CHAPTER 3

THE IMPLICATION OF EXCISION FOR BORDER SECURITY

3.1 This chapter looks at term of reference (a), the implications of excision for border security. It discusses:

- the excised offshore places;
- what 'border security' means in the context of this Bill;
- the rationale for excisions; and
- the likely routes and targets of people smugglers.

The excised offshore places

3.2 As discussed in Chapter 2, the existing excised offshore places are the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands, the Territory of Ashmore and Cartier Islands, and Australian sea and resource installations.

3.3 Those islands are all a considerable distance from mainland Australia. Christmas Island is situated about 360 kilometres south of Java,[1] the Cocos (Keeling) Islands are situated about 900 kilometres south-west of Christmas Island[2] and Ashmore and Cartier Islands are situated in the Timor Sea approximately 320 kilometres off the north-west coast of Australia and 100 kilometres south of the Indonesian island of Roti.[3] As Senator the Hon John Faulkner said in the debate on the call to the government to table the regulations that were subsequently disallowed:

> Those islands are geographically closer to Indonesia than they are to mainland Australia.[4]

3.4 The Explanatory Memorandum for the Bill for the Excision Act gave examples of places that might be added in future to the definition of excised offshore place:

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1 Commonwealth Grants Commission, *Report on Indian Ocean Territories 1999*, p. 11.

2 ibid.

3 House of Representatives Standing Committee on Legal and Constitutional Affairs *Islands in the Sun: The Legal Regimes of Australia's External Territories and the Jervis Bay Territory*, 1991, p. 13.

4 *Senate Hansard*, 18 June 2002, p. 2030.

> Examples of islands that could be prescribed . . . include the islands on Scott Reef and Rowley Shoals (Western Australia).[5]

3.5 Both those examples are a considerable distance from the mainland.[6] In the debate on the call for the government to table the regulations, Senator the Hon Chris Ellison, the Minister for Justice and Customs, said:

> Rowley Shoals is several hundred kilometres offshore.[7]

3.6 However, the current Bill proposes the excision of places that are not only outlying islands, like those on Scott Reef and Rowley Shoals, but also islands which, as Senator the Hon John Faulkner said in the debate on disallowance of the regulations:

> … are in clear view of the Australian mainland. Some of the islands are literally just a couple of hundred metres away from the Australian mainland.[8]

3.7 A most eloquent statement about the proposal to excise these close islands came from Mr Alan Keeling who gave evidence on Goulburn Island. Mr Keeling expressed doubt about the need to excise:

> My concern is that, if you come this far from overseas, you would be a damned fool to stop here when, if you go two kilometres, you will be where you do not have the problem. If you land on Australia, it will be open slather. So why would anybody want to stop here? I just think it is overkill when the whole of the border of Australia is open slather but a few little scattered islands have to have a separate law.[9]

Does border security mean protection against terrorism?

3.8 The concept of 'excision' is directly relevant only to migration matters. For example, the long title of the Excision Act refers to excision of territory from the migration zone for purposes related to unauthorised arrivals. However, the term 'border security' has been used more widely in recent times, for example, in relation to the package of anti-terrorism legislation introduced by the Government earlier this year.[10]

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5 Migration Amendment (Excision from Migration Zone) Bill 2001, *Explanatory Memorandum*, p. 5.

6 Scott Reef is situated at 14 0S, 121 50E and Rowley Shoals is situated at 17 30S, 119 0E. From maps, they appear to be nearly as far from the coast of mainland Western Australia as the Ashmore and Cartier Islands.

7 *Senate Hansard*, 18 June 2002, p. 2049.

8 *Senate Hansard*, 19 June 2002, p. 2166.

9 *Hansard*, 11 September 2002, p. 217.

10 For example, one of the five Bills was the Border Security Legislation Amendment Bill 2002.

3.9 Thus while the term 'border security' in this Bill relates mainly to control of migration, it may also have implications for security in general. As the Hon Peter Reith, then Minister for Defence, said in a radio interview on 13 September 2001:

> . . . part of security is to ensure that you can properly process and manage and know who's coming into the country.

