activities, in a generic sense, of the people who are people smugglers? Do they just smuggle people, or are they often involved in legitimate business activities? What do they do when they are not people smuggling?

Federal Agent McDevitt—It would be fair to say that they engage in a range of activities and that the motive is predominantly one of profit. They tend to be opportunists in relation to whatever criminal enterprises may present themselves. You heard the commissioner speak about commodities. The reality is that if there is easy money to be made from facilitating the illegal movement of people that might be the activity that these people engage in, or they may determine that facilitating the movement of drugs, weapons or some other commodity may be the best enterprise to engage in at that particular point in time. It is a long answer, but certainly these people are generalists rather than specialists.

Senator STEPHENS—We heard from DIMIA this morning about a funded regional cooperation model that is being used to assist in processing claims for asylum seekers. Does the AFP have any formal role in that regional cooperation model?

Federal Agent McDevitt—We participate in a number of cooperative efforts around the region, but it would be fair to say that most of the AFP's efforts are focused on engaging with the Indonesian National Police and other police and law enforcement agencies in the region. That is really the main aim for the AFP.

Senator STEPHENS—Another issue that was raised in the previous submission was that the outcome of that regional cooperational model was to share the burden of the migration outcomes for some of these people seeking refugee status. Does the AFP have a formal role—rather than just an advisory or intelligence gathering role—in that whole process?

Federal Agent McDevitt—It would be fair to say that the product the AFP brings to the table is generally from an intelligence perspective and also relates to facilitation of, and liaison with, law enforcement in the region.

CHAIR—Thank you very much for your assistance.

[11.45 a.m.]

CORNISH, Ms Sandra Jayne, National Executive Officer, Australian Catholic Social Justice Council

MURPHY, Reverend John Joseph, Director, Australian Catholic Migrant and Refugee Office

CHAIR—Welcome. You have lodged submission No. 33. It is quite an extensive one, for which I thank you. Do you wish to make any recommendations or alterations to that submission?

Rev. Murphy—Not at this stage.

CHAIR—I invite you to make a short statement, at the conclusion of which we will ask you questions.

Rev. Murphy—I will give a brief outline of our agencies first and then make a few points from our submission. The Australian Catholic Migrant and Refugee Office, ACMRO—of which I am the Director—and the Australian Catholic Social Justice Council, ACSJC, appreciate the opportunity to appear before this inquiry into proposed legislation on migration zone excision. We represent the national agencies of the Australian Catholic Bishops Conference directly concerned with this issue and, as such, we have made a combined submission. Sandy Cornish is the National Executive Officer of the ACSJC and I am the Director of the ACMRO.

The ACSJC was established by the Australian Catholic Bishops Conference in 1987 as the national justice and peace agency of the Catholic Church of Australia. The Bishops Conference mandates the ACSJC to promote research, education, advocacy and action on social justice, peace and human rights issues, integrating them deeply into the life of the whole of the Catholic community in Australia, and to provide a credible Catholic voice in Australian society on these matters. The council is accountable to the Bishops Conference through the Bishops Committee for Justice and Peace.

The ACMRO was established by the Catholic Bishops Conference in 1995. It brought together two previous conference bodies: the Federal Catholic Immigration Committee and the Australian Catholic Refugee Office. The Bishops Conference mandates ACMRO to advise and serve the Bishops Conference at both national and international levels on migrant and refugee issues, including the development of church policy; to act as an official church voice as approved by the Bishops Conference; to promote effective consultation and coordination between church agencies; and to make appropriate representation to government on these matters. The ACMRO is accountable to the Bishops Conference through the Bishops Committee for Migrants and Refugees.

I wish to highlight the following points from our submission. The first is that to seek asylum is a moral as well as a legal right. The excision of certain territories from Australia's migration

zone seeks to prevent people without valid visas entering Australia to exercise these rights. Catholic social teaching accepts that states have the right to control human mobility. But this right is not absolute; it has limits. Pope John Paul II, in his World Migration Day message for 2001 said:

... although it is true that highly developed countries are not always able to assimilate all those who emigrate, nonetheless ... the criterion for determining the level that can be sustained cannot be based solely on protecting their own prosperity, while failing to take into consideration the needs of persons who are tragically forced to ask for hospitality.

The excision of Australian territories for migration purposes seems to be based solely on protecting Australia's prosperity. The second point is that asylum seekers should not be used as a deterrent—to 'send a message'—to others who may consider coming to Australia in the same way. This seems to be the principal reason for Australia's hard treatment of asylum seekers through mandatory detention, temporary protection visas, the so-called Pacific solution and now this latest proposal to excise more islands for migration purposes.

The third point is that, in a statement released on 26 March 2002, the Australian Catholic Bishops noted that the paramount importance of the dignity of the human person must 'be reflected in our nation's policies' and called for a review of policies 'for dealing with those who seek asylum here, so as to ensure that they are not discriminated against because of their mode of arrival'. They described the Pacific solution as an 'unconscionable practice'. We can presume that they would say the same about the proposals of the present bill.

The fourth point is that we believe the proposed legislation fails to address the reasons behind the demand for people smugglers. We believe that it would be much more constructive for Australia, rather than reacting to popular opinion, to concentrate resources on reducing the flow of asylum seekers by addressing root causes more comprehensively—for example, by increasing the number of offshore places to enable more refugees to enter Australia under safe and organised conditions. The number of humanitarian cases approved overseas is currently at about a third of the level of 20 years ago. As a wealthy nation we have a responsibility to share the burden posed by those who seek asylum.

The fifth point is that, if the bill is passed, we would ask what will happen if asylum seekers land on the excised territories and who would be responsible for their welfare, accommodation and the processing of their asylum claims.

CHAIR—Thank you for your submission. I would particularly point to page 23 and 24, where you draw that historical analogy between some of the activities now and the situation with Jewish refugees in 1938. I think that anyone who has been to Israel can see the museum with the plaque saying, 'In 1938 we came to Australia, but they turned us back.' That is a striking reminder of the lessons of history.

Senator KIRK—You say in your submission that Australia could show international leadership by expanding its humanitarian program according to need. What is the suggestion underlying that?

Rev. Murphy—We know that, no matter what the expansion might be, it is not going to solve the world refugee problem—it will still only be a drop in the ocean. But we feel that it would be sending out a positive message. Hopefully, by working together with other countries,

it would encourage those countries to either increase their totals or to come in on a program that they are not already involved in.

Senator SCULLION—I notice that in your opening statement you mention that refugees have not only a legal right but a moral right. I guess my concern and the concern of many others is that often the difference between an offshore application and an onshore application—principally with those people who are travelling from Indonesia and surrounding countries—is a voyage. If you can imagine dividing this room by about 25 per cent and adding 350 people, there will be pretty horrendous conditions on that voyage in any event, particularly because they are family groups. The only other thing that can make that nightmare worse is to allow a bit of water through the door. From my perspective it is absolutely essential that we avoid that situation.

Evidence from DIMIA this morning indicated that they now have a regional cooperation model, where the Australian government actually funds UNHCR and the International Organisation of Migration, the IOM, to process interdicted asylum seekers' applications in Indonesia. This is clearly something that is going to avoid the risk to those people and to families. Do you think that is going to be a part of a solution and will you be supporting that sort of process?

Rev. Murphy—If people are going to be interviewed and assessed in Indonesia and then they meet the requirements for protection and refugee status, and if Australia is prepared to accept a fair number of those people, then I think we would be happy with that.

Ms Cornish—It is clearly better if people do not have to take terrible risks in order to effectively exercise their right to seek asylum. It is of concern that many of our neighbours are not signatories to the refugee convention. We would want to be sure also that the full range of rights would be available to them in the processing of their applications in those countries. But it is clearly better if they do not have to take such risks.

Senator SCULLION—You would have faith that the processes that the UNHCR, in concert with the International Organisation for Migration, undertake to assess people about their protection status are adequate?

Rev. Murphy—Yes, but if people got left behind in Indonesia, after having been assessed, the system would probably break down, so we would have to still be ready to accept people.

Senator SCULLION—I am sorry; could you say that again?

Rev. Murphy—If people are assessed as refugees in Indonesia, say, and then we do not take anyone, the system would soon break down—if Indonesia felt that they were just going to be left holding the baby, so to speak.

Senator SCULLION—As I understand it—and perhaps I will be corrected—for the people who are found to have refugee status, under the UNHCR arrangements there are a suite of countries who are signatories to an agreement that they will be placed somewhere amongst those. If that outcome is not Australia, one would think that in the countries that are signatories to that the refugees would be given appropriate protection. Would you agree with that?

Rev. Murphy—Yes.

Ms Cornish—The experience of the comprehensive plan of action in South-East Asia during the Indochinese crisis suggests that we need to look very carefully at what will happen to people who are screened out and what their rights will be in places like Indonesia which are not signatories to the convention. What will happen to these people? Will they be returned to places where they are perhaps not safe? We have duties under the refugee convention not to return people to places where they will not be safe. What are our guarantees for people who are screened in Indonesia or Malaysia or places that are not signatories to the convention?

CHAIR—But under that CPA there were quite a few people returned to Vietnam. Are you saying that they were returned in non-safe circumstances?

Ms Cornish—I am saying that we need to be very careful that that is not the case.

CHAIR—We accepted some—

Ms Cornish—The expectation of the countries of first asylum that there would in fact be places for those who were screened and determined to be refugees was at times frustrated. Towards the end of the CPA there were numbers of people still in the camps and there was a crisis about how to deal with those people.

CHAIR—That is right. But out of 200,000 or so we accepted close to 100,000, other countries accepted a fair few and 40,000 to 50,000 were sent back to Vietnam. From my continuing close interest, there has not been any level of concern expressed from those people. Are you saying, for instance, that with this current flow of people we need to be looking at a similar mechanism?

Ms Cornish—Yes. I think we need to be thinking of the endgame already rather than waiting to see who is screened out and presuming that they will easily be accepted. There are also the people who will not be determined to be refugees according to the strict definition of the convention but who may have good humanitarian cases. We need to ensure that any such arrangement takes care of their needs as well.

Rev. Murphy—There was just one other point following on from that. From memory, in the legislation that came in last September, anyone for whom Indonesia is not their first stopping off place and who is given refugee status there and accepted for Australia will only get temporary residence for 4½ years. There have been so many laws I have forgotten, but I think that is still in action. That would be a concern I would have: that someone who was approved in Indonesia and was then taken into Australia would have to wait 4½ years before they could bring family with them, for example.

CHAIR—We are looking then at the end of the pipeline. The source countries, I suppose, overwhelmingly have been Iraq or Afghanistan.

Rev. Murphy—Yes.

CHAIR—What sort of action do you recommend Australia engage in at the source of the flow to try and accommodate it? For instance, with the CPA, there was a regional plan which involved quite a number of countries in terms of assessment and so-called burden sharing. With Bosnia and the collapse of the former Yugoslavia there was a UNHCR process there in which countries around the world participated. We took more than our fair share; we took quite a number. Are you recommending a similar sort of process, for instance, with Afghanistan or with Iraq? We are about to bomb Iraq. I would have thought that probably necessitates some action there.

Senator PAYNE—Are you, Senator Bolkus?

CHAIR—I think it would be total madness, but others do not share that view.

Senator PAYNE—That was not the royal ‘we’, then.

Rev. Murphy—We need to have a bigger assessing presence in the countries where the people are. As far as I know, we have not got a very big potential in Pakistan, for example, to assess the huge number of people that are there or have been there. If we were going to talk about any comprehensive plan of action, we would have to have much larger staffing levels to cope with it.

CHAIR—I am glad that Ms Cornish raised the CPA, because, despite some of the problems at the end and on the way through, it is a plan that successfully handled some 200,000 people. I do not know if you have given any consideration to a similar proposal for Afghanistan. Are you recommending anything like that? You are suggesting that we should handle those who arrive here, but do we not also have some sense of obligation to stop the flow of unauthorised people or to try and share the burden amongst other developed countries?

Ms Cornish—They are part of the same dynamic. In this submission we have focused on people arriving in Australia to seek asylum, because the right to seek asylum is under threat from this proposed legislation. We believe that there needs to be a much more comprehensive response to the whole dynamic of unauthorised human movement. Certainly, there will continue to be flows from Afghanistan and Iraq, given the situations in those countries. We need to be much more proactive in addressing the causes. The people’s first need is to get to somewhere safe. Then they need to be able to access a process for applying for asylum that is speedy, efficient and just. Certainly, we would be very interested in talking further with DIMIA and with any others who want to develop a concrete proposal for how this might best be done. Internationally, the church has quite a lot of experience in working in refugee situations, and that information could be accessed through John’s office.

CHAIR—Efficient and just you can probably legislate for. Speediness is something that has been very difficult in our history over the last 15 or so years.

Ms Cornish—It is partly a matter of resources, isn’t it?

CHAIR—It is partly a matter of resources, but what do you suggest we do with those who may have been rejected as qualifying under the UN definition of refugee?

