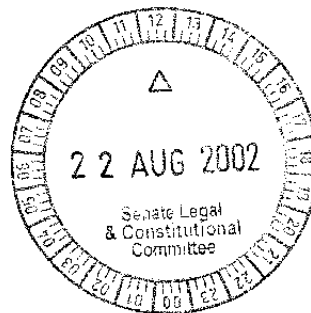




**DEPARTMENT OF IMMIGRATION AND MULTICULTURAL  
AND INDIGENOUS AFFAIRS**

Mr Peter Hallahan  
Secretary  
Senate Legal and Constitutional References Committee  
Parliament House  
CANBERRA ACT 2600



Dear Mr Hallahan

**INQUIRY INTO THE MIGRATION LEGISLATION AMENDMENT  
(FURTHER BORDER PROTECTION MEASURES) BILL 2002  
AND RELATED MATTERS**

I refer to the inquiry by the Senate Legal and Constitutional References Committee ("the Committee") into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 ("the Bill").

Representatives of the Department appeared before the Committee on 6 August 2002. During the course of the hearing, several questions were taken on notice. The Department's response to these questions are attached at Attachment A.

In addition, following consideration of the submissions received by the Committee, we would like to provide comments in relation to some of the matters that most commonly arise. Our response is attached at Attachment B.

I would also like to take this opportunity to clarify one matter discussed during the Department's appearance before the Committee. This related to the legislative bars (in sections 46A and 46B), which prevent an offshore entry person and a transitory person respectively from making a valid visa application in Australia.

Both sections permit the Minister to lift the bars, if he or she believes it is in the public interest to do so. If the Minister decides to lift the bar, he or she is required to table a statement to that effect in Parliament.

The Minister has exercised his discretion to lift the bars in one case – for a mother and her child, who applied for a Subclass 785 (Temporary Protection) Visa on 4 June 2002.

I confirm that the Minister is required to table a statement to this effect before both Houses of Parliament within 15 sitting days after 1 July of this year. This has not yet been done, but the deadline is not until the end of September 2002. The Department will submit draft documentation for the Minister's consideration shortly.



I trust that the attached comments will be of assistance to the Committee.

Yours sincerely

A handwritten signature in black ink that reads "Des Storer". The signature is written in a cursive style with a large, sweeping initial "D".

Des Storer  
First Assistant Secretary  
Parliamentary and Legal Division

21/8/02.

Senate Legal and Constitutional Legislation Committee Inquiry into the  
Migration Legislation Amendment (Further Border Protection Measures)  
Bill 2002 ("the Bill")

***Response to Questions on Notice arising from 6 August 2002 Hearing.***

***1. 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? (L&C 24)***

According to the Department's records, between 1 January 2002 and 20 August 2002, the Federal Court received 466 applications for review of decisions made by the Refugee Review Tribunal (RRT). This can be broken down as follows:

- 186 applications were received between January and March 2002, with 89 of these applications being from applicants in detention;
- 134 applications were received between April and June, with 29 of these applications being from applicants in detention; and
- 146 applications were received between July and August to date (as at 20/8/02), with 33 of these applications being from applicants in detention.

***2. Can you tell us whether there are any islands within the territorial sea of Australia, but not within the migration zone? (L&C 24)***

All islands within the territorial sea are part of the migration zone. The land from the low water mark of each island which is part of a State or Territory of Australia is part of the migration zone. This includes both those islands that are defined as excised offshore places and also all other islands.

***3. 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? (L&C 24)***

The Department understands that the report to which the Committee refers is the Senate Legal and Constitutional Legislation Committee Report on the Migration Legislation Amendment Bill (No. 1) 2002, which was tabled on 5 June 2002.

The Committee referred to two central issues that the Refugee and Immigration Legal Centre (RILC) had in relation to legislation enacted in September 2001, and has suggested that the Department discuss these matters with RILC.

The Government is currently considering its response to the Committee's Report. No discussions have yet taken place.

**4. *Has any contingency plan been made in the event that any boat coming into the migration zone has sick people on board?***

The migration zone is defined as the States and Territories, Australian resource installations and Australian sea installations. It includes all land that is part of a state at mean low water mark, and sea within the limits of both a State and Territory and a port and piers or similar structures.