3.10 On the other hand, as the St Vincent de Paul Society said in evidence to the Committee:

> . . . 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.[11]

3.11 The Committee sought information from the AFP about whether there had been any occasion to investigate evidence of criminality amongst asylum seekers. The Commissioner responded that generally speaking there had not.[12] The AFP subsequently confirmed that the only offences in which they had been involved in investigating asylum seekers were offences that had occurred in Australia following arrival, such as escaping from lawful custody or criminal damage.[13]

3.12 Mr Dennis Richardson, Director-General, Australian Security Intelligence Organisation (ASIO), told the Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade that ASIO had provided DIMIA with 5986 security assessments of illegal arrivals between 1 July 2000 and 16 August 2002. In none of those cases had it been assessed that the person's entry into Australia would pose a direct or indirect threat to Australia's security, on the grounds that he or she could be involved either in espionage related activities or in terrorist related activities.[14]

The Government's rationale for excisions

3.13 The Explanatory Memorandum states that, in response to the excision of Christmas Island and the Ashmore Reef, people smugglers are shifting their focus to islands closer to Australia. A further excision was therefore considered necessary to prevent asylum seekers who reached these latter islands from applying for a visa:

> The Bill is being introduced in response to indications that people smugglers are changing the focus of their operations to target islands closer to the Australian mainland. In combating these new threats it is necessary to

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11 *Hansard*, 6 August 2002, p. 62.

12 *Hansard*, 6 August 2002, pp. 31-32.

13 *Submission 32A*, p. 2.

14 Joint Standing Committee on Foreign Affairs, Defence and Trade, Human Rights Subcommittee, Inquiry into aspects of HREOC's annual report 2000-01 concerning migration detention centres; *Hansard*, 22 August 2002, pp. 36, 39.

> extend the bar on visa applications by persons who arrive without lawful authority at these offshore islands.[15]

3.14 The reason given for the initial excision legislation passed last year was also to prevent people from using excised offshore places to achieve migration outcomes. The Explanatory Memorandum stated:

> The purpose of excising the places and installations from the migration zone in relation to unlawful non-citizens is to prevent such persons from making a valid visa application simply on the basis of entering Australia at such a place or installation.[16]

3.15 The Second Reading Speech for that Bill also stated that it 'will significantly reduce incentives for people to make hazardous journeys to Australian territories'.[17]

3.16 However, the idea seems to have developed that in some way excision of one place prevents an asylum seeker from landing at another. For example, in answer to a question on 19 June 2002 Senator the Hon Robert Hill, Minister for Defence, gave a different perspective on the purpose of the Excision Act:

> Earlier, Labor was prepared to support us in excising Christmas Island and Ashmore Reef to make it more difficult for people smugglers to reach the mainland. When it is proven necessary to excise further islands to make it more difficult for people smugglers to reach the mainland, Labor says no.[18]

3.17 Evidence given during the inquiry appeared to indicate that the bill could lead to people smugglers bringing their boats closer to the mainland. For example, in a written response to questions on notice, DIMIA stated that:

> 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** [emphasis added], will make it harder for these people smugglers to escape detection and remove themselves without being caught and prosecuted.[19]

3.18 Evidence given by the AFP showed that the Commissioner, Mr Keelty, shared the assessment that that the Bill could lead to people smugglers coming direct to the mainland. The Committee asked him whether it was anticipated that boats would now come closer to mainland Australia. Commissioner Keelty responded:

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15 *Explanatory Memorandum,* p. 2. A similar statement was made as part of DIMIA's opening statement in the Committee's first public hearing (*Hansard*, 6 August 2002, p. 2).

16 Migration (Excision from Migration Zone) Bill 2001, *Explanatory Memorandum,* p. 2.

17 *Senate Hansard*, 20 September 2001, p. 27497

18 *Senate Hansard*, 19 June 2002, p. 2159

19 DIMIA *Answers to Questions on Notice*, 21 August 2002, p. 5.

> 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...[20]

3.19 As noted by DIMIA, coming closer to the mainland increases the risks for people smugglers of detection and prosecution. Other evidence given by the Department showed that the likelihood of vessels coming closer to mainland Australia arises not only because they were targeting the mainland as a destination, but incidentally when attempting to reach New Zealand, particularly via the Torres Strait.

3.20 DIMIA acknowledged that if boats come closer to the mainland in the quest to reach New Zealand, there is an increased possibility of landings on the mainland:

> 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. [21]

3.21 DIMIA officers explained why such boats might change course, in the process making it clear that there is a strong likelihood that landings will occur if people smugglers attempt to transit the Torres Strait:

> …very often passengers will panic. Very often they are not good sea travellers and, once they see landfall, we have had occasions where passengers have virtually threatened the life and limb of captains and crew and insisted that the boat be taken into land. This is very much the case where boats have been at sea for a long time. Passengers have had enough, they are fed up, they are seasick - particularly if there are children on board - so they just want to go to the nearest land. The Torres Strait is also a very difficult area to navigate. The likelihood of a boat getting through the Torres Strait without hitting land somewhere along the way and without the passengers panicking or being ill and the boat needing to turn into Australia is very low.[22]

3.22 In discussing the possibility of a boat travelling en route to New Zealand changing its route and heading towards the mainland, DIMIA claimed 'These provisions enable us to prevent that circumstance'.[23] In addition, in speaking of the change of tactics by smugglers to bypass the mainland on the way to New Zealand and invariably travelling close to Australia or through the Torres Strait, DIMIA said:

> 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.[24]

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20 *Hansard*, 6 August 2002, p. 30.