Ms Cornish—There needs to be a more generous approach to those who have humanitarian cases but do not meet the UN definition. It is a definition that was developed at a particular point in time to deal with a crisis in another context geopolitically.

CHAIR—Are you agreeing with Mr Ruddock that we should change the definition?

Ms Cornish—I would agree that the definition needs to be changed, but I doubt very much that I would agree with the way in which Mr Ruddock would like to change the definition. I am looking to a much broader definition. I think people whose human rights and dignity are in danger have a moral claim on the international community, and we need to have legislation that organises our response.

CHAIR—Is there a failure of the UNHCR to step into a situation like Afghanistan or the Middle East and try and organise a regional base, in the first instance, and ultimately a global response to massive flows of people?

Ms Cornish—Many of us wish that the UNHCR would do more, but the resources available to that organisation are extremely limited. If we wish to see the UNHCR do more, there needs to be more support for that institution.

Senator TCHEN—You said that your concern at this point is only those people who actually arrive in Australia and how we deal with them. Do you make a fundamental assumption that all the unauthorised arrivals are genuine refugees?

Rev. Murphy—No, we do not make that assumption.

Senator TCHEN—Do you agree that they need to be processed and their claims need to be proved?

Rev. Murphy—Yes.

Senator TCHEN—So it is the process to adequately prove that they have genuine needs as refugees?

Rev. Murphy—Yes.

Senator TCHEN—How do you think we should deal with that?

Rev. Murphy—Often, if not most of the time, those who are not genuine refugees have a really big humanitarian need but do not come under the strict needs of the convention. Australia's offshore program acknowledges that—we do accept 4,000 convention refugees, and this year there will be about 6,000 humanitarian entrants who do not meet that requirement—but, onshore, we do not allow that flexibility.

Ms Cornish—This particular submission deals with asylum because that is the matter that this proposed legislation impacts on. We do not presume that everybody who arrives here must be a refugee. That is what we need screening for.

Senator TCHEN—I think you were here when the Acting Secretary to the Department of Immigration and Multicultural and Indigenous Affairs described this bill as a strategic step rather than a legal step. He did not wish to argue about the legality of it; he was only talking about this bill and the regulation preceding it as being part of a strategy to stop people-smuggling. As you say, not all unauthorised arrivals will be genuine refugees—you accept that people-smuggling plays a part in these arrivals—so what is your objection to this strategy to stop people-smuggling?

Ms Cornish—This strategy excises parts of Australia's territory and basically says that our international human rights obligations do not apply in those parts of Australia. If we believe that human rights are inalienable, universal and indivisible, they should apply in every part of our lands and waters.

Senator TCHEN—Even to people who are not genuine refugees?

Ms Cornish—Human rights should be applied to all human beings no matter where they are. Our international treaty obligations should apply in every part of our territory. It is a very bad symbol that we pretend that certain parts of our country are somehow not part of Australia for the purposes of certain kinds of claims that people have a right to make on us because we have voluntarily bound ourselves to certain international human rights standards.

Rev. Murphy—In any case, we do not know that they are not genuine refugees until we have assessed them. Everyone, including genuine refugees, is being treated in the same way—that has been a big problem—but they are being talked about as though they are almost evil. Undoubtedly there are some who have jumped on the bandwagon, but there are others—and I have met them myself when I have visited Woomera—who have been deemed not to be genuine refugees. There are cases there at the moment of people who have gone through every possibility. Some of them even want to go back home, but the department has told them they cannot go back because it is too dangerous. That, in itself, seems to indicate that they had a reason for getting out.

Senator TCHEN—It is also is an indication that Australia does take care, and that we do not contravene any international convention on refugees if they cannot find a secure place to go. The definition of a refugee is very strict under the international conventions, and these people do not meet that definition. Yet, as long as it is not safe for them to go to a particular place, we meet our obligations by not sending them back. That is not a cause for objection, is it?

Ms Cornish—Not if they are indeed able to reach some part of our territory from which they can have their claims assessed, which is the point of this legislation.

Senator TCHEN—What does it matter where you assess them, as long as the process of assessment is fair and transparent?

Ms Cornish—If they are on part of our territory, it is our duty to see that they are assessed. What do we do with them instead? Do we persuade some more of our neighbours to take these people and to assess their claims—neighbours who perhaps have less experience, less infrastructure and who may not even be signatories to the convention?

Senator TCHEN—I think you will find that the assessment of those people—this is a different issue, of course—being assessed on Manus Island and Nauru are assessed by either UNHCR or by Australian officials.

Ms Cornish—There are legal questions about the holding of people on Manus Island. I understand that the ombudsman in Papua New Guinea has very serious concerns.

Senator TCHEN—Yes, but those are not part of this inquiry.

Ms Cornish—It is part of the context of the legislation.

Senator TCHEN—Why do you have an objection to certain parts of Australia being excised from the immigration zone, when people are processed at a different spot but the process is the same?

Ms Cornish—Human rights are universal. They should apply everywhere. In the common law tradition, the rule of law should apply to us everywhere.

CHAIR—I think you are getting that same answer.

Senator TCHEN—Your position is clear.

Rev. Murphy—The process will not be exactly the same; otherwise, there would not be any point in the whole exercise. For example, who will assess the people who do land on the excised territories? That is the question I asked at the end. I am not quite sure whether that is certain, but they certainly are not able to apply for review if they get knocked back.

Senator TCHEN—The purpose of the legislation is quite clear, and the minister stated it quite clearly. It is to disable the asylum seekers from accessing Australia's legal system.

Ms Cornish—That, in itself, is a very serious concern. Anyone present in Australia ought to be able to access our legal system.

CHAIR—Senator Tchen, do you want to follow up?

Senator TCHEN—No. That is an argument that is bottomless.

Senator SCULLION—I have some questions that lead on from Senator Tchen's. You said that our international human rights obligations should be extended by Australia, and rightly so. We directed a question of similar ilk to DIMIA this morning. We asked whether they could assure us that people who came to an offshore place and sought a visa application would not have their international obligations and rights impacted on. DIMIA assured us that, under the UNHCR guidelines, along with those of the International Organisation on Migration, these people would still be able to apply for protection in some of the countries under the UNHCR. Given that, why haven't asylum seekers sought protection—because that is what it is about—in one of the numbers of countries that they have visited prior to Australia?

Ms Cornish—A number of the people who arrive here without authorisation have been through countries that are not signatories to the refugee convention. They have no particular right at international law to seek asylum in Indonesia, for instance, because it is not a signatory to the convention.

Senator SCULLION—They could make an application to the Australian Embassy through the UNHCR facilities in Indonesia. As I said earlier, they can access the funded regional cooperation model to ensure that application is made in Indonesia. I do not want to talk about the technicalities—we both understand them—but why do you think they wish to come to Australia, particularly to make an application that is considered under the same process?

Ms Cornish—I think it indicates a lack of confidence or lack of practicality of those mechanisms that you have described. There is a lack of confidence in their operating in those countries or an inability to access them in those countries. I do not think people undertake hazardous sea journeys lightly.

Rev. Murphy—I would like to give an example here. The sister in Indonesia asked me if I could help a young man who was in detention in Indonesia and who wanted to come to Australia. He was in detention in Indonesia for a couple of years. I wrote to the department about his case on a number of occasions, but he still did not get accepted—this was about the time when all of this was starting—and, eventually, he succumbed and came with the people smugglers. I did not hear what happened to him after that, but I do not know how many times that would be multiplied. That is one case where someone was genuinely trying to come in the right way but who could not get past first base.

CHAIR—In that respect, I think your point about the overseas refugee queue being reduced to about one-third of what it used to be is also quite relevant. On that note, I thank you for your submission and your evidence this morning. I presume we will see you at the next inquiry.

Rev. Murphy—Thank you.

[12.16 p.m.]

CULLEN, Ms Gabrielle, Resettlement Officer, United Nations High Commissioner for Refugees

GABAUDAN, Mr Michel, Regional Representative, United Nations High Commissioner for Refugees

HANSEN, Ms Ellen, External Relations Officer, United Nations High Commissioner for Refugees

CHAIR—The committee has before it your submission, No. 30. Do you wish to make any amendments or alterations to it?

Mr Gabaudan—Yes. I would be grateful if you would correct a typographical error on the last page of our submission. At paragraph 27, line 8, the word ‘not’ should be replaced by the word ‘only’. It does change the meaning of the sentence quite seriously. I think we missed it in our redrafting.

CHAIR—Is it typographical or a rethink?

Mr Gabaudan—It is not a rethink. I think it was in the redraft; it was a double negative.

Senator TCHEN—What do you want it changed to?

Mr Gabaudan—The eighth line in paragraph 27, where we say ‘restrictions of freedom of movement shall not be applied’, should read ‘restrictions of freedom of movement shall only be applied’.

CHAIR—Okay. I now invite you to make a short opening statement, at the conclusion of which we will have questions.

Mr Gabaudan—Thank you for giving us the opportunity to provide our observations on this draft legislation. You would have before you a copy of our recent submission, which sets out both our standing to comment as well as our substantive comments to the amendment. I wish to emphasise from the outset that UNHCR’s work is of an entirely non-political character and that we have come before you to provide advice with regard to issues that are clearly within our mandate.

The UNHCR is mandated by the United Nations General Assembly, under its statute, to ensure international protection for refugees and to seek durable solutions to their problems. However, extending refugee protection is primarily the responsibility of states under the internationally agreed framework of the 1951 Convention Relating to the Status of Refugees, which we call the refugee convention. In acceding to the refugee convention, as Australia and over 140 other states have done, states agree to accord refugees within their territories the rights

and privileges set out in the convention and to cooperate with the High Commissioner for Refugees in the fulfilment of his mandate, including his duty of supervising the application of provisions of the refugee convention.

In addition to the formal legal instruments setting out obligations and mandates, UNHCR also relies for guidance and direction on guidelines and conclusions adopted by consensus by our governing body, strictly composed of states, the executive committee of the high commissioner, of which Australia is a founding and active member. Although not formally binding, conclusions on international protection, what we call the 'EXCOM conclusions', have a strong persuasive force since they constitute expressions of opinion that are broadly representative of the views of the international community.

We understand that much of recent Australian legislation, including the draft before you, is intended to combat people-smuggling. UNHCR shares the legitimate concerns of government about people-smuggling and supports international, regional and national initiatives to detect and dismantle such smuggling. We wish to stress, however, that, while people-smuggling has led to an abuse of national refugee status determination systems and needs to be effectively tackled, attempts to combat people-smuggling should not be at the expense of the legitimate beneficiaries of the refugee convention.

I will now touch briefly on our substantive points, which can be summarised as follows: first, with regard to excision of a territory, under the Vienna Convention on the Law of Treaties, to which Australia is a signatory, treaty obligations are binding in respect of the state's entire territory and a state may not invoke the provisions of its internal law as justification for its failure to perform a treaty. We consider, therefore, that Australia's international protection obligations to refugees and asylum seekers are engaged at the frontiers and throughout its entire territory.

With regard to the consequence of excision on the treatment of refugees and asylum seekers, in considering whether the bill is consistent with Australia's international obligations, UNHCR has had to look at the treatment of refugees and asylum seekers both in the excised areas and following transfer to a third country, as provided for in the package of acts passed last September which are referred to in the explanatory memorandum and the second reading speech to these amendments. Treatment under each option must be in accordance with Australia's protection responsibilities provided for by the refugee convention, EXCOM conclusions and other human rights instruments. These include respect for the principle of non-refoulement and the right to seek asylum, adequate refugee status determination procedures to identify those in need of international protection, and treatment in accordance with international human rights standards and international refugee standards.

With regard to asylum seekers and refugees processed in the excision zone, UNHCR is concerned at the lack of formal procedures for the determination of refugee status. Protection against refoulement would be better guaranteed by assessing claims under the existing, well-developed regular asylum procedures of Australia. For recognised refugees, we also view the section 46 bar and additional visa requirements to enter the mainland as inconsistent with articles 26 and 31(2) of the convention, which provide for freedom of movement of recognised refugees. UNHCR is also concerned that, if the bar is lifted, recognised refugees will only have

access to a section 447 visa, which restricts access to travel documents, in contravention of article 28 of the convention, and negatively impacts on family reunification.

I would also like to note that ‘resettlement’ is not the appropriate term to be used when referring to the transfer of individuals within a state’s territory. With respect to the transfer from the excision zones of asylum seekers to declared third countries for processing, Australia’s international protection responsibilities continue to be engaged following the transfer of asylum seekers from the excision zone to a third country for the processing of their asylum claim. Only when a durable solution is found does this responsibility cease. In this regard, UNHCR is concerned at the lack of formal procedures for the determination of refugee status undertaken by DIMIA. Protection against refoulement would be better guaranteed by assessing claims in Australia under existing and well-developed asylum procedures. UNHCR also remains concerned that section 198A(1) of the Migration Act does not refer to the need for an admission agreement so as to protect against chain refoulement and to ensure Australia’s protection obligations are met on transfer to declared third countries.