We understand that this question is referring to the entry of unauthorised arrivals at excised offshore places. Unauthorised arrivals may be intercepted, detained and removed to a declared country. During all of these stages, contingency plans are in place to ensure the health and safety of these persons and the Australian community.

When an unauthorised boat arrival is intercepted, the people on board are asked if any person has a medical problem and an assessment is made of the health of those on board. This is advised to concerned agencies in a formal situation report. If a person is assessed as requiring a medical evacuation this is arranged.

Royal Australian Navy and Australian Customs Service vessels involved in the interception of unauthorised arrivals have personnel on board who have been trained to make a comprehensive assessment of illness and injury.

Apart from injuries, the most common medical conditions found amongst unauthorised arrivals are: sunstroke/sunburn; seasickness; dehydration; lice/scabies; pregnancy; tropical ulcers; heart conditions; STDs; gastroenteritis; and diabetes. Only a small number of unauthorised arrivals enter Australian territory with pre-existing conditions.

In all instances where it is suspected that a person is showing signs of a quarantinable (eg Ebola viral haemorrhagic fever) or prescribed (eg tuberculosis) disease, the Australian Quarantine and Inspection Service (AQIS) is notified. AQIS officers seek advice from the Commonwealth Department of Health and Ageing to determine appropriate arrangements.

On arrival at a declared country, Immigration Reception Processing Centre or other place, all unauthorised arrivals undergo medical triage. Depending on the numbers who have arrived and the reported medical conditions on board, a nurse or nurses are deployed. The nurse identifies those who need to be hospitalised or require other medical attention and these cases are given priority.

Additional resources such as medical practitioners or an ambulance are provided on arrival if required.

**5. 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? (L&C 24)**

We have ongoing and regular communications with our New Zealand counterparts.

The High Level Group of the People Smuggling Taskforce also invited representatives from New Zealand to participate in a one day information planning and scenario development exercise in February this year.

Information is passed on in a regular and timely fashion at post to Australian agencies and their New Zealand counterparts, and to the New Zealand mission in Canberra.

**6. What are the closest islands to the mainland within the zone? (L&C 24)**

The Department does not have access to the geospatial resources to answer this question. The Department is currently arranging a contract with the assistance of Geoscience Australia (National Mapping Division) to provide a definitive answer on the location of islands, many of which have no names. A subset of this contract, and only able to be undertaken once the task described above is completed, will be to identify those islands that are closest to the mainland within the migration zone. Many of these masses are small rocks with no names but, because they are still above water at high tide, are recognised as part of Australia.

Initial indications are that this task will be completed in approximately 4 weeks.

**7. We have agreements in place with PNG regarding people movements. How are they affected by the excision? (L&C 24)**

The Memorandum of Understanding under which Papua New Guinea accommodates asylum seekers during the period of their processing is not affected by the proposed extension of the definition of excised offshore place.

The Bill defines additional islands as excised offshore places for the purposes of the making of a valid visa application.

Unauthorised arrivals that are detected and detained by the Australian Navy, Coastwatch or Customs can be detained at that place, brought to Australia and detained or removed to a declared country. If this third option is chosen, consultation will be undertaken with the relevant declared country prior to any removal action being commenced under s 198A of the *Migration Act 1958* (the Migration Act).

**8. 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? (L&C 24)**

An excised offshore place remains part of the migration zone and is part of the territory of Australia. All laws, including the provisions of the Migration Act, apply in an excised offshore place.

The effect of including an island as an excised offshore place is that persons who on arrival at that place are unlawful non-citizens may not make a valid application for a visa and may be detained and removed to Australia or a declared country.

The amendments have no other effect on the operation of the Migration Act or any other law in the islands to be included in the definition of an excised offshore place.

**9. Why are the UN procedures, which you have promised to give us, not incorporated in the legislation, by way of either legislation or regulations? (L&C 24)**

The documentation setting out the refugee assessment procedures developed by Australia for declared countries does so at a level of detail far greater than would generally be recorded either in Acts of Parliament or regulations.

The processes are being documented in an internal Departmental operating instruction. Such operating instructions are used to record equivalent levels of detail in relation to protection visa decision-making arrangements within Australia.