21 *Hansard*, 6 August 2002, p. 5.

22 *Hansard*, 22 August 2002, pp. 9-10.

23 *Hansard*, 6 August 2002, p. 2.

24 *Hansard*, 6 August 2002, p. 6.

3.23 These claims as to the effect of the current Bill appear dubious. Aside from the risk of apprehension if a people-smuggling vessel strays into Australian territorial waters or is forced by its passengers to divert to the mainland, it is difficult to see how the Bill would prevent any vessel from attempting to pass through the sea channels of the Torres Strait on its way to New Zealand. It is not clear how excising Australian islands has any connection with that goal.

3.24 In conclusion, it is clear that there has been a departure from the rationale expressed in the Explanatory Memorandum that the Bill was being introduced in response to people smugglers targeting Australian islands closer to the mainland. Further, because of the excision of the outer islands and because of the change of destination, boats may come closer to the mainland. If this happens, the likelihood of landings on the mainland increases. Accordingly, the legislation is likely to be self defeating.

The likely routes and targets of people smugglers

3.25 Government spokespersons have also given different assessments of the likely routes and targets of people smugglers (and the consequent need for additional excised offshore places). For example, Senator Hill indicated that the focal point of the regulations was the islands in the Torres Strait. He said in the debate on disallowance of the regulations that:

> … intelligence was building that one way they (the people smugglers) were going to do that (get clients into the Australian jurisdiction) was, instead of talking the traditional short cuts across to Christmas Island or Ashmore Reef, that boats would move along the Indonesian archipelago and basically get into the Torres Strait. Once there, of course, they would be able to deposit their customers on islands within the Australian jurisdiction ... Therefore, the government again saw no real alternative but to take the logical next step ... to make it more difficult for them. The logical next step apparent to the government was to excise the islands that ran the risk of being the next example of a short-cut to the Australian jurisdiction.
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> … the government … decided that the next step was to excise the Torres Strait Islands in order to effectively combat this illegal activity.[25]

3.26 However, in answer to a question without notice on the same day, Senator Hill appeared to envisage a further possible route, and a need to excise islands along that route in addition to the Torres Strait islands:

> We had intelligence which told us that people smugglers were planning to use alternative routes to the east of Christmas and Ashmore Islands, possibly into the Torres Strait; thus the regulations which prescribe the islands along

25 *Senate Hansard*, 19 June 2002, p. 2168.

> those routes as excised offshore places are a responsible and necessary component of the government's anti people-smuggling strategy.[26]

3.27 During this inquiry, DIMIA appeared to agree with the latter assessment, telling the Committee:

> 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 by pass 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 ...
>
> The intelligence we have suggests that New Zealand remains the primary target at this point.[27]

3.28 However, DIMIA departed from Senator Hill's second assessment to include outlying islands (presumably like those on Scott Reef and Rowley Shoals) as a possible primary target, stating:

> 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 ...[28]

3.29 In drawing all of these assessments together, a DIMIA representative left open the question of why no part of the mainland was excised:

> ... we do have very strong indications of what smugglers are intending, what their plans are and what the outcomes are that they are trying to achieve. What has been paramount has been to look at the routes that they are intending to travel as well as, obviously, their final destinations. In the main, that has been Australia to date but ... the focus has now shifted to also being New Zealand as a target destination ... In seeking to include certain islands in Western Australia, the Northern Territory and through to the Torres, we have looked very closely at the potential and possible routes that people smugglers may attempt to take. We have also looked at the potential areas of landfall that they may hit or try to reach if they take these routes. In doing that, we have obviously sought advice from others who are more knowledgeable about navigational routes ... but it is also based on our previous experience of where we have had boats try to land. We have had Sri Lankans, for example, who landed near Cape Leveque on the north-west coast of Western Australia [on the mainland, near Derby][29]

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26 *Senate Hansard*, 19 June 2002, p. 2159.

27 *Hansard*, 6 August 2002, pp. 5-6.

28 *Hansard*, 6 August 2002, pp. 1-2.

29 *Hansard*, 17 September 2001, pp. 254-255.