We are concerned that the detention of asylum seekers is not in conformity with UNHCR guidelines on detention. We also view the detention of recognised refugees with no freedom of movement—which may take place in declared countries, as is currently happening on Nauru and Manus Island—as in contravention of articles 26 and 31(2) of the convention. Finally, we are concerned that refugees resettled to Australia on temporary resettlement visas do not have access to travel documents or family reunification, as I mentioned before.

CHAIR—I could ask you where you think the legislation is consistent with our international obligations, but that would be the wrong way to start. In paragraphs 12 and 13 you say you are concerned at the current lack of formal procedures for the determination of refugee status in excised areas. That follows on from paragraph 11, where you say that to respect our obligations we need to have a consistent law across the territory. Are you essentially saying that *prima facie* we are breaching our obligations—that the legislation is a breach of Australia’s obligations with respect to that?

Mr Gabaudan—No. We are saying that there are now being instituted two different systems of processing refugees who have reached Australian territory and we consider that this is somehow discriminatory against asylum seekers depending on the way they reach the country.

CHAIR—But in paragraph 11 you talk about the prohibition against refoulement and you later indicate that the lack of an adequate legislative assessment system is a problem. If there were a legislative regime for assessment and review within this legislation, do you think that would help us go some way towards meeting international principles? Would you recommend that it be an independent review or could it be an internal review?

Mr Gabaudan—We would welcome consultations with UNHCR on what procedures are being applied. Right now we do not know which procedures are being applied; this information has not been shared with us.

CHAIR—The department told us this morning that they had just about settled their document which will govern the assessment processes and that they will make it available to us. Have you been involved in the development of that document?

Mr Gabaudan—We have not been involved. We have made one observation to the government on the basis of our experience in Nauru and we are waiting for the government's answer on this issue.

CHAIR—You have not been involved and you express concern at the current lack of formal procedures but, in terms of your perspective, what would be adequate? Would a set of non-compellable guidelines be adequate or would you require legislation or regulations to govern the process?

Mr Gabaudan—There is a need for transparency, particularly in respect of the fact that the government has stated that it was applying UNHCR standards. We know that for one issue this has not been the case—as I said, we are negotiating these with the government at present—and we would like to have access to these procedures. We think they should be transparent, just like our own manual for assessing refugees, which is on the web site and is available for anyone to consult.

CHAIR—When you say that in one instance that has not happened, what do you refer to?

Mr Gabaudan—We refer to the issue of derivative status. UNHCR considers that the spouses and minor children of recognised refugees should be given refugee status—or refugee-like benefits, at least—and be reunited immediately with the father, mother or the child. Currently, this is not being applied by DIMIA, who wants these people to qualify on their own merit. We are at variance in this respect and we have addressed that to the government. I must specify that I do not yet have the government's answer and we are still hopeful that we can reconcile these differences. It is a fairly substantial one as far as we are concerned.

CHAIR—Someone else might want to follow that up, but I would like to go back to my earlier point. In paragraph 13 you refer to the current lack of formal procedures. I do not know whether you can answer it at this stage, but by 'formal procedure' do you mean something in legislation or a regulation, or would a mere guideline be sufficient?

Mr Gabaudan—Having transparent guidelines and knowing what instructions are given to the officers conducting the assessments would be good enough. We would like, if possible, to be consulted on these guidelines inasmuch as it is stated that they reflect ours.

CHAIR—Would you require an independent review process or do you just want a review?

Ms Cullen—Under EXCOM conclusions, an independent review process is not required—that is EXCOM conclusion No. 8—but an appeal is necessary.

CHAIR—An appeal is necessary?

Ms Cullen—Yes, for a person who has failed to be recognised as a refugee in the first instance decision.

CHAIR—To what sort of body should that appeal go?

Ms Cullen—In our own refugee status determination, UNHCR also does the appeal by a different officer.

CHAIR—By a different officer?

Ms Cullen—Absolutely.

Senator PAYNE—Do I take it from what you have just been saying about the processing of refugees for determination of refugee status in the excised areas that UNHCR is comfortable with Australia's procedures for the processing of refugee status in other areas?

Mr Gabaudan—The processing that the administration has been performing on Australian territory has traditionally been first-class, so we were quite happy with the processing. We fear that in the excision territories and perhaps in the third countries there is still a question mark.

Senator PAYNE—What is the basis of those fears?

Mr Gabaudan—It is because we do not know. As I said, we came across one difference which we think is substantive. We do not have reason to suspect that everything is wrong—certainly not. Particularly as it is said that it copies our own procedures, we would like to have reassurance that this is indeed the case.

Senator PAYNE—As the chair has indicated, through the committee this morning I requested a copy of those guidelines, so hopefully they will be forthcoming sooner rather than later, and we can all have a look at them.

CHAIR—Just on that, you say that traditionally your assessment has been that our process has been first-class, but part of that process has been the independent Refugee Review Tribunal, which the UNHCR, for quite some time, thought was an imperative part of the process.

Mr Gabaudan—That was the review process. We do ask that there be a review. The way governments set up the review mechanism varies from one government to the other, but it is an independent review process.

Senator PAYNE—This, of course, goes to point 7 of the explanatory memorandum for the bill, which says that the Commonwealth will continue to ensure that appropriate arrangements for Australia to fulfil its obligations under the UN Convention. Relating to the status of refugees and under other relevant international instruments, will exist. That is what we are all working with here—that statement in the explanatory memorandum, essentially.

My other questions go to the definitional matters I raised with the department this morning, because they were raised in your UNHCR submission. At page 2, points 6, 7 and 8, you raise some concerns in relation to terminology—that is, the use of the phrases 'unlawful asylum seeker', 'safe third country' and 'resettlement'. In this bill—which, as you know, is a very small document, relatively speaking—those pieces of terminology do not necessarily occur. For the benefit of the committee—and these may be questions that you would rather take on notice—could you be more specific about where you think these problems exist? What are the inconsistencies? What are your concerns? If it is the head legislation, the migration legislation

or the previous excision legislation, that makes it a little easier for us to address the concerns that you have raised.

Mr Gabaudan—We refer to the bill, to the legislation and also to the debate.

Senator PAYNE—There is not much we can do about debates, I am afraid.

Mr Gabaudan—No, but we wanted to take advantage of this submission to set the record straight on what we consider to be important questions of definition. The word ‘resettlement’ has been clearly used by the minister for immigration and DIMIA referring to the arrangements for Australia to take some of the refugees in excised areas. The words ‘safe third country’ are used. Regarding ‘lawful asylum seekers’, in the second reading speech the minister mentions unlawful arrivals seeking asylum afterwards, so there is an indirect reference to that. We have heard that expression and perhaps an even more forceful one used repeatedly. We just wanted to make it clear that in our view there is no such thing as an unlawful asylum seeker. It was more a matter of pre-empting.

Senator PAYNE—That is what DIMIA thought you would think. I will have to commend them on their prescience!

Senator BARTLETT—You have talked about how, as you understand it, the government follows UNHCR guidelines, with the exception of the situation you mentioned, which I will get to in a minute. Could you outline how important those guidelines are? In some respects guidelines appear to be just for assistance rather than anything more important than that. These are guidelines that have actually been established by EXCOM decisions, is that right?

Mr Gabaudan—Yes.

Senator BARTLETT—So are they the bottom line in terms of what is needed to ensure that the basic protections of the convention are applied?

Mr Gabaudan—Certainly. Nevertheless, almost every year our executive committee calls upon states which have signed the convention to try to give a more generous reading rather than a strict interpretation of the guidelines. We are only an international administration; we have no sovereignty. We have to apply the strictest reading of the guidelines. Over the last decades many governments, particularly in the industrialised world, have adopted a more generous reading of the convention grounds. This is encouraged by our own executive committee.

Senator BARTLETT—But the guidelines themselves are, if you like, a bottom line.

Mr Gabaudan—Yes, they are the minimum standards that we consider would protect people from refoulement.

Senator BARTLETT—You have probably already answered this—I might not have been listening properly—but is it your understanding that DIMIA are using your handbook on procedures to make their determinations?

Mr Gabaudan—As I said, from the consultations we have had in Nauru, where we have had to work pretty closely, in general we are satisfied that there is a large degree of understanding between our procedures and theirs. However, we have not cross-reviewed cases so we cannot make a specific comment. As I said, we came across one instance where we did have a substantive difference.

Senator BARTLETT—I will explore that instance a little further now. Does that apply to a number of people?

Mr Gabaudan—Yes.

Senator BARTLETT—Basically the spouses of people who are already in Australia on protection visas?

Mr Gabaudan—Exactly.

Senator BARTLETT—Are you able to say how many people are in that situation?

Mr Gabaudan—I think there are seven families. We got some mail this morning from these people, requesting our views, and we will certainly convey these to the government. I think it is seven families, but I would like to put the number in brackets and perhaps confirm it to you later. Those are from the DIMIA caseload, of course. We have personally recognised the families of persons with TPVs here in accordance with our own guidelines.

Senator BARTLETT—So, in respect of the ones that you and UNHCR assessed, you applied that derivative status. In that sense you have acknowledged them as engaging protection obligations. Have those people been resettled in Australia, or are they also still potentially sitting on Nauru?

Mr Gabaudan—For those we have assessed, who had immediate relatives in Australia, we have submitted the cases for resettlement in Australia, and we understand that the government is favourably considering their admission. One family has already gone for urgent health reasons.

Senator BARTLETT—That gets to a point I raised with the department earlier. Obviously for those people you have assessed—not just those with derivative status, but particularly those who have immediate family links in Australia—it has in some cases been months since that assessment was made. As paragraph 27 of your submission says:

The ongoing detention of persons recognized as refugees is ... in breach of Article 26 of the 1951 Convention.

It seems to me to be a pretty clear-cut breach. I presume you have raised this concern with the government. Is there any movement in relation to that?

Mr Gabaudan—We have indeed raised concerns with the government in writing and we have been requested to address our concerns to the government of Nauru. We have done that and we have been sent back to the government of Australia, so we are in this discussion at present.

Senator BARTLETT—So the Australian government said, ‘It is a matter for the government of Nauru as to whether they let people out of detention camps,’ and the government of Nauru said, ‘We are operating under the agreement with Australia’?

Mr Gabaudan—Indeed.

Senator BARTLETT—The other key thing that struck me in your submission relates to family unity. That is not specifically dealt with in the refugee convention? Is it covered by EXCOM determinations?

Mr Gabaudan—It is not an element of the convention. When the convention was established the introductory statement did refer to family unity, and since then it has been the object of numerous conclusions of EXCOMs. We consider that it should be an international standard, as it has been repeatedly requested that we apply that criterion.

Senator BARTLETT—Is the failure of Australia to allow or facilitate family reunion—not just in this case; it is specifically prohibited under the temporary protection visas as well—unusual by global standards?

Mr Gabaudan—I would consider that among the industrialised countries with whom we cooperate this would be an exception.

Senator BARTLETT—I was recently in Indonesia and met with some of your officials there amongst others. I cannot remember the precise numbers, but there were certainly some hundreds of people in Indonesia who had been assessed by UNHCR and to whom UNHCR was basically paying money to assist them to survive whilst you were trying to find somewhere for them to resettle. Is the fact that Australia is trying to resettle people from Nauru and PNG impacting on your ability to quickly resettle people from Indonesia?

Mr Gabaudan—This is a difficult question, but I do not think so. We had difficulties in Indonesia at the beginning of the interdiction program when very few countries were responding to our requests for resettlement. Australia was slow in responding, but other countries were also slow. Since later last year things have slowly picked up, and this year we are really catching up. Right now I would say that we are almost up to normal speed in our success with resettlement. At the beginning we were very slow and I think that led some people to leave our offices and never come back and perhaps keep moving on. Now we are more or less back on track. I have some statistics to give you. We have 246 people who have departed, 160 who have been accepted and are just waiting to depart, 219 who are still waiting for a decision from the resettlement country and 462 who still have to be resettled. Those are the cases we are still processing. It is a much more even picture than we had a year ago. These figures are as of 30 June this year. I can provide them if you are interested.

Senator BARTLETT—That would be good. This is not outside the scope of the legislation, in a sense, but under the temporary protection visa that has been established and particularly as part of the associated legislation, as I understand it, if people who are intercepted on excised places ever get a visa to Australia, they will get a rolling temporary visa. That is, they will never qualify for a permanent visa unless the minister decides otherwise. How does that fit with obligations under the convention and with EXCOM decisions? You raised in your submission

problems with some of the terms, particularly with resettlement. If someone can never become a permanent resident, is it accurate to say that that is a form of resettlement?

Mr Gabaudan—For those who come from declared countries or third countries, the government considers it a resettlement. I think it would be difficult for us to argue with that, though one could try to make a case that they had come to Australia initially. For those who are taken in from excised territory, we think the word ‘resettlement’ is wrong and would create a precedent worldwide. That would not be proper, because resettlement is a discretionary authority of the country, while the granting of asylum is a convention ground. The resettlement program of Australia is one of the top ones in the world. It works perfectly well, it is generous and it cooperates very well with us. I do not mean to make any derogatory comments vis-a-vis this program, which is well established and which we value very much, but we think that, for people who have reached Australian territory and who are in excised areas, ‘resettlement’ to the mainland is the wrong use of the term. We would be worried if that were to become the international understanding of the term in the future. This is not the understanding elsewhere.