**10. How many inhabitants are there on the islands proposed to be excised? How many inhabitants are Australian citizens and how many are not? (L&C 20-21)**

The Department is currently unable to respond to this question. The Australian Bureau of Statistics was approached and agreed to provide answers to these questions on a cost-recovery basis. Details in response to this question will be provided as soon as possible.

**11. Who is on the people-smuggling strike team, when has it met since May this year and who has been present at the meetings? (L&C 28).**

The people smuggling strike team is made up of 10 members of the AFP and five members of the Department.

The Board of Management that oversees the operations of the team last met in May 2002. The board consists of one senior AFP member and one senior Departmental member. There have also been several informal meetings associated with the ongoing administration of the team since that time.

**12. Do people smugglers in Indonesia have an understanding of how the current and proposed legislation works and the risks to them if they venture closer to the mainland? (L&C 32)**

Since new measures were introduced in September 2001 to strengthen Australia's border control, the Australian Embassy in Jakarta has been conducting a phased information campaign in Indonesia, with strong support from the Indonesian Government. The campaign targets three types of audiences:

- the broader Indonesian elite and opinion formers;
- those involved in people smuggling including fishing and port communities; and
- potential illegal immigrants.

Australian Embassy officials have been working with the Indonesian Marine and Fisheries Department, as well as officials in the provinces, to spread the word about the criminal nature of people smuggling and Australia's heavy penalties for those involved in people smuggling.

A range of media have been used for information dissemination, including print, television, radio, local meetings, "STOP" leaflets, and teeshirts with graphic designs of the penalties imposed by Australia for those involved in people smuggling.

Work has begun on production of a 30 minute television drama to increase public awareness of the dangers and penalties of people smuggling activity, including gaol terms in Australia.

**13. What happens to an offshore entry person whom the Government is unable or unwilling to remove from an excised offshore place? (L&C 83)**

There is a range of options available to the Government in relation to offshore entry persons in excised offshore places:

- the Migration Act now bars such persons from applying for a protection visa;

- such persons may be detained, however the Government is under no obligation to take an offshore entry person into detention; and
- section 198A of the Migration Act allows officers to restrain and remove such persons to a declared country.

Whether the Government detains or removes an offshore entry person may be influenced by the method and place of arrival of the person, and the number of persons with whom that person arrived.

The Australian Government recognises that where asylum-seekers have entered Australian territory (which includes the territorial sea), Australia's obligations under the Refugees Convention are engaged. A key obligation under the Refugees Convention is not to *refouler* a person, directly or indirectly, to a place where their life or freedom would be threatened for a Convention reason. This obligation on a party to the Convention does not create a right for a person to decide where he or she may receive protection from persecution.

Australia ensures that persons who enter Australia's territory are able to access a refugee determination process. This process may be undertaken either in an excised offshore place or in a declared country and is in line with United Nations High Commissioner for Refugees (UNHCR) processes.



Senate Legal and Constitutional Legislation Committee Inquiry into the  
Migration Legislation Amendment (Further Border Protection Measures)  
Bill 2002 ("the Bill").

***Comment on matters addressed in submissions to the Committee***

**1. *The Bill prevents people from claiming asylum in Australia***

The Bill will not prevent Australia fulfilling its international obligations under the United Nations Convention and Protocol relating to the Status of Refugees ("Refugees Convention") and under other relevant international instruments.

Under international law, the right to seek and enjoy asylum is permissive as there is no counterpart obligation on States to permit their entry to territory, nor to grant them asylum. The key obligation of States is not to *refoule* and to treat asylum-seekers and refugees in accordance with core human rights standards and with specific Articles in the Refugees Convention.

There is nothing in international law that removes a State's prerogative to intercept, exclude, expel or deport an illegal entrant, although that prerogative is qualified by the *non-refoulement* obligations of the Refugees Convention.

There is no obligation in the Refugees Convention that requires a State to provide access to a particular refugee status determination process.

The Australian Government recognises that where asylum-seekers have entered Australian territory (which includes the territorial sea), Australia must ensure that it meets its obligations under the Refugees Convention. A key obligation under the Refugees Convention is not to *refoule* a person, directly or indirectly, to a place where their life or freedom would be threatened for a Convention reason. This obligation on a party to the Convention does not create a right for a person to decide where he or she may receive protection from persecution. Australia ensures that persons who enter Australia's territory are able to access a refugee determination process. This process is undertaken in a place where the person seeking protection will not be persecuted, and is in line with United Nations High Commissioner for Refugees (UNHCR) processes.