The excision of the islands close to the mainland

3.30 While there have been examples of unauthorised arrivals on remote parts of the mainland (for example, the Cape Leveque landing referred to in the previous paragraph), the Government took a firm stand in relation to the excision of any part of the mainland. In answer to a question, the Prime Minister, the Hon John Howard, said on 17 June 2002:

> I want to make it clear that there is no intention – and there never has been – to excise any part of the Australian mainland. That is an absolutely ludicrous proposition.[30]

3.31 However, any logic in that position has been undermined by the proposal to excise islands close to the mainland. Government spokespersons seem to have had difficulty with focussing on the idea that the excision of islands close to the mainland may encourage people to come to the mainland.

3.32 For example, Senator Ellison completely rejected any suggestion that the effect of the regulations whose terms are adopted in the current Bill would be to encourage people smugglers to come to mainland Australia. In the debate on the call for the government to table the regulations, he said:

> To merely say that the excision of these islands will invite people to come to the mainland is facile. As Senator Eggleston pointed out, many of these islands are over the horizon – Rowley Shoals is several hundred kilometres offshore ...
>
> All it [the Australian Labor Party] can point to is that these excisions will encourage people to come to the mainland of Australia. It has no evidence for that; it has no basis for that.[31]

3.33 At the other extreme, the AFP seems to have regarded encouragement to people smugglers to come direct to the mainland as being the deliberate policy of the current Bill, although it only appeared to take account of the excision of outlying islands. As noted at paragraph 3.18, the Committee sought the AFP's view about whether it was anticipated that boats would now come closer to mainland Australia. Commissioner Mick Keelty confirmed that he anticipated that result. He indicated that from both a policing and humanitarian perspective, that was a preferable outcome:

> …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.[32]

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30 *House of Representatives Hansard*, 17 June 2002, p. 3432.

31 *Senate Hansard*, 18 June 2002, pp. 2049-2051.

32 *Hansard*, 6 August 2002, p. 30.

3.34 DIMIA agreed that excision of outlying islands would ease the burden on policing resources by encouraging people smugglers to come to, or closer to, the mainland, stating:

> The Bill ... 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.[33]

3.35 However, DIMIA seems to have regarded the possibility of asylum seekers landing on the mainland as remote, but did not explain what was to happen if they did so. In answer to the suggestion that the proposed excisions would provide an incentive for people smugglers to bring their boats to mainland Australia, a DIMIA representative said:

> If it were easy to get to the Australian mainland, the smugglers would have already 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 ... [34]

3.36 Other persons and bodies participating in the inquiry considered it illogical to excise islands close to the mainland without excising the mainland itself. The New South Wales Council for Civil Liberties considered that the likely effect of excision would be to encourage asylum seekers to come to the mainland:

> In fact, the Bill will probably do nothing to protect our borders and it may actually encourage asylum seekers to head closer to the Australian mainland as outlying regions are excised from our law. It is a dangerous path we are travelling because our next option, presumably, is to excise further areas of Australia. Where do we stop under this scheme?[35]

3.37 The International Commission of Jurists agreed that asylum seekers would probably be motivated to head for the mainland and argued:

> … by forcing refugees fleeing persecution by sea to push on for the mainland in order to activate their rights under the [Refugee] Convention, Australia is placing them in a more perilous situation with further grave risk to their health and safety, particularly in areas with coral reefs. It is exactly these people that the Convention is designed to protect …[36]

3.38 At the Committee's last public hearing, DIMIA was asked why it was necessary to excise islands off the Western Australian coast as far south as 23 degrees

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33 *Hansard*, 6 August 2002, pp. 1-2.

34 *Hansard,* 6 August 2002, pp. 5-6.

35 *Hansard*, 7 August 2002, p. 92. Australian Lawyers for Human Rights (*Submission 31*, pp. 1-2) argued that the 'true nature of the "border security" measures [is] not about security at all … excision actually constitutes a retreat by Australia from obligations owed to onshore asylum seekers at international law, under the guise of addressing people smuggling'.

36 *Submission 36*, p. 3.

latitude. The response indicated a belief that people smugglers might pursue another route to New Zealand via the south of the continent:

> Firstly, we have had landings, not down to 23 degrees south, but along the coast of Western Australia. The other issue is that one of the other routes that can be taken is to bypass Christmas Island and to head directly south. In fact, in the context of attempting to travel to New Zealand there are, in essence, three main routes that vessels can take. There is one route to the north of PNG, one through the Torres Strait and one that would take the vessel a good deal further and it would be more difficult. But it has been done by fishing vessels, including those illegal fishing vessels that have targeted the Patagonian toothfish in that southern region. The vessels go south past Christmas Island, continue down the coast of Western Australia and then attempt to go to New Zealand that way.[37]

3.39 This response, however, does not explain why people smugglers would be deterred by excising islands very close to the Western Australian coastline when they could land on the mainland, or indeed further south than 23 degrees, if they were taking the route described.