Senator BARTLETT—People on temporary protection visas do not get access to that resettlement program, as I understand it, in Australia.

Mr Gabaudan—Those who would be taken in Australia would be given a temporary protection visa as part of the resettlement quotas.

Senator BARTLETT—They would come under the quota but would not get access to the program that you were just praising?

Mr Gabaudan—To the full program, no.

Senator BARTLETT—In terms of people being on a temporary visa potentially for the rest of their lives, does that in any way breach the convention or EXCOM conclusions?

Mr Gabaudan—No. The fact that protection is temporary is recognised by the inclusion of a cessation clause in the definition of refugees. We understand that, when conditions have changed, promotion should be made for people to return home. Nevertheless, the convention in article 34 suggests that states should facilitate the assimilation and naturalisation of refugees as a way to give them the most productive lives and a way to start new lives. So it is not a breach. We consider a breach to be some of the attributes of the temporary protection visa, particularly the lack of travel documents; that is a clear breach of one of the articles of the convention. As I say, family reunification is inconsistent with numerous EXCOM conclusions.

Senator BARTLETT—Could you point out which article it breached?

Mr Gabaudan—Article 28.

Senator KIRK—I refer you to paragraph 11 of your submission, at the top of page 3. It reads:

... where such legislation limits access to territory for individuals seeking asylum who may be subject to persecution for a reason articulated therein, consideration should be given to the prohibition against refoulement, as contained in Article 33 and the prohibition against penalising unlawful arrivals for their illegal entry or presence, as contained in Article 31 ...

Could you outline the provision in article 31 and detail why you think there might be a breach of this article in this legislation?

Ms Cullen—I do not think that we are saying there that there is a breach of article 31. We are just saying that in any system it is necessary to ensure that the principle of non-refoulment is respected, as is article 31.

Senator KIRK—Do you believe that article 31 is respected in the legislation as it stands?

CHAIR—Would you like to consider that further?

Mr Gabaudan—We will consider that. Shall we write to the committee?

Senator KIRK—That would be good.

Mr Gabaudan—We will do that. I think it does require a considered answer.

Senator SCULLION—I understand that the convention does not actually give a refugee the right to seek protection in a particular country. Is that correct?

Mr Gabaudan—Yes.

Senator SCULLION—In evidence earlier this morning, people spoke to me about a regional cooperation model that is being funded by Australia, but which is a partnership between the UNHCR and the International Organisation for Migration. I understand this is to further assist and facilitate the processing of applications in Indonesia. What is your assessment of that process? Is it a worthwhile process?

Mr Gabaudan—The government has set up an interdiction—bilateral arrangements—with Indonesia to try to get Indonesia to stop people who are en route to Australia and make sure that they are processed there. As Indonesia is not party to the convention, we have to come in and do the processing, which we have been doing with Australian support. In this respect, there is a regional arrangement. Initially, we were not part of the interdiction agreement. As I mentioned before, initially the persons we had assessed to be refugees were finding very little durable solution in Indonesia because Indonesia was certainly not prepared to give them any sort of local integration. We were extremely unsuccessful at resettling them. The international community did not answer very quickly. These people were probably on the move because they had some protection problems and certainly no durable solution in the places they came from. At this time, we felt that the interdiction was not very successful. Now that we are able to resettle them, I think it might be a little more useful. Only the future will tell to what extent we can sustain the work we have engaged in in Indonesia.

Senator SCULLION—I think it was Ms Cullen who said, quite rightly, that we are effectively discriminating against people who come to Australia in a certain way. People who are, for

example, overstayers or who make an application through an airport have different rights. I have spoken over the last week or so to a number of principally indigenous people across the islands of our north who say that they have certain rights of protection. They do not say this in regard to the people who are on the vessels, but in regard to some of the dangers that exist with the bio-fouling on the boats, which have the capacity to have a huge impact on their lives and their culture. It is always about a balance of rights. What do you think I should be saying to those people? At the moment many of them say that this is a good thing and that this excision means a further protection for their islands and their places. What should I say to them about their rights?

Mr Gabaudan—First, Australia, as a country, including all its territory, has voluntarily subscribed to the convention. I think it was the sixth country which subscribed to the convention. It has engaged its responsibility and that of all its citizens to abide by the specifics of the convention. The other point is whether people have to stay on these islands. If they are very small islands, I can understand the local population may be concerned. It is just a point of entry. It would be difficult for me to comment further on what does become a question of how the government manages the flows of people.

Senator SCULLION—Thank you for that. It was not a mischievous question; I was just genuinely looking for assistance in that area because it is a little difficult. I also want to clarify one other comment you made in regard to the family reunions for people who are existing on temporary protection visas in Australia. There are people who are now held in an offshore place. Are you saying that we should extend to them the rights of being joined, irrespective of their refugee status?

Mr Gabaudan—Yes.

Senator SCULLION—If that is the case, then anybody who has a temporary protection visa in Australia, irrespective of how they arrive, would be in the same position—they could then send for their families, which they cannot do at the moment?

Mr Gabaudan—We are talking about spouses and minor children. We are not talking about extended families. We are talking about the nuclear family, really, because we think that is an international—

Senator SCULLION—You are talking about wives and children?

Mr Gabaudan—Yes. We are not talking about brothers and uncles et cetera. It would be very limited.

Senator SCULLION—You talk about industrialised countries. Is that reflected in those countries?

Mr Gabaudan—Yes. All industrialised countries grant family reunification on the basis of the nuclear family under different sorts of arrangements. Some give them refugee status and some give them refugee-like benefits, but basically they reunite them on their territory.

Senator SCULLION—I would like to clarify a response to another question as I am not sure that I caught the answer. In response to a question about the sort of process we are talking about now in relation to this interdiction process and offshore places, you said that there was nothing like it in other industrialised nations. Was that the response?

Mr Gabaudan—I am sorry. Could you restate that?

Senator SCULLION—I want to clarify your response to a question from Senator Bartlett who asked whether we have anything to compare that process to. You said that there was no similar situation in other industrialised nations. Was that your response to that question?

Senator BARTLETT—I think I was talking about the family reunion.

Senator SCULLION—Perhaps you can give me a direct answer on that. In the United States, as I understand, there is an interdiction process for people travelling from Haiti and Cuba. I understand that they actually process them at sea. They then go to Guadalcanal and are resettled—don't hold me on the definition—and they are taken principally to South America or other places. Would you have similar problems with the way the United States deals with that issue?

Mr Gabaudan—Yes. In this case, the United States takes them to the Guantanamo Bay base in Cuba, which happens now to be under lease and is therefore considered to be US territory. From there it tries to resettle them in South America. We have had arguments with the US government on this issue.

Senator SCULLION—So they are similar issues?

Mr Gabaudan—Yes, somehow, but they are not exactly the same.

Senator TCHEN—My question is also about family reunion. Generally speaking, do I understand that the other concerns that you have expressed about this legislation arise from some uncertainty about the intention in the detail of the processing rather than from firm concerns? Is that correct? You said you have a number of concerns about this legislation, but I understand from what you said in your submission and from your answers that you are concerned basically about uncertainties about some of the provisions.

Mr Gabaudan—Yes. The excision has an impact on the way the asylum seekers are processed and we are looking at some of the impacts. We have some concerns about the nature of the processing that is done. That is not yet completely clear—we hope to advance on that, but there is still a question mark. We have concern about issues of detention of asylum seekers, but mostly on the issue of the detention of recognised refugees and the limitation of their freedom in breach of the convention article. We also have concern about family reunification and travel documents. So there are impacts of the excision for asylum seekers.

Senator TCHEN—But those are possible impacts rather than known or defined impacts. A lot of these provisions are not actually spelt out and that is your concern.

Mr Gabaudan—I think that freedom of movement is definitely a direct impact. Family reunification so far has been an issue; we may be able to overcome it but it is still an issue. Regarding our concerns on refoulement, when we talk about our wish that readmission agreements be considered under the legislation before transfer to third countries is considered, it is just to make sure that in the future there is no risk that the third country will all of a sudden change its mind and decide to refoule these people in what we call 'refoulement in chain'. This is a risk. We have no evidence of that. We certainly do not suspect intent from the Australian government, but we are saying the legislation does not offer all the safeguards that we would like to see.

Senator TCHEN—Exactly. Because your concern will only become reality if the Australian government has a sea change in terms of its historic treatment of refugees.

Mr Gabaudan—We already have concerns about the issues of travel documents and detention.

Senator TCHEN—One of these concerns is about family reunion. Your position is that you believe that families of recognised refugees should be given the same status.

Mr Gabaudan—Yes.

Senator TCHEN—Can I put it to you that, logically, the reverse argument can be put? In respect of the immediate family of a recognised refugee claimant who has successfully claimed refugee status, and his or her immediate family is assessed independently and found not to be refugees, then logically the reverse argument can be true, namely, that his or her status should be reviewed.

CHAIR—I think this will be the last question!

Senator TCHEN—Isn't that logical?

Mr Gabaudan—No, I would disagree with that completely. Let me give a practical example. You have a man who has political opinions in a country where this is severely discriminated against, who escapes so as not to be jailed or tortured or whatever. His wife may not know anything about his activities but that does not give the international community the right to separate them forever, and that is why we consider that his family should be reunited with him. It could be the reverse; it could be a woman with political opinions and the man who does not know. We know of some countries where it has happened that, even if the spouse is not aware of the activities of the other person, he or she could very well be discriminated against just for the association. That is why we consider that the refugee status is important.

CHAIR—Senator Tchen, I am sure that you acknowledge that neither your spouse nor mine would be held responsible for our activities—

Senator TCHEN—The argument is that unawareness or lack of knowledge is a legal defence only in a community which is led by law. A country based on law, like Australia, does not create political asylum seekers. It is only in countries which do not respect laws that you find political

asylum seekers, and in those countries lack of awareness of a spouse's activities is not a legal defence.

CHAIR—I think we will take that as a statement. There is no need for an answer. In closing, I ask you to provide some information for the committee with respect to Iraq. Has the UNHCR internationally made any assessments of what might happen in the event of an invasion of Iraq and the outflow of people the world community might expect to handle as a consequence? You do not have to answer that now, but could you come back to us with information from your Geneva office?

Mr Gabaudan—I will give you a very simple answer: we do make assessments and we have contingency plans at various levels for the number of people that might move. Usually these things remain pretty much in the hands of some senior managers in our headquarters and I do not have access to this, but I do know from my experience at headquarters that any time there is such international rumour about a possible massive attack we do make contingency plans.

CHAIR—Can you find out any information as to whether they have developed plans? They do not have to tell us the confidential details but what level of expectation the world might have. On that note, thank you very much.

Proceedings suspended from 1.05 p.m. to 2.02 p.m.

McCARTHY, Mr Terence Barry, President, National Social Justice Committee, St Vincent de Paul Society

WICKS, Mr John Patrick, Vice-President, National Social Justice Committee, St Vincent de Paul Society

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Mr McCarthy—I am a member of the local conference of the St Vincent de Paul Society but I am here purely in the capacity of President of the National Social Justice Committee.

Mr Wicks—I am an unpaid volunteer of the St Vincent de Paul Society. I have been a member of my local conference in Canberra for about 25 years.

CHAIR—Thank you. You have lodged a submission, No. 19. Do you wish to make any amendments or additions to that submission?

Mr McCarthy—No, we do not.

CHAIR—I now invite you to make a short statement, at the conclusion of which I will ask you some questions.

Mr McCarthy—Thank you very much. First of all, I apologise for the absence of our national president, John Moore, who unfortunately was obligated to be in Tasmania this week. There was insufficient time for him or the vice-president to alter their arrangements.

At the outset, we would like to restate that not only are we opposed to the proposed amendments to the bill on the excision of parts of Australia from its migration zone, but we believe the entire bill should be rescinded. This bill, and other activities surrounding the handling of desperate people who are seeking asylum in this country, is a most important issue affecting Australia and Australians. It will help define who we are as a people and how we are seen by others. We have been concerned for some time that the demeaning and demonising of disadvantaged people, in this case asylum seekers, has undermined social justice in this country. It has done so by desensitising Australians about anything which is likely to disturb their comfort zones. It has given us all an excuse and rationalisation for acquiescence in harsh and unjust measures against disadvantaged people.

The St Vincent de Paul Society is an organisation of Christian volunteers who work with disadvantaged people in every part of this country. Each year, we visit about 800,000 people and about 300,000 homes. That is our core activity but by no means our only one. The others are outlined, albeit briefly, in our submission. As a society we have considerable experience in dealing with migrant and refugee issues. Indeed, the first Vinnies conference in Sydney was established in 1881 in the Rocks area, which consisted of hundreds of destitute people, most of whom were newly arrived migrants, many escaping from persecution and discrimination elsewhere. All had arrived by boat and most had paid their own fares. In the Rocks they found

plagues of rats, disease, squalor and degradation, yet these people recovered and helped launch Australia's independence and contributed to making this country what it is today.