In the case of persons taken to a country declared under s198A of the *Migration Act 1958*, Australia will ensure that that country meets internationally recognised standards for providing protection to asylum seekers and has effective procedures for assessing protection claims. Where protection claims are substantiated, Australia will explore appropriate international resettlement opportunities for each person.

## **2. The Bill does not guarantee border security**

The Bill strengthens the Government's border protection policy, implemented in a package of Acts passed in September 2001. 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 (Enforcement and Validation of 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.

By extending the definition of "excised offshore place" to include islands closer to the Australian mainland, people smugglers will face greater risk of detection, capture and prosecution by Australian authorities by having to bring unauthorised arrivals closer to the Australian mainland to access visa application processes.

This Bill is only one part of the Government's comprehensive border protection policy to deter people smugglers to Australia – see further comments provided at 8 (below).

## **3. The Bill breaches, or potentially breaches, Australia's international obligations in relation to refugees – in particular the obligation not to refoule**

See our comments provided at 1 (above).

A non-citizen who arrives at an "excised offshore place", and becomes an unlawful non-citizen on arrival, may be taken from Australia to a "declared country". The declaration process ensures that the Minister is satisfied that appropriate arrangements are in place in the declared country to provide protection for persons seeking asylum, pending determination of their refugee status, and to provide protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country. Provision exists for the Minister to revoke declared status if satisfied that appropriate arrangements no longer existed. At present, the only two declared countries are Papua New Guinea and Nauru. In Australia's agreements with Nauru and Papua New Guinea, those countries have made commitments to provide such protection.

**4. The Bill discriminates between, and provides different outcomes for, unlawful arrivals based on where they arrive in Australia and how they arrive.**

The Refugees Convention leaves it open to States to provide or withhold different rights or benefits over and above those required by the Convention in respect of different groups of refugees, provided that discrimination does not occur within its obligatory provisions. The Bill will not prevent Australia fulfilling its international obligations under the Refugees Convention and under other relevant international instruments. Regardless of where, and how, unauthorised non-citizens arrive in Australia, those who claim asylum will have their protection claims assessed and provided with protection if those claims are made out.

**5. Asylum seekers have the right to seek asylum, therefore they are not “illegal”.**

There is no right at international law for an individual to enter the territory of a State of which that individual is not a national. The non-refoulement obligation under the Refugees Convention arises only once a person is in the territory of a State Party. Australia's laws provide that all persons who are not Australian citizens must have a valid visa to enter Australia under the *Migration Act 1958*. Any non-citizen enters Australia without a valid visa is an unlawful non-citizen. An unlawful non-citizen who makes a protection claim does not become a lawful non-citizen merely by virtue of that claim. Indeed they do not become lawful in the country merely by being found to be refugees. That asylum seekers and those asylum seekers who are refugees may be unlawful is specifically recognised in Article 31 of the Refugee Convention, which refers to “refugees unlawfully in the country of refuge” and “their illegal entry or presence”.

**6. Australia is breaching its international obligations in relation to refugees by detaining persons recognised as refugees on Nauru Island and Papua New Guinea.**

Persons taken to Nauru and Papua New Guinea pursuant to the *Migration Act 1958* are not in immigration detention. They are in a place of protection whilst their claims are processed. Australia is making every effort to ensure that such persons in Nauru and Papua New Guinea who are determined to be refugees are resettled in accordance with UNHCR guidelines. Australia is committed to taking its fair share of refugees, as part of the international community's efforts to resettle refugees.

**7. Australia is breaching its international obligations (especially Articles 26 and 31(2) of the Refugees Convention) by restricting the freedom of movement of asylum seekers.**

Article 26 of the Convention, which provides freedom of movement within a contracting State's territory, specifically relates to "refugees *lawfully* in its territory". A non-citizen who enters Australia's migration zone without a valid visa is an unlawful non-citizen and Article 26 does not, therefore, apply.