3.40 Similarly, it is not clear that the AFP argument about drawing smugglers into the policing net requires islands close to the Western Australian and Northern Territory mainland to be excised.

3.41 Finally, the Committee received many submissions that argued that the Bill would not deter asylum seekers from attempting to enter Australia because of the situations from which they seek escape. Mr Brian Bond was one of several who argued:

> Those who seek to flee a situation of great danger to themselves and their families will take whatever risk is necessary to escape such situations.[38]

Summary

3.42 There is little evidence to support assertions that the excision of islands close to the mainland is likely to deter asylum seekers. In fact, some evidence was received that the likely effect of the Bill would be to drive asylum seekers closer to the mainland, either with the intent of landing there, or incidentally. Either may increase the likelihood of landings on the mainland. There is also evidence that far from

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37 *Hansard*, 17 September 2002, p. 256.

38 *Submission 2*, p. 1. Similar views were expressed by Ms Joan Kinnane *Submission 3*, p. 1; Ms Margaret Graves *Submission 5*, p. 1; Australian Presentation Society *Submission 6*, p. 1; Ms Alison Murdoch *Submission 8*, p. 1; Social Action Office - CLRIQ *Submission 12*, p. 1; Dominican Sisters of North Adelaide *Submission 13*, p. 1; Ms Judith Roberts *Submission 15*, p. 1; Human Rights Council of Australia *Submission 25*, p. 3; Ms Maureen Keady *Submission 27*, p. 1; Australian Lawyers for Human Rights *Submission 31,* p. 2; Rockhampton Social Justice Action Group *Submission 39*, p. 1; Social Responsibilities Commission *Submission 40*, p. 1; Missionary Franciscan Sisters *Submission 41*, p. 1.

reducing incentives for people to make hazardous journeys to Australian territories, the Bill will increase the likelihood of asylum seekers embarking on increasingly hazardous journeys, either through the dangerous waters of the Torres Strait or across Southern Australia. Accordingly, the Bill must be considered as self-defeating.

3.43 What, if any, effect excision has on border security must also be considered in the light of the disadvantages suffered by an offshore entry person when compared with other applicants for visas. These issues are discussed in the following chapters.

CHAPTER 4

AUSTRALIA'S INTERNATIONAL OBLIGATIONS - NON-REFOULEMENT

4.1 Much of the evidence the Committee received was concerned with whether the legislation is consistent with Australia's international obligations (term of reference (f)). While the current Bill only extends the area of operation of the existing legislative scheme, its effect can only be considered if the existing provisions are also examined to see if they comply with international law.

4.2 This chapter:

- briefly outlines Australia's international obligations in relation to asylum seekers and refugees;
- considers in detail the obligation of non-refoulement of refugees; and
- discusses the evidence the Committee received on these issues.

Australia's international obligations

4.3 The Explanatory Memorandum for the Bill contains a clear statement as to the Government's position on its international obligations and the effect of the Bill:

> The Commonwealth will continue to ensure that, while unauthorised arrivals at "excised offshore places" cannot apply for visas, appropriate arrangements will ensure that Australia continues to fulfil its obligations under the United Nations Convention relating to the Status of Refugees and under other relevant international instruments.[1]

4.4 However, during this inquiry the Committee heard significant concerns that this was not necessarily the case, as is discussed below.

4.5 Australia is a party to several international instruments that are relevant to these issues, namely:

- the Convention Relating to the Status of Refugees as amended by the 1967 Protocol[2] (the Refugee Convention);
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

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1 Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, *Explanatory Memorandum*, p. 2.

2 Agreed in 1951, the Refugee Convention applied only to circumstances occurring before that year. The key change effected by the 1967 Protocol was to remove that time limitation.

- the International Covenant on Civil and Political Rights;
- the Convention on the Rights of the Child;
- the Convention on the Law of the Sea; and
- the Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the area between the Two Countries, Including the Area Known as the Torres Strait, and Related Matters (the Torres Strait Treaty).

4.6 The Committee has previously considered Australia's obligations to asylum seekers and others in need of protection in its June 2000 report, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Process*. More detail on those issues can be found in that report and reference is made where relevant to that discussion.

Obligation of non-refoulement of refugees

4.7 One of the most important protections for those seeking asylum is the obligation of non-refoulement (non-return) of refugees to the country of persecution.[3] The Refugee Convention defines a refugee as any person who has:

> … a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion, is outside the country of his nationality or of habitual residence, if stateless and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.[4]

4.8 Article 33(1) of the Refugee Convention prohibits parties from expelling or returning refugees 'in any manner whatsoever' to territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. The obligation does not apply to refugees who may be reasonably regarded as being a danger to the security of the country, or who, having been convicted of a particularly serious crime, are a danger to the community.[5]

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3 The obligation of protection has been directly recognised in Australian law by section 36 of the *Migration Act 1958*, which refers to protection obligations under the Refugee Convention as an essential criterion for a protection visa.