Similarly, Vinnies was active in the late 1940s assisting hundreds of thousands of refugees and displaced persons who arrived in Australia after World War II. Since then, we have played a significant role in handling other groups, including Vietnamese, Kosovars and Cambodians. We are not without experience therefore in dealing with these issues. We are pleased that arrivals in this country so far, like our ancestors, have made Australia into a proud, multicultural country which had, up till recently at least, espoused an egalitarian and fair go approach to all. In our view, all humans are God's people and we have an obligation to show compassion to those who are disadvantaged.

Specifically, there are matters under three of your terms of reference which lead us to call for the rescission of the bill and rejection of the amendments to it. I would like to deal very briefly with the first one:

...the implications of excision for border security.

To us, there seems to be at least four implications which are false, the first being that it incorrectly implies that our borders are under threat from terrorists posing as refugees and asylum seekers arriving in Australia in unsafe vessels. Secondly, it seems to imply, incorrectly, that the legislation is necessary to address people-smuggling. Thirdly, it incorrectly implies that Australia's borders need to be protected from asylum seekers. Fourthly, it sends out a message that Australia is not concerned about people who are fleeing persecution.

We have difficulty in understanding why we have spent so far over \$1 billion to deter or to handle the arrival by boat of some 3,600 asylum seekers and gone to the extraordinary length of declaring some parts of Australia as not really parts of Australia. These efforts are not matched in any way by similar procedures or efforts to handle the 60,000 illegals who are in this country, most of whom arrived by air. Are not our borders under more threat from the latter group since this is the way any terrorists are more likely to arrive in this country?

Mr Wicks will now outline our concerns on the other two terms of reference.

Mr Wicks—Further concerns we have, senators, fall within terms of reference (b) and (f). Under (b), we address the effect of excision on affected communities and indigenous communities. We object to excision because the islands involved encompass fragile communities with unique cultures. They are fragile because they do not have modern transport and communication networks. They do not have modern food supply chains and housing availabilities. They have inadequate health facilities, especially to cope with diseases and other emergencies that a capital city medical centre might consider quite minor. Hence, these communities—and, let us face it, they are Australian communities—would be left open to a large range of threats and uncertainties. Under terms of reference (f)—‘whether the legislation is consistent with Australia's international obligations’—we feel it is not and see inconsistencies between the legislation and both the spirit and letter of these obligations.

By way of example: firstly, the Declaration of Human Rights, article 14, seeks to establish that everyone has the right to enjoy asylum from protection in other countries; secondly, the

1951 convention relating to the status of refugees says that the contracting does not impose penalties on account of asylum seekers' illegal entry; thirdly, there is the Convention on the Rights of the Child 1989, under which Australia is committed to protecting and ensuring children's rights; fourthly, the Covenant on Civil and Political Rights, article 12, regards freedom of asylum seekers within communities they have fled to. That is a summary of our main concerns and objections. We are now happy to answer any questions you may wish to raise.

CHAIR—I will ask you one question and then we will move to Senator Tchen, who I think has some questions as well. In respect of the last point you made—the term of reference (f)—on page 8, you state that the bill seems to be in breach of Australia's obligations under the Convention on the Rights of the Child. Would you like to elaborate on that?

Mr Wicks—We could go into great detail and spend hours looking at a convention but, very simply, when you sign up to a convention of that nature the object of it is to protect children in a refugee situation. You can get to a situation where you say, 'The children have got parents with them and we have to deal with this, that and the other,' and you can run around and find teeny-weeny little things which somehow get you out of your obligation to deal with it. But, let us face it, the basic thing we are saying is that we have signed up to an international agreement that we will look after the rights of the child. Regardless of the situations surrounding that, we feel we have an obligation to do so. To determine whether we are actually in breach, we are aware that we would have to go to a court and we could end up there for a year arguing the toss of this case, that case, and the rest of it, but the point is that we are still against the actual spirit of what we have signed up to.

Mr McCarthy—I think article 37 would almost categorically determine that we were in breach. I do not want to read out article 37 of the Convention on the Rights of the Child, but it goes through four phases. It says:

No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort ...

Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

Finally, it goes into a bit more detail. Article (d) says:

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

They are prevented from getting into this country and wonder how they will get that prompt action.

CHAIR—Thank you for that explanation. Senator Tchen, I thought I would let you go first this time.

Senator TCHEN—Now I have the hardest question to ask. Everybody knows what the St Vincent de Paul Society stands for. It is very difficult to ask questions of people with obviously good intention. However, could I go on to some of the issues that you have raised to see whether, in your earnestness, you have perhaps—using your term—misinterpreted what the government is trying to do through this bill.

Let me go through the four grounds of objection. You describe the unacceptable implications of this bill. Firstly, you claim that this bill implies that our borders are under threat from terrorists arriving in Australia in unsafe vehicles posing as refugees and asylum seekers. If that were the reason for this bill then, indeed, you would be right. But, quite frankly, I have never come across that claim being made anywhere by the government when presenting this bill. Can you indicate where you came across this claim?

Mr McCarthy—I am not able to go back on specific detail, but certainly, in the original Pacific solution there was no secret made of the fact that one of the reasons that you had to do all of this after September 11 was to stop terrorists coming into this country. We and a lot of others at that time said quite clearly and categorically that it would be a pretty foolish terrorist who decided he was going to enter this country on a leaky boat, risking his life. He would do exactly what a September 11 terrorist did in the United States—he would come in by aircraft with a valid visa. I cannot go back to the exact details, but there was certainly no secret of the fact that that was part of the explanation—that you had to go to some other solution, because you would have terrorists arriving on these boats.

Senator TCHEN—Yes, but it was not in regard to this bill.

Mr McCarthy—Surely this bill is just a part of a whole process of deterring people from entering this country and trying to prevent them coming in the numbers that they were apparently coming in.

Senator TCHEN—That is the inference you draw. I suggest to you that, in fact, it may not be such a safe inference because there is no direct link.

Mr McCarthy—I think we would have to disagree with you somewhat and say that that was certainly an implication that we gathered out of hearing people proposing a whole raft of stuff with regard to dealing with asylum seekers—that that was one of the reasons why they were acting in the way they were. I did not think this was different from any of the other legislation.

Senator TCHEN—That is the important point—if, indeed, this bill was based on a claim or a clear implication such as this then, obviously, this bill would be a faulty bill. But my suggestion to you is that, if you look at the bill and the minister's second reading speech, nowhere is there any claim like this.

Mr McCarthy—If you gave me time I do not think I would have too much difficulty in finding other comments from the minister on other issues. I do not see how you can separate this particular piece of legislation from all of the other activities that are combined into the way in which the asylum seekers who have come into this country are being dealt with. You are not suggesting to me that this is something quite separate from the overall plan of how you deal with asylum seekers when they come into the country?

Senator TCHEN—No, this is part of a legislative process to deal with the problem of people-smuggling, which is an industry that brings people from other parts of the world into Australia without authorisation.

CHAIR—This might be a good conversation, but we should move on.

Mr Wicks—I would like to say that it seems very strange to me that every other country in the world has got a problem with trying to incise islands—Gibraltar, Spain, England, Morocco and the islands off Morocco, the Paracels, the Philippines, Vietnam and China are all fighting over islands. We are the only ones that are trying to excise them. You have got to say to yourself: are we the only ones in the world who have this problem? You have to look for unstated reasons behind what we are doing. It seems very strange that we are the only ones that are doing this.

Senator TCHEN—Can I move on—

CHAIR—It might be a good idea.

Senator TCHEN—I would like to quote from the minister's second reading speech—perhaps you have not heard this before. When this bill was introduced it was actually World Refugee Day. The minister reminded the parliament of that and he said:

The significance of this day should not be lost on this debate, a debate centred on strong border protection thereby enabling Australia to provide effective resettlement options for those refugees in the most vulnerable of situations.

Have you noted that statement before?

Mr McCarthy—We say it is an incorrect interpretation and a way to deal with people smugglers. As we have said in our submission, this is a country that involves itself in so much international law and international trade and in a whole range of aspects of business. For example, if you have problems with a business then you deal with them in a lawful way. It just so happens that I had a bit to do with refugees in the times of the Vietnamese refugee crisis. There were people who were supposed to be people smugglers, but we did not go into this detailed way of handling it then. We had the countries of first asylum accept responsibility for handling these people, and we helped to finance that. Because it was done under the auspices of the United Nations High Commissioner for Refugees, there was a process by which the world accepted responsibility for sharing the load of all of the refugees. In those days, we had a queue and we had a way of dealing with them.

We think this is a bit like using an elephant to crack a nut: you are going to deny a group of people social and international justice because there is an element of people who are helping these people come to Australia. If they are acting illegally, our view is that you should deal with them as if they were acting illegally. But, if they are not acting illegally, they are in a situation no different from that of my grandparents, who came to this country in the 1870s. They came on a boat and they paid for their fare, too. They did not have a visa when they came. Nobody asked them to come. They came out here—and they were not exactly terribly welcome—and they settled, as have hundreds of thousands of others in other times and that is how we have the country we have now. If people smugglers are a problem and if they are acting illegally then

deal with those people as if they are acting illegally, but do not punish the people who are on the wrong end of it. That is what we are saying.

Senator KIRK—On page 7 of your submission, you suggest, ‘The Bill which is being proposed will be arguably contrary to Australia’s obligations under international law,’ and you set out article 31 of the Convention relating to the Status of Refugees. Could you elaborate on why you consider that there might be a breach of article 31 in this legislation?

Mr Wicks—As we say in the submission, the convention says:

A Contracting State shall:

... not impose penalties, on account of illegal entry, on refugees coming directly from a territory where their life or freedom was threatened ...

It continues:

... accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals ...

Senator KIRK—Perhaps you could tell us what you think the nature of the penalty is. How does the penalty manifest itself in this legislation?

Mr Wicks—The penalty is being imposed now. You only have to have read yesterday’s newspapers. We are treating them worse than we are treating the criminals in our jails. I think there were articles in the paper yesterday saying that some of our worst criminals—who are incarcerated in major prisons in Australia for having committed major crimes—are better treated than the refugees.

Senator KIRK—I understand that, but you are referring to this legislation in particular. I wonder how you say a penalty is imposed by this legislation itself. What is the nature of it?

Mr Wicks—The penalty?

Mr McCarthy—The penalty is denying them the right to a visa. We are denying them the right to come into the place and to get one.

Mr Wicks—Yes, and we are locking them up.

Senator KIRK—So you are saying the inability to apply for a valid visa is a major penalty?

Mr McCarthy—And the inability to exercise their international rights. I will note quote the International Convention on Refugees but if, for any of those three reasons, they decide that they will apply for asylum they have no rights to do that. They are being punished. As we say at the end of our submission, we do not know what is going to happen to all of these people. If they arrive on some small island in the Torres Strait and they say all of a sudden, ‘We want to apply for asylum,’ and they are told, ‘You’re not in Australia,’ they might well ask you what seems to me quite a legitimate question—and one which we would be interested to know the

answer to—‘Where are we?’ They might say, ‘Now that we are on a piece of land or in sight of land, under whose laws can we apply for asylum?’ Do you have an answer to that?

Senator KIRK—I did not think it was my role to provide the answers, just to ask the questions.

Senator SCULLION—Your submission is excellent and I certainly support the general work that the council does. I note with interest your comments in regard to affected communities, principally Indigenous communities. By and large, not many islands off the north coast are not characterised in that way. I asked a witness from the Federal Police about the impact of the existing excisions that we have done. He said that there has been a great impact: in 1999 there were more than 30 boats; in 2000 there were more than 30 boats; in 2001 there were fewer than 30 and more than 20; and since then we have had none. So there has been an impact. You say that the communities that have these fragile infrastructures and unique cultures are going to feel the brunt of the arrival of these asylum seekers. In this area, from all the evidence and expert opinion that I have been given, I believe that this legislation will be a deterrent. In fact, when we have this legislation in place, people will not seek to come to the islands because they cannot get a migration outcome. They will not seek to come here. So in fact this legislation prevents people from going there and it actually assists these island communities. What do you say to that?

Mr Wicks—Can I pose a question to you, Senator? Which is the biggest deterrent to you? Say you were a little Afghan who came out of nowhere. If someone came to you and said, ‘Australia has excised a couple of islands,’ or, ‘Last week 350 people drowned when a boat was trying to get through,’ which would be the biggest deterrent?

Senator SCULLION—I was going to get to that.

Mr Wicks—I know which would be the biggest deterrent.

Senator SCULLION—I appreciate your comments, but I will stick to the question. This acts as a deterrent so, as far as the people in these communities are concerned, if these people are not choosing to come to their islands because that does not give them the migration outcome they may require, surely it is going to be of assistance to those communities. Would that be right?

Mr McCarthy—Where are they going to go?