In addition, Article 31 of the Convention provides that, where States consider it necessary, they may detain refugees who are *unlawfully* in their territory up to the point that either "their status is regularised or they obtain admission into another country". This Article retains for States the capacity to determine whether refugees who are *unlawfully* in their territory will have their status made lawful in their territory, or alternatively will be protected in the territory of another country. The section 46A bar, which prevents an offshore entry person in Australia from applying for a visa unless the Minister considers it to be in the public interest, is fully consistent with the Convention in that it provides the legislative framework for Australia to exercise the discretion reserved for contracting States by Article 31.

An offshore entry person, who is in Australia and is an unlawful non-citizen, is affected by the section 46A bar on making a valid visa application. However, the section 46A bar on making a valid visa application does not apply to an offshore entry person who is not in Australia. An offshore entry person who is in another country may apply for a Refugee and Humanitarian (Class XB) visa which includes the Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa.

A person who is granted a Subclass 447 visa may then enter Australia on one occasion, but must enter before a date specified by the Minister. Once they enter Australia, they become a lawful non-citizen. The Subclass 447 visa then permits the person to remain in Australia for a specified period (36 months) unless the person applies for a protection visa before the expiry of the specified period (in which case, the person may remain until the application for the other visa is finally determined).

There is no restriction on the person's freedom of movement within Australia during the period that a Subclass 447 visa is in effect.

**8. Australia needs to address this problem at its source and address the root causes of refugee flows rather than punishing asylum seekers.**

The Bill is only one part of the Government's comprehensive strategy, involving both legislative and administrative measures to combat irregular migration and people smuggling. This strategy recognises that these problems are intertwined with the longstanding and unresolved refugee caseloads around the world for which the international community needs to develop solutions.

The Government's approach comprises three main elements:

1. prevention of the problem by minimising the outflows from countries of origin and secondary outflows from countries of first asylum;
2. working with other countries to disrupt people smugglers and intercept their clients en route to their destination, while ensuring that those people in need of refugee protection are identified and assisted as early as is possible; and
3. developing appropriate reception arrangements for unauthorised arrivals who reach Australia, focusing on the early assessment of the refugee status of the individual, and the prompt removal of those who are not refugees or who are refugees but can access effective protection elsewhere. The Government has also removed additional benefits not required by the Refugees Convention to minimise the incentive for people to attempt illegal travel to Australia.

The Government's efforts to implement the prevention element of this strategy recognises that irregular migrants can be motivated by a range of considerations including humanitarian, protection and economic issues. Key actions taken under this strategy include:

- concerted multilateral and bilateral efforts, including through aid contributions, to try to eliminate the reasons why people leave their homelands to seek refugee protection in other countries;
  - in February 2002, Indonesia and Australia co-chaired a Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime in Bali during which 38 countries from across the region agreed to address these problems through a cooperative approach involving source, transit, destination and donor countries;
- aid and other support for countries of first asylum and agencies such as the UNHCR to provide sustainable protection for refugees while efforts are made to enable them to return to their homelands in safety and dignity;
  - for example, the Government committed over \$43 million in humanitarian assistance for displaced and vulnerable Afghans during 2001-02, of which \$14.3 was provided to the UNHCR.
- promotion of a regional cooperation model for handling illegal people movements into and through the region in a way which ensures that any who are refugees have access to IOM support and UNHCR assessment and resettlement processes, without a need to travel on to Australia in order to obtain protection;
- maintaining a vigorous offshore refugee resettlement program to support UNHCR efforts to resettle refugees where the existing protection arrangements cannot be sustained;
- posting specialist liaison officers to key overseas posts for bilateral and multilateral liaison on readmission and resettlement, technical and border management capacity, processing of the humanitarian caseload and government identity, character and security checking;
- conducting domestic and international information campaigns designed to highlight the dangers of illegal migration and deter people smugglers and explain the legal avenues of migration to Australia; and
- active participation in a number of international programs that work to combat people smuggling. These include:

- the inter-governmental consultations on asylum, refugee and migration policies in Europe, North America and Australia;
- the Asia-Pacific consultations on refugees, displaced persons and migrants;
- the irregular migration and migrant trafficking in east and south east Asia; and
- the Pacific Rim immigration intelligence officers conference.