4 The definition excludes various circumstances including: where the person has voluntarily returned to his or her country of nationality or residence, has acquired a new nationality, or the circumstances of persecution have ceased to exist; where the person is receiving protection or assistance from UN agencies other than the UNHCR; where the person has a right of residence in a third country, which gives him or her the same rights and obligations as its citizens have; or where there are serious reasons for considering that the person has either committed certain serious crimes (such as war crimes), or been guilty of acts contrary to the purposes and principles of the UN (Articles 1C-1F).

5 Article 33(2).

4.9 Traditionally the granting of asylum has been viewed as an act of grace by states, and this perspective is reflected in the Refugee Convention. Under the Convention those people who satisfy the definition of 'refugee' do not have a right to gain entry to the country where they are seeking refuge.[6] What the Convention prohibits is the return of refugees to a place of persecution; it does not prevent such people being sent to a safe third country. The reliance of parties on the concept of a safe third country has grown over the years, and Australia has recognised the concept in its legislation.[7]

4.10 Three other international conventions also impose obligations of non-refoulement:

- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- the Convention on the Rights of the Child; and
- the International Covenant on Civil and Political Rights (ICCPR).

4.11 Their key provisions are outlined briefly below.

4.12 Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Australia has ratified,[8] provides that a person shall not be refouled to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.[9] The person does not need to fall within the definition of 'refugee'. There is also no exception to the principle of non-refoulement on the grounds of national security or danger to the community, as in the Refugee Convention.[10] The protection the article gives is absolute.[11]

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6 See discussion in Department of the Parliamentary Library *Bills Digest No. 69 2001-02: Migration Amendment (Excision from Migration Zone) Bill 2001)*, p. 4, where it is noted that this principle has been accepted by courts in various countries and was a significant aspect of the decision of the Full Federal Court in *Ruddock v Vadarlis* [2001] FCA 1329.

7 *Migration Act 1958*, Part 2, Division 3, Subdivision AI - Safe Third Countries (inserted in 1994).

8 Australia ratified the Convention on 8 August 1989 and it entered into force for Australia on 7 September 1989.

9 Article 1. 'Torture' is defined as the intentional infliction of severe pain or suffering by, or at the instigation of, a public official, in order to obtain a confession, as a punishment, or to intimidate or coerce, or for any reason based on discrimination. In determining whether there are such grounds, the authorities shall take into account all relevant considerations including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the State concerned.

10 For further discussion, see *A Sanctuary Under Review*, pp. 53-54.

11 As affirmed in *Chahal v UK Eur Ct HR* (70/1995/576/662) 1996, in a case dealing with a similar provision in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

4.13 The Convention on the Rights of the Child[12] gives special protection for children who are refugees or who seek refugee status, for example, by recognising that States must, in all their actions towards asylum seeker children, make their best interests a primary consideration.[13] Article 20 provides that unaccompanied asylum seeker children must be given special protection and assistance by the government.[14] Article 22 also provides that children are to 'receive appropriate protection and humanitarian assistance in the enjoyment of their rights under the Convention and other human rights and humanitarian instruments' to which the State is a party (including the Refugee Convention).

4.14 It has also been argued that various articles of the ICCPR impose an obligation of non-refoulement, even though the language is not as direct as that of the other conventions.[15] For example, Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The United Nations Human Rights Committee has stated that returning a person to a country where he or she will be at risk of such treatment will constitute a breach of Article 7.[16] The non-refoulement obligation under the ICCPR is broader than the obligation under the Refugee Convention, in that it does not require persecution or intentional acts: it may apply to people who have been caught up in situations of generalised violence or war but cannot show that they have been targeted.[17]

4.15 The Committee has previously recommended that the non-refoulement obligations under the Convention against Torture and the ICCPR be incorporated into domestic law.[18] However, the Government's response has been that the ministerial discretion in the Migration Act is adequate to ensure compliance with these conventions.[19]

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12 Australia ratified the Convention on the Rights of the Child on 17 December 1990 and it came into force for Australia on 16 January 1991.

13 Article 3. For further discussion, see *A Sanctuary Under Review*, pp. 55-56.

14 Recognised in part by the *Immigration (Guardianship of Children) Act 1946*, discussed further in Chapter 5.

15 The ICCPR entered into force for Australia on 13 November 1980, following ratification by Australia on 13 August 1980. For discussion of the relevant provisions of the ICCPR, see *A Sanctuary Under Review*, pp. 54-55.