Senator SCULLION—According to evidence given this morning, they will choose countries apart from Australia. I am not trying to avoid why you have said these things, but several submissions have stated that international obligations can be met through other processes. Certainly, in Indonesia the Australian government have set up the regional cooperation model whereby, through UNHCR and the International Organisation for Migration, they can triage people, so their rights are protected.

Mr McCarthy—I am not an expert in this, but my understanding is that the UNHCR have been operating in Indonesia for some time and have been declaring people refugees. Over a three-year period we accepted fewer than 20. Is that not so? I understand that they were not taking out of the UNHCR camps people who had been declared by the UNHCR to be refugees.

If Australia were not taking them, they will bypass the system and say they will go the other way. These are pretty desperate people.

Senator SCULLION—I do not think this is the place for a debate on how many placements Australia offers. It has been an issue here—

Mr McCarthy—It is, if you do not mind my saying so, Senator, if you are saying that there is a system in place. If there is a system in place, I do not see any evidence that it is really working.

Senator PAYNE—I am confused, Mr McCarthy, if I might interrupt Senator Scullion momentarily, and he will certainly stop me if I cannot. Are you talking about Australia's permanent settling of refugees through the UNHCR system versus our intake of 12,000 per annum, which is the stated intake on the books of DIMIA?

Mr McCarthy—Are you talking about what you call the refugee and humanitarian program, as I understand it is?

Senator PAYNE—Yes.

Mr McCarthy—I am not putting any judgment on that program at all.

Senator PAYNE—I see; I misunderstood you. I thought that you had said something about only 12 being accepted, but was that through the UNHCR process?

Mr McCarthy—From Indonesia, I understood.

Senator PAYNE—Thank you for that clarifying that.

Mr McCarthy—I did say that—from Indonesia.

Senator PAYNE—Thank you for clarifying that.

Mr Wicks—There is another crucial issue that was inherent in your comments, Senator. If we can excise these islands, these refugees can go somewhere else. Now, you tell me where they are going. They are going to Pakistan, one of the poorest countries in the world. There are more than two million refugees stacked high in camps there, ridden with disease and facing huge problems. Where else do they go? There is Papua New Guinea or Indonesia, one of the poorest countries in the world. Isn't that marvellous? Australia, one of the richest developed countries in the world, says 'Go away.'

The basic way to stop refugees is to increase the standard of living in those countries. Let's look at our performance in assisting with that. For example, look at Pakistan which is overloaded with refugees at the moment. We spend \$1.7 billion on overseas aid. The whole of South Asia, including Pakistan, got a miserable \$92 million. You spend \$500 million keeping people out and you give the country that is most affected by refugees a miserable \$92 million. You look at the trade with Pakistan. We export \$400 million worth of goods to Pakistan; we import half of

that—\$200 million worth. Gee! We are really helping these countries to stop the refugee flow, aren't we? And what is our answer? Go somewhere else.

CHAIR—Thanks for the forceful arguments, Mr Wicks. It has only been half an hour but we have to go to a teleconference. Thank you for the submission, for the work you have been doing over the years and for some of the very telling arguments you have put before us today.

[2.32 p.m.]

LINDSAY, Mr Robert Erskine (Private capacity)

CHAIR—I welcome you, Mr Lindsay. Please state the capacity in which you appear today.

Mr Lindsay—I am the chairman of the Western Australian branch of the Refugee Council and I appear with their concurrence, obviously. However, chiefly I want to speak to you as a barrister who has argued both on behalf of the minister on occasions and fairly frequently for asylum seekers in the Federal Court and occasionally in the High Court.

CHAIR—You have lodged submission No. 10 with us. Do you wish to make any amendments or alterations to that submission?

Mr Lindsay—No, thank you. Though, please be mindful that that submission was made in regard to the initial reforms and amendments to the legislation last year rather than the most recent excision legislation.

CHAIR—Yes, but you resubmitted it on 29 July this year in respect of this inquiry and that is why we have sought to discuss it with you this afternoon. Would you like to make a short opening statement at this stage?

Mr Lindsay—Yes, certainly. First of all, I would like to address very briefly term of reference (f):

whether the legislation is consistent with Australia's international obligations.

I heard the last speaker and the general exchange which took place in regard to that. My submission did refer to Professor Goodwin-Gill, who is probably amongst the three most notable academic commentators on refugee law. On pages 30 and 31 of his book on refugee law on pages 30 and 31—this book was written in 1996 so you will appreciate it was not written with any particular reference to Australia's legislative initiatives—he said:

Similarly, the developed world has expended considerable energy in trying to find ways to prevent claims for protection being made at their borders, or to allow for them to be summarily passed on or back to others. 'Interdiction', 'visa requirements', 'carrier sanctions', 'safe third country' concepts, 'security zones', 'international zones', and the like are among the armoury of measures recently employed. The intention may be either to forestall arrivals, or to allow those arriving to be dealt with at discretion, but the clear implication is that, for States at large, refugees are protected by international law and, as a matter of law, entitled to a better and higher standard of treatment.

I mention that because it is clearly his view that this sort of approach of excising territories is an evasion of international law. I listened to the debate on article 31 of the refugee convention. Whether article 31 is at odds with this legislation depends upon the interpretation of the word 'penalties'. But it would be open to say that not permitting people who are, in effect, not allowed to make ordinary applications in Australia and are therefore deprived of the opportunity to have their matters heard through the normal appeal processes, might be construed as amounting to a penalty. I do not say it definitely does, but it might do.

Other perhaps relevant provisions—and I will not dwell on them—contained in the International Covenant on Civil and Political Rights include, notably, article 9 rule 4, which deals with a person deprived of liberty by detention being allowed to take proceedings before a court to decide whether the detention is lawful; article 14 rule 1, which again goes to rights and obligations of persons at law; and articles 16 and 26, which provide for the equality of all persons before the law and their entitlement to equal protection under the law. In regard to the Convention on the Rights of the Child, article 22 and article 37(d) deal with the rights of children who are seeking refugee status to:

... receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the ... Convention ...

The tenor of what I am saying in regard to the excision legislation and its implication is that the ordinary processes for review and for examination of whether an individual qualifies as a refugee are not available in these circumstances. Having said that, I acknowledge that there were problems with a system which had an endless number of potential appeals. I think the problems largely stem from the fact that the resources were mostly on one side. Having appeared as counsel for the minister, one is very conscious that you are in court up against someone who is generally unrepresented, who very often does not understand the language of the proceedings and, although they have been supplied with a copy of your submission, as often as not he or she really has not had anyone interpret it for them. They automatically appeal to a full court if they lose before the tribunal or before a single judge at the Federal Court, not properly understanding the reasons upon which the matter has initially been decided against them.

There were problems with an adversary system which depended upon some sort of parity of resources which were not there. One acknowledges that some kind of alteration to the system of review was needed, because, as the minister pointed out at the time of the September reforms, it was a very costly system. But to have a system where people, in the case of those in the excised territories, really have their claims determined by a delegate—someone who is within the department—does not bring that impartiality and objectivity to the process, and they are deprived of review possibilities thereafter. Essentially, those are my submissions.

CHAIR—I will follow up with a couple of questions. With respect to that last point, you say that the normal processes for determination of refugee status are not available and you reflected on the need to have a degree of independence in that assessment process. What would be an adequate process? Could you point to some part of the convention from which you draw force for your argument?

Mr Lindsay—Taking your second point first, if you look at the provisions to which I referred earlier, they deal with equality before the law and they deal with the rights of people in detention to have access to judicial review, so there is an obligation in that regard. The first part of your question, which seems to me to be the crux of the matter, is, ‘If it is unsatisfactory, what can we do to make it better?’ I think we could probably look at overseas systems, and perhaps at Canada in particular. Canada has been taken as a model for the United Kingdom and some other new commonwealth countries. Someone like Dr Susan Kneebone would be much better placed than me to talk about the detail of it, but, as I understand it, both under that system and under the United Kingdom system, as your initial tribunal determining whether someone falls within the definition of ‘refugee’ you would have people who are genuinely independent—you might

have more than one, you might have two or three and they would be people who were selected for their independence.

It is very difficult, conscientious though many of them may be, for a delegate of the minister or a member of the Refugee Review Tribunal who is constantly dealing with asylum seekers who are making extravagant claims—and very often no doubt untruthful ones—to bring to bear an objective view on these things. So I think if you had a genuinely independent tribunal—they do not have to be lawyers of course; they can be laypersons who have got a balanced view of the whole issue—and then a right of appeal on a question of law by way of leave, and leave only, to the Federal Court—

CHAIR—Or reference for judicial review—you mentioned a reference to judicial review?

Mr Lindsay—Yes. Could you enlarge on that? I don't have the drift of your question.

CHAIR—Where do you find that reference? Which convention are you talking about?

Mr Lindsay—The reference to judicial review? Article 9 rule 4 of the International Covenant on Civil and Political Rights talks about how a person who is deprived of their liberty by detention should be entitled to take proceedings before a court and have the court determine the lawfulness of that detention. That of course is a covenant which Australia has signed. Article 14 talks about the need for a fair, public and independent hearing. Article 26 talks about equality of all persons before the law and entitles them to have equal protection before the law, which I would suggest includes the right to a court review of administrative decisions.

CHAIR—In your statement you also referred to penalties and you discussed whether the denial of a right to apply was a sufficient penalty. Are there any other penalties that you would like to mention in the context of a breach of the refugee convention or the ICCPR?

Mr Lindsay—I know it has been argued that the very fact of detention itself is a penalty. The argument is put that even if a resident of Australia is charged with a criminal offence they have a right to appear before court at set intervals to have the matter reviewed and here you have people who because they are unauthorised arrivals are put in detention. There is the argument that penalty embraces that. I must confess I have not researched the law in relation to what penalties signifies so I cannot say with any dogmatism that mandatory detention itself is a penalty. But I would think it is open to argument that it is and that it is a penalty that they do not have access to the court in the ordinary way.

Senator PAYNE—I have just one question, which goes to the matter of processing individuals who may arrive on these islands. The UNHCR raised with us earlier a concern at what they perceived to be a lack of formal procedures for the determination of refugee status in excised areas. I understand from some of your comments this afternoon that that is a matter which would be of concern to you also.

Mr Lindsay—Yes, that is right. Perhaps I could mention just one matter which may be of interest, simply because I am conscious that you are probably getting a lot of duplication of information and this is something which may not have been mentioned. It is the question of children and the role of the minister in regard to children. You may be aware that, under section 6 of

the Immigration (Guardianship of Children) Act 1946, the minister is guardian for non-citizen children and remains the guardian—whether or not their parents have arrived here—until they are 18 or they depart the country. As guardian, he has all the common law responsibilities, which includes acting in the best interests of the child. He has the right to delegate that function under section 5.

I should mention that there is a case which has been argued recently—and it has just gone for application for special leave to the High Court—on the question of the extent and scope of the minister's responsibilities. But to relate it to your question about procedures in excised territories, one of the issues may be in relation to children and whether or not the minister is properly carrying out those guardianship responsibilities or whether or not the person to whom the minister delegates those responsibilities is carrying them out. It was certainly the argument in the case I mention that, in fact, the minister had not been carrying out those duties in a satisfactory manner in regard to minors who were making applications for refugee status.

Senator PAYNE—Thank you very much for that. I was also going to say that in evidence which we received this morning from the Department of Immigration and Multicultural and Indigenous Affairs they indicated that they were a fair way down the road in terms of finalising proposed guidelines and would be able to make available to the committee that information in due course. We also discussed that with the UNHCR. That may perhaps clarify some of the practicalities in that regard—we hope.

Mr Lindsay—I suppose one's misgiving is simply this: even if the procedures are such that they give you reasonable satisfaction that there is a coherent and ordered procedure and a reasonably fair one, the legislation does preclude any kind of application to the courts unless the minister allows it. Therefore, even if the procedures appear fair, you are still going to be left with the problem that the people who are determining and overseeing those procedures are people who to some degree have a coloured view.

Senator PAYNE—I understand the point you are making although I would say that in discussion with the UNHCR they commented favourably on the assessment procedures in relation to refugee assessment that exist in Australia onshore currently. We will be looking at those documents to see whether they are a reflection of the onshore processes or whether there are substantial differences.

Senator SCULLION—I had the UNHCR confirm for me today that the convention does not actually give any rights for refugees to seek protection in a particular country. Further to that, I understand that Australia has an obligation under the refugee convention not to refoule asylum seekers. However, I understand that there is not actually anything in the convention that prevents us from sending asylum seekers to a third country to be processed. Given those two positions, I put it to you that Australia is not in breach of the convention. What would you say to that?

Mr Lindsay—Certainly there is nothing in the convention that I am aware of which stipulates countries to which a refugee can or cannot be returned, save that article 33 says that a refugee cannot be sent or returned to a country where he is likely to be at risk of life or limb. That is the extent of it. But, as I mentioned earlier, because of article 31 and the prohibition on penalties, I would have thought that it is strongly arguable that this would not justify us in in

effect penalising people who are arriving in Australia's territorial waters and landing on Australia's territories and not giving them the same rights as we give to others in processing their claims. As I say, this is not just a personal view but appears to be the view of Professor Goodwin Gill, who is an international authority in regard to it.

CHAIR—I do not think there are any other questions from other members of the committee. Thank you, Mr Lindsay, for your submission and your time and your constructive input to the committee.

[2.53 p.m.]

OO, Dr U Ne, Secretary, Network for International Protection of Refugees

CHAIR—Welcome. You have registered with the committee your submission, No. 24. Are there any amendments or alterations that you would like to make to that submission?

Dr Oo—No, I do not have any amendments, but I would like to make an opening statement.

CHAIR—I invite you to do so.

Dr Oo—Before I make my opening statement, I would like to encourage you to ask questions if you do not understand me very well. I did not fly here from Adelaide to be misunderstood by this committee.

CHAIR—We will try and understand you to the best of our capacities.

Dr Oo—My accent is difficult to understand.

CHAIR—We have a little bit of time.

Dr Oo—Could you also please speak a little bit slowly so that I can understand.

CHAIR—Sure.

Dr Oo—Firstly, I would like to thank this committee and the Romero justice community in Adelaide for enabling me to come here and present my organisation's view. I am U Ne Oo, a Burmese exile and refugee living in Adelaide. I was sent to Australia in 1988 by the Rangoon University physics department to do a doctorate under the Australian government's Colombo Plan scholarship, and I obtained a PhD in physics from Adelaide University. I applied for refugee status in Australia in 1992, and the government granted a refugee visa in 1993.

Since then, I have survived as a refugee in Australia and as an exiled person from Burma. Over the years, from 1992 to date, as a Burmese exile I have had an extensive involvement with Burmese democracy and human rights movements. As the committee members may have noted from one of the attachments to my submission, I began to be seriously concerned about the refugees in Australia in 1997-98. In response, I started a South Australian based grassroots refugee advocacy group, the Network for International Protection of Refugees, and its objectives are outlined in an appendix to my submission.

Our organisation seeks to address the government's views on the human rights of refugees and displaced persons at the policy level. In a personal capacity I am also involved with several other refugee support groups in South Australia. Our organisation is disturbed by the Australian government's continuing inhuman treatment of asylum seekers and refugees. Over the years we have seen the Australian government carry out misinformation campaigns about asylum seekers

and refugees in this country. Day after day the government ministers regurgitate untruths about asylum seekers so as to dehumanise asylum seekers. The children overboard scandal was one such example.

As the senators may understand, refugees in any society are marginalised and powerless. It is so unfair of the government to launch misinformation campaigns about refugees, because refugees have no capacity whatsoever to conquer such campaigns. This current amendment bill, just like many of the other government initiatives on the so-called border protection, is just poking around the refugee issue whenever the Australian government desires popular attention or wishes to create a political distraction. It is immoral for it to use refugees and asylum seekers as pawns to further its political agenda. Our organisation is greatly concerned that the Australian government is heading towards the old apartheid system of South Africa and will be shunned by the rest of the world.

Mr Chairman and committee members, you no doubt find it disturbing when you hear about the behaviour of human smugglers. You are disturbed when human smugglers exploit refugees and asylum seekers. You are distressed when human smugglers make money out of these vulnerable people. You feel outraged when human smugglers show callous disrespect for the wellbeing of their human cargo. You find human smugglers despicable because they make a profit out of vulnerable people, such as refugees. Now, here in this parliament, your very own government is using refugees and asylum seekers as pawns in its political agenda. The government exploited refugee and border protection issues to win the election. The government shows callous disregard for the lives of asylum seekers by intercepting and turning away refugee boats on the high seas. And, most importantly, the government has demonised and given inhuman treatment to refugees in order to sustain its political power. This is inhuman conduct committed on a grand scale by the Australian government, and it is much worse than what any human smugglers have done. I ask: don't you find that disturbing? I certainly find the Australian government's conduct inhuman, despicable and disturbing.

I would like to complete my statement by highlighting our organisation's recommendations. Our organisation, the Network for International Protection of Refugees, calls on the Australian government and the Prime Minister to:

- Apologise to the refugees who were being wrongly accused of throwing their children overboard
- Conduct an independent inquiry into the death of two women asylum seekers in November 2001
- Carry out speedy processing and resettlement of asylum-seekers who are held in off-shore detention centers
- Cease the interception of refugee boats on the high seas and put a halt to the Pacific Solution
- Repeal Temporary Protection Visa legislation of October 1999
- Remove existing excision bill of September 1001 and withdraw current amendment.

CHAIR—Dr Oo, you have given us a press statement from December 1998 in which you mention office-holders: patron, Sister Janet Mead, and chairperson, Reverend Martin Chittleborough and so on. Are they still your office-holders?

Dr Oo—Yes. The only change is in the executive committee members. This is the original document that was put out in 1998.

CHAIR—On page 2 of your submission you say that an analysis of unauthorised arrivals shows an increase in the percentage of women and children since the introduction of the temporary protection visa legislation in October 1999. Could you provide us with the sources of information that you relied on for that statement?

Dr Oo—I cannot give you out of hand which source I got that from, but I have been interested in these issues over the years, so I sourced this fact from somewhere. If the committee wants it, I will provide it to you.

CHAIR—Would you take that question away with you to find the source of the information and give it to the committee?

Dr Oo—Yes.

CHAIR—You also state that the policies are not well thought out in a legal and constitutional sense. Are you saying that there are some constitutional problems with the legislation?

Dr Oo—I am not a lawyer. That certainly does not help my capacity to fully comprehend all those legal and constitutional implications. But, as graduate activists and a refugee advocacy group, we take data from reliable sources like Amnesty International, Human Rights Watch and human rights committees.

CHAIR—If you could take that question away and find the source of that constitutional concern, you could come back to us with it.

Senator STEPHENS—Regarding your organisation's experience, perhaps you would comment on the impact of the restriction that refugees currently in Australia on temporary protection visas granted after 27 September 2001, who spent more than seven days in a safe country en route to Australia, will not be eligible for a permanent protection visa. This means that although the person may be recognised as a refugee, they will not be able to bring their family out to Australia, they will not be able to leave the country without their TPV being cancelled and, if they try to re-enter Australia, they will be deemed an illegal arrival. Has that been the experience of your organisation?

Dr Oo—Our organisation has more of an advocacy role, and I do not have a direct involvement with refugees and resettlement issues. I only look at the policy and policy implications of those refugees.

Senator PAYNE—There are number of statements you have made with which not every member of the committee would agree. I am probably going to indicate that there are number of statements that I do not agree with, but I am interested in a number of the points that you make in your submission. In considering that document and some of the aspects that you have raised today, what is your organisation's view of people who, some might say, in their role as people smugglers extort from, but most certainly exploit, vulnerable individuals and make them pay extortionate amounts of money to transport them around the world and bring them to places like

Australia in pretty average circumstances—of transport at least? What do you think about people smugglers at your organisation?

Dr Oo—The people smugglers do break the laws and they are not good people, but, as an organisation and human rights activists, we are more concerned about the government implicating the refugees in association with the human smugglers.

Senator PAYNE—I understand that that is your concern. Do you think governments, of any colour, who are in a position to do so, should make any efforts to deter people smugglers from doing what they try to do?

Dr Oo—I did not quite hear you. What did you say?

Senator PAYNE—I was wondering whether you thought governments in any context should take steps to deter people smugglers from doing what they do. Should we just let it go on all around us with little regard for the consequences either for the individuals being smuggled or for the people smugglers or for the recipient countries?

Dr Oo—If governments try to make refugees less exploitable, that would be a welcome initiative. But to my knowledge, Australia's human smuggling law and penalties are so tough already that if Oscar Schindler were still alive, even he would not be able to smuggle into Australia.

CHAIR—Thank you, Doctor. I think we can leave it there. The committee looks forward to receiving the information we have sought from you. Thank you and your organisation for your submission.

Proceedings suspended from 3.11 p.m. to 3.30 p.m.

LAFORGIA, Ms Rebecca, Lecturer in Law, Flinders University

FLYNN, Mr Martin, Senior Lecturer, Faculty of Law, University of Western Australia

CHAIR—Welcome. You have lodged a submission; would you like to make any alternations or amendments to it?

Ms LaForgia—No.

Mr Flynn—No.

CHAIR—I now invite you to make an opening statement.

Mr Flynn—Thank you very much for the opportunity to address our submission. It identifies one problem with the legal regime which is propping up the Pacific solution. The problem that we identify was introduced in the post-*Tampa* package of legislation that commenced in September 2001. The problem that we identify would be made worse if the bill which is the subject of this inquiry were to be passed. The problem is that the Migration Act provides for the detention of an asylum seeker who arrives on Christmas Island or, under the bill, an asylum seeker who arrives on any island off the north coast of Australia. The act enables the asylum seeker to sit in detention at Christmas Island indefinitely. That asylum seeker may be removed to Nauru, but the problem is that they may not be removed to Nauru. In short, that asylum seeker has no rights at all whilst they sit in detention.

I will briefly outline how this problem arises under the Migration Act, and then Rebecca will talk about why it is a problem. Imagine that I am an asylum seeker and I arrive at Christmas Island or, if the bill is passed, I arrive on any island off the north of Australia. The Migration Act says that I am an offshore entry person because I have arrived at what the act calls an excised offshore place. The Migration Act says that, as an offshore entry person, I may be detained. This would typically be at Christmas Island. It then says that I may be removed to a declared country—at the moment that is Nauru or PNG. But what if I am not removed? The Migration Act says that I cannot apply for any visa, including a protection visa, so I find myself in a position where I am in detention on Christmas Island with no possibility of release under the terms of the Migration Act.

I will then try and call a lawyer. That might be a practical problem, because no-one knows that I am sitting in detention at Christmas Island. Putting that to one side, the lawyer is going to tell me that the Migration Act says that it is true that I cannot apply for a visa unless the minister decides that I can make a visa application, and the minister must be satisfied that it is in the public interest to do so. So I say to my lawyer, ‘Well, let’s do it. Let’s write to the minister and ask him to allow me to make a visa application.’ The lawyer will tell me that the problem is that, under the Migration Act, the minister does not have to consider my request at all. In other words, under the Migration Act, the minister is not obliged to open my letter, and no court is going to force the minister even to consider my request to make a visa application. Therefore, under the Migration Act, I might continue to sit in detention on Christmas Island.

So the next thing I am going to do is to say, 'What about a court? Surely this situation cannot continue.' My lawyer is going to tell me that the Migration Act says I cannot go to a Federal Court because there is something called a privative clause in the Migration Act. The lawyer is going to say that the question about whether or not you can go to the High Court is itself a little bit confusing in the Migration Act. Assume for the moment that the Migration Act says that, as an offshore entry person, you may go to the High Court, what I need to realise, as an asylum seeker, is that the High Court, if it does have power, only reviews decisions which are possible under the Migration Act. In reality, I have no visa application decision for the High Court to review. The minister is not obliged under the statute to open his mail, so the High Court has nothing to review there. In other words, even if I get to the High Court my prospects are looking quite limited. That is the problem that we identify in the Migration Act. I will ask Rebecca to take it from there.

Ms LaForgia—You might ask: why did we set up this mythical person—this fictional person—who is on Christmas Island and why did we identify this gap? There were two reasons why we thought this was an important omission to take into account when considering whether or not the passage of this particular bill should occur. The first point is that the government announced in May 2002 that there would be a detention centre built on Christmas Island and this would house approximately 1,200 detainees. That suggests that at some point in the future the rights or otherwise of the offshore entry person will in fact become a very live issue.

The second point is that passed also in 2002 was the transitional movement act. The transitional movement act allows for the offshore entry person to come back to Australia for a limited purpose—perhaps a medical purpose; perhaps a legal purpose. This again shows the intersection which must and does occur because of the fact that Australia, while it is processing in Nauru or in Papua New Guinea, still retains *de facto* control, so if an offshore entry person does have medical problems they will be brought back to Australia—and that has been legislated for. Under both points we can see it is not a fictional case and it may be that there will be an offshore entry person on Christmas Island and that this gap will occur.

But what of it? Why should we be concerned about the fact that there are, as Martin has identified, almost no laws covering the offshore entry person? There is one primary reason that we should be concerned about that and that is that section 46A, which is the section which prohibits the application for a protection visa in relation to the offshore entry person, removes the primary way in which we have traditionally upheld article 33 of the refugee convention—the non-refoulement obligation. Traditionally, Australia has upheld that obligation via asylum seekers applying for a protection visa. As we have seen, that has been removed. So a very live question arises: how are we complying with the refugee convention for the offshore entry person who remains on Christmas Island? There is only silence in the legislation. By passing this bill what we would be doing is creating more offshore entry people and therefore potentially more people with no domestic legislation.

That was our second point. Putting to one side—if we possibly can—the important non-refoulement provision, there is a second point and that is almost a legal curiosity: we would be creating a further category of people—that is, the offshore entry person. That is essentially what this bill does; it creates more excised places so potentially there will be more offshore entry people. But still it has complete silence as to the domestic legal regime that would cover them. There is a curiosity in that respect. Surely the two should go in tandem.