16 General Comment 20, Paragraph 9.

17 See *A Sanctuary Under Review*, p. 55. The Committee also heard evidence during that inquiry that the principle of non-refoulement attaches to the ICCPR protection of the right to life (Article 6), the right to security of person (Article 9) and the general requirement for the protection of the rights of individuals (Article 2.1).

18 *A Sanctuary Under Review*, p. 60, Recommendation 2.2.

19 *Government Response to the Senate Legal and Constitutional References Committee Report: 'A Sanctuary Under Review'*, 8 February 2001, p.1, referring to section 417 of the Migration Act which allows for Ministerial discretion to substitute a more favourable decision for a decision of the Refugee Review Tribunal.

Evidence to the inquiry on non-refoulement

4.16 The Committee received numerous submissions and heard evidence from several key witnesses who argued that Australia was potentially in breach of its international obligations not to refoule refugees. Witnesses included the Office of the United Nations High Commissioner for Refugees (UNHCR), academics Dr Pene Mathew and Mr Angus Francis, the Refugee and Immigration Legal Centre, the International Commission of Jurists and Amnesty International. Some argued the law itself was being infringed by the current and proposed legislative scheme, while others maintained that, at the very least, the spirit of the Refugee Convention was being violated.

4.17 Of major concern was the obligation of non-refoulement under Article 33 of the Refugee Convention. Witnesses noted that this obligation extends to 'chain refoulement', whereby asylum seekers may not be sent to another country from which they are returned to a place of persecution.

The Government position

4.18 DIMIA stated that the Australian government recognised that its protection obligations under the Refugee Convention, including the non-refoulement obligation, were engaged where asylum-seekers had entered Australian territory, including the territorial sea. However, DIMIA emphasised that the obligation did not create a right for a person to decide where he or she may receive protection from persecution, and justified Australia's arrangements by stating:

> 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 [UNHCR] processes.[20]

4.19 The UNHCR told the Committee that the transfer of asylum seekers to a third country may be permissible in certain circumstances, which must include compliance with basic protection standards:

> To conform to standards, a transfer agreement [with a third country] must include provision:
>
> (a) that the person will be admitted to that (third) country and accepted as an asylum seeker;
>
> (b) that the asylum seeker will enjoy effective protection against refoulement;
>
> (c) that the asylum seeker will have access to a fair and effective asylum procedure;

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20 DIMIA *Answers to questions on notice*, 21 August 2002, p. 5.

(d) that the asylum seeker will be treated in accordance with international refugee law and international human rights standards.[21]

4.20 A representative from the Attorney-General's Department strongly denied that refoulement of offshore entry persons was an issue, describing it as a 'red herring':

> The crux of non-refoulement is not returning people to the frontiers of the place where they are going to again face persecution. There is no question here of that taking place. What in fact is happening … is that people are being processed by DIMIA officers in accordance with the UNHCR handbook and adverse decisions are subject to review by another officer. That is precisely the manner in which the [UNHCR] carries out its functions.[22]

4.21 However, this response was criticised as inadequate. Dr Pene Mathew noted that the response did not address the circumstances of those interdicted at sea and returned to Indonesia, but only the processing of offshore entry people taken to Nauru and PNG. In addition, she criticised the comparison of Australian processing of offshore entry people with the UNHCR:

> … it is quite wrong to suggest that review by one DIMIA officer of decisions made by another DIMIA officer is not concerning from the perspective of refoulement, given that the Pacific Solution has been designed, in part, to avoid normal Australian procedures for assessing refugee status. I would note in this regard that while the Minister for Immigration has suggested that UNHCR is less generous in its acceptance rates in relation to refugees than the Australian procedures, the statistics on which he has relied have been rigorously analysed and found wanting.[23]

4.22 Despite DIMIA's statements that Australia complied with its non-refoulement obligations, the Committee heard evidence of serious concerns about possible refoulement, both where unauthorised boat arrivals are returned to Indonesia and where offshore entry persons are taken to declared countries for processing of their claims for asylum.

Return to Indonesia

4.23 Australian Lawyers for Human Rights noted that Indonesia is not a party to the Refugee Convention and argued:

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21 *Submission 30*, pp. 6-7, referring to EXCOM Conclusions 85 (XLIX) (1998), 87 (L) 1999.

22 *Hansard*, 19 August 2002, p. 160.

23 *Submission 34A*, p. 2, citing P Mares 'The generous country? Asylum seeking in Australia: myths, facts and statistics', Paper for *What next? A public forum on asylum seekers in Australia*, 13 September 2001, RMIT, Melbourne. The issue of internal review of DIMIA assessments is discussed in more detail in Chapter 5.

> If an asylum-seeker is returned to Indonesia by Australia and subsequently refouled, Australia remains responsible for that person. Australia is the precipitator of chain refoulement.
>
> … The current Australian policy places unjustifiable reliance on Indonesia as a country in which a person can apply for and receive 'effective protection'. The further excision of territory will not alleviate this concern.[24]

4.24 Dr Mathew expressed similar views, noting that there appeared to be no re-admission agreement between Australia and Indonesia and therefore there were 'few, if any, safeguards against chain refoulement'.[25] She recommended that the policy of intercepting boats and turning them back to Indonesia (permitted by Division 12A of the *Migration Act 1958*) should be abandoned, noting that because Indonesia was not a party to the Refugee Convention:

> People cannot apply for protection there, so how can we say that they are getting effective protection? If they are allowed to remain, they will have a very tenuous existence there.[26]

4.25 Amnesty International also expressed concerns, noting:

> Indonesia has not previously been formally regarded as a 'safe third country' by Australia. The faith that has now been placed by Australia in Indonesia appears to have been done without the implementation of proper safeguards and transparency.[27]

4.26 Australian Lawyers for Human Rights argued further:

> There is a very real risk that the policy of return to Indonesia could lead to a situation of 'refugees in orbit' - no protection in Indonesia, no desire to return to a situation of persecution and no prospects of resettlement in the longer term.[28]

Declared countries

4.27 Concerns were also raised about Australia's reliance on declared countries where asylum seekers who have landed at an excised offshore place may be taken. While PNG is a party to the Refugee Convention, Nauru is not. The Human Rights and Equal Opportunity Commission stated:

> These provisions create a system in which Australia's non-refoulement obligations are not being specifically fulfilled by Australia; instead we are ultimately relying on other sovereign countries (Nauru and PNG) behaving

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24 *Submission 31*, pp. 8-9.

25 *Submission 34*, p. 3.

26 *Hansard,* 21 August 2002, p. 186.

27 *Submission 29*, p. 16.

28 *Submission 31*, p. 9.

> appropriately in complying with the non-refoulement obligation even though this obligation had its origin within Australia. In the case of Nauru which is not even a signatory to the Refugee Convention, this anomaly could, theoretically, assume even greater importance at some time in the future …[29]

4.28 Mr Angus Francis told the Committee that one of the criteria that the UNHCR applied in relation to determining whether there was effective protection in a third country was the person's access to a 'durable solution'.[30] He argued that the Minister's power to declare countries under section 198A of the Migration Act lacked a key component, namely local integration, and that the effect of the provisions was that:

> … the Commonwealth can effectively expel refugees to a country where they can be left in limbo, without any chance of local integration in that country, pending voluntary repatriation or resettlement.[31]

4.29 Mr Francis pointed out that the Minister's power to declare countries under section 198A was not reviewable. He also noted that the power to detain and remove such persons, contained in section 245F(9)(b) of the Migration Act, was not confined to removal to declared countries but referred more broadly to 'a place outside Australia'. He argued that there is thus no guaranteed protection against refoulement.[32]

4.30 The Refugee and Immigration Legal Centre (RILC) argued that the concept of a 'safe third country' was being misused in the current arrangements with declared countries:

> The concept of a 'safe third country' presupposes some linkage to the country in question, generally through rights acquired by a period of residence or other relevant connections in or with that country ... Use of the concept of the 'safe third country' to transfer asylum seekers to 'transit camps' in countries where they have no right of entry, to which they have no connection and which have no capacity to facilitate their resettlement is a serious misrepresentation and misuse of the concept … It should not be used as a mechanism to 'farm out' asylum seekers to unrelated countries.[33]

4.31 The RILC referred to the need to assess individual circumstances:

> In particular, we note that unaccompanied minors or dependent children may face certain risks which adults do not, and such risks must be taken into account in assessing whether the declared country will provide effective

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29 *Submission 35*, p. 4.

30 *Hansard*, 19 August 2002, p. 174.

31 *Submission 26*, p. 19.

32 *Submission 26*, pp. 19-20.

33 *Submission 37*, p. 5.

> protection to the child. The current arrangements make no provision for taking such relevant factors into consideration.[34]

4.32 The RILC called for 'increased transparency and proper scrutiny' of the process by which the Minister declares a country under section 198A, including consultation with key bodies about the ability of the third country to guarantee effective protection.[35]

4.33 In response, DIMIA stated that while 'some' people had engaged Australia's protection obligations:

> … there seems to be a misunderstanding that that protection has to be provided in Australia. Certainly it is our clear view that, for example, people being provided protection in Nauru or Manus are fulfilling our obligations in respect of the provision of protection.[36]

4.34 DIMIA