CHAIR—I have two questions in response to that. I suppose the government would argue that, by setting up a process for assessment, albeit in Nauru or wherever, they are meeting their obligations under the convention. If the people are then returned to Christmas Island, the government have already met their obligations. What do you say to that?

Ms LaForgia—There are two distinct aspects to that question. The first is that it is made explicit that refugees will not come under the Migration Legislation Amendment (Transitional Movement) Act 2002. It will just apply to the classic offshore entry person, who perhaps has not had a determination process. That is a quite specific answer. But the broader question you are asking is: is there a substantive compliance with our non-refoulement obligations on Nauru or Papua New Guinea. Would that be correct?

CHAIR—Yes.

Ms LaForgia—There may or may not be. Senator Tchen, the gist of your question earlier on was similar to Senator Bolkus's: if we are complying with our non-refoulement provisions, be it on Nauru or Papua New Guinea, isn't that fine? The point is that we are not sure whether we are or we are not. I know that Senator Payne has called for guidelines. The very fact that, almost a year after we have been implementing this, we need this committee to call for that shows the large question mark that we have over it. We are not sure. What is the status of a question mark? What is the status of not being sure? It is more than a minor irritation. It actually goes to the heart of the non-refoulement provision. If the non-refoulement provision is to mean anything, then it must be a substantive right that, if you are a refugee, you will not be returned. A substantive right requires a certain element of publicness, accountability and lawfulness. When I say that we are not sure whether or not it is being complied with, when I say that it is questionable, that is actually a characterisation that we are not complying with the non-refoulement provision, because we have to be sure that we are—and it is ambiguous.

CHAIR—Would you say that the only way you can be sure is if there are obligations on the Australian government to act within Australian jurisdiction, and any obligation to act in Nauru or New Guinea, for instance, is unenforceable and uncertain?

Ms LaForgia—At the heart of it are almost questions of sovereignty and what sovereignty means. There is a sense in which we can say we should be free to process people wherever we want. We can set up legal fictional places such as Papua New Guinea and Nauru and we can say: 'Australian law is not applying there. We are going to create a new regime. We will try and make it fair but we are going to create a new one.' That really goes to the heart of what we can do as an Australian government. There is some guidance in the case of the minister against Vidalis on the question of cost in relation to the *Tampa* case. The government argued: 'We have to claim costs, because really you should not have been questioning what we were doing, which was a sovereign act, an act of state.' The justices, Justice French and Chief Justice Black—and, of course, Justice French was in the majority on the *Tampa*—strongly said: 'No, that misunderstands the nature of Australian sovereignty. Australian sovereignty is under the Constitution. It has to be under the rule of law, and the executive must always be under the rule of law.' Really, that is what we are coming to grips with here.

Mr Flynn—Could I add to this question of why we need to ensure that our domestic law is complying with the refugee convention if the government is saying that we are complying with

it. Australia is party to a number of human rights conventions, such as conventions concerning sex discrimination and race discrimination. In those two examples we passed legislation and we subjected all Australians, including the executive branch, to the obligations contained in those human rights treaties, because we recognised that the best way to ensure compliance with values and norms that we feel we ought to comply with is to ensure that our domestic law reflects those values and norms and to create systems to ensure that the judicial branch of government also has a role to play in relation to those values. Why would we not go down the same path in relation to the refugee convention, ensuring, essentially, that we do what we can within our system of government—where we place value on the rule of law—to ensure that our system is at one with the terms of the refugee convention, rather than leaving it to the executive to say, ‘In our view, we are doing what is necessary’?

Senator KIRK—Following the theme you set up there on the rule of law and judicial oversight of executive decisions, something that Mr Flynn was referring to earlier was the situation where a person is not removed, they cannot apply for a visa and, as you said, they might be detained without any prospect of release. They can apply to the minister, but the way Mr Flynn put it was that they could write to the minister, yet the minister might not open his mail and the court could not compel the minister to do so. I think you referred to section 75(5), and I just wanted clarification. Did you say that the High Court under that jurisdiction would only review a decision made under the act—that is, if the minister has actually made a decision?

Mr Flynn—I should clarify the position. Section 46A of the Migration Act—subsection 7—provides that the minister does not have a duty to consider whether to exercise the power to allow an offshore entry person to make an application for a visa. If the offshore entry person somehow got to the High Court and the Migration Act was interpreted so as to allow the High Court to review the minister’s conduct, they would find that the minister does not have a duty to do anything. There would be little joy in seeking to force the minister, using the High Court, to allow an offshore entry person to make a visa application. The Migration Act, in its own terms, does not provide that the minister need do anything.

Senator KIRK—So you are saying that there is no remedy available at all?

Mr Flynn—Precisely. What is important to realise about judicial review is that it is the court reviewing an administrative process to ensure that the decision makers have complied with the process according to the terms of the law. Where the law is silent it may imply, for example, that decision makers must ensure that there is natural justice, that they are not biased and all of those things that we value in terms of administrative decision making—or, I should say, at one stage used to value in the migration context. But the starting point for the court on the process of judicial review is the terms of statute itself. It simply asks, ‘Has there been compliance with the statute?’ A statute such as 46A, that says ‘the minister does not have a duty to consider whether to exercise the power’, is going to be a very difficult hurdle for anybody seeking to force the minister to exercise a power to enable an offshore entry person sitting on Christmas Island to apply for some form of protection visa.

Senator KIRK—So it is the nature of this non-compellable personal power and unfettered discretion that the minister has to do nothing that you take objection to?

Mr Flynn—It is exactly in the terms that you describe it. It is non-compellable and it is personal. As Rebecca explained at the outset, we have moved away from a system in which asylum seekers have a right to apply for a protection visa. Essentially, we have said there is a category of asylum seekers—offshore entry persons. If this bill is passed, any asylum seeker who does not reach the Australian mainland will not be able to apply for a protection visa in the Australian system.

Ms LaForgia—If the bill is passed, we will increase the number of offshore entry people who have almost no law covering them and who can simply sit on Christmas Island.

CHAIR—I take it one step further. We had some evidence this morning from the department that indicated that people would be able to apply—although they did not specifically say ‘for a protection visa’ but you might be able to help us on that—if they were in territorial waters but not within the migration zone. First, what is your view on that, if you have a view? Secondly, could you help us with the effect of the legislation? Does it excise merely the islands or does it excise from the migration zone the waters as well? Is it possible, for instance, for someone to come to the mainland, having not set foot on an island, and therefore be able to make an application?

Mr Flynn—You have asked quite a technical question, to be frank. I would not be confident answering a question as to the rights of a person who finds himself in Australian territorial waters so far as our visa system is concerned. I can say that, as is notorious, the act does provide that such a person may be removed to a declared country, but I understand you to be asking a slightly different question, which is: is it the case that somebody in territorial waters could somehow apply for a visa? I must say that my initial reaction is that it would be surprising, but I would not want to commit one way or the other. I am certainly happy to look it up for you, if you like, and to supplement our submission if you are interested in that question.

Ms LaForgia—I only have one thing to add to that, and it might be a good time to show my gratitude to all the people who prepared the *Bills Digest*. I do not think I could even understand this legislation without them, particularly Nathan Hancock. On page 5 of *Bills Digest* No. 176, which relates to the [Migration Legislation Amendment \(Further Border Protection Measures\) Bill 2002](#), he refers to the territorial sea argument and identifies a gap in the way in which the Migration Act, the creation of the offshore entry person category and section 46 intersect. It is in more detail than I can give, but his concluding point is that he believes that there may be a loophole. The history of this territorial sea argument is that he first identified it in the first raft of legislation that was introduced in September. He identified it briefly because it was odd that the *Tampa* scenario, which of course was within the territorial sea—and this legislation was brought in as post-*Tampa* legislation—may not even have been covered by this legislation. He has developed it further and made quite a detailed submission. Page 5 probably answers your question more fully than I can.

CHAIR—If you would like to think about it a bit more, and if there is anything either of you would like to add, we would appreciate hearing from you. Let me go to the prerogative writ argument. Once again, you may want to take this on notice. Under the Migration Act there is a codification of the rules of natural justice. Can you foresee a situation where the Migration Act is deemed not to apply—such as excision here—but where the prerogative writ power can apply and, as a consequence of the excision of the Migration Act, there is a broader discretion in the

High Court on how it utilises its power and the definition of natural justice? They would not be bound, for instance, by a Migration Act codification of natural justice.

Ms LaForgia—Section 494AA of the Migration Act does two things. Essentially it is your privative clause section, which stops the offshore entry person from challenging almost anything: they cannot challenge proceedings in relation to being an offshore entry person, their status as an offshore entry person or proceedings in relation to their being removed to a declared country. However, it does maintain the right under section 75 of the Constitution. Section 494AA(3) says:

Nothing in this section is intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

There are two points to that. In direct answer to your question, it seems to leave it in a purified form. That would suggest that it remains only subject to the privative clause in section 494AA(1), which does not refer to limitations of natural justice.

I draw the committee's attention to the fact that the inclusion of section 75 in this particular context could possibly be open to some sort of constitutional question, taking into account the submission from Martin, which is whether or not and how it can be applied full stop! But the inclusion of section 75 here is almost a rubber stamp. We know we have to include it. We know, at least in the context of migration matters, that the Constitution has almost been a nemesis, so we have to include the original jurisdiction of the High Court. So it is there. However, there is a real question about the reality of being able to access this original jurisdiction of the High Court. In relation to an offshore entry person being taken to a declared country, section 198 says that they can be placed on a vessel, that as much force as necessary and reasonable can be used, that they have no right to access a lawyer and that they have no right to challenge this. Yet we have this rubber-stamping, as it were, that says that you still do have the right under section 75 of the Constitution. A real question must be raised. If section 75 is to be substantive and meaningful in any context, perhaps there is an implied notion of at least not being able to be denied legal representation; Otherwise, as it stands here in conjunction with section 198A, it is fairly meaningless.

Mr Flynn—I would emphasise what Rebecca has said: that we need to be a little realistic here. We are talking about people on Christmas Island going to the High Court, and she has made the point very well. Senator, I think the question you are asking, to use the language of section 75, is this: if there are officers of the Commonwealth involved in decisions outside the Migration Act—for example, considering the issue of status under the refugee convention, perhaps with a view to hoping that some third country might take these asylum seekers—might the High Court visit those actions of those officers of the Commonwealth? I would not like to offer anything other than a very guarded opinion on that.

My initial thinking is that the phrase 'officers of the Commonwealth' is linked in section 75 to administrative law remedies, so the original jurisdiction is in relation to administrative law remedies. When we are talking about officers of the Commonwealth making decisions under the refugee convention, outside of the Migration Act context, it would not surprise me if the High Court were to say that it cannot be involved in supervising every activity of an officer of the Commonwealth, and that it is limited in section 75 to an administrative law function. These officers are doing something quite different from that, which is not tied to any statute or any

common law activity. In effect, the government is engaged in an activity under an international statute. I would not offer a concluded view, but you cannot take comfort from the reference to section 75 not only for the reason that Rebecca gave but also because the High Court might take the view that what these officers of the Commonwealth are doing on Christmas Island outside the Migration Act is not a matter that the High Court has jurisdiction to review.

Senator PAYNE—It is important to put on the record that a couple of legal and constitutional issues have been raised in Mr Flynn's and Ms LaForgia's presentation and in their written submission. In particular, the concept of what happens to an offshore entry person whom the government is unable or unwilling to remove from an excised offshore place is something that the committee should put to the department for their advice and response. In that process we may then need to come back to Ms LaForgia and Mr Flynn. I hope that is acceptable to them.

CHAIR—I think that is a proper way to proceed. Is that acceptable to you?

Ms LaForgia—Yes, certainly.

Mr Flynn—Certainly.

Senator BARTLETT—As I understand it, you are putting forward that people who are potentially going to be detained for long periods—for example, in the future detention centre on Christmas Island—in essence will have no legal rights.

Ms LaForgia—We have identified a legal gap, because section 46A says that the offshore entry person has no right to apply for any visa while in Australia. It does not matter whether you are taken to Baxter or anywhere else, because once you are an offshore entry person you are an offshore entry person. At the moment, you are taken and processed offshore, and then you have the right to apply for the 447 visa, which states that if you are an offshore entry person outside Australia you can apply for a visa. But our point is that this bill will create more categories of offshore entry person, coupled with the fact that there is going to be a detention centre. It is a live question: if you remain there, there are essentially no laws governing your refugee status and complying with the non-refoulement provision.

Senator BARTLETT—Or no legal rights with regard to the Migration Act, anyway.

Ms LaForgia—In relation to the Migration Act, exactly.

Mr Flynn—I should add that the Migration Act provides that these people may be detained, so it is the absence of legal rights combined with the real prospect of detention.

CHAIR—There are no other questions. Thank you both for your time and your most constructive input. I am sure we will have to get back to you, but only because the points you have raised really need addressing.

Committee adjourned at 4.04 p.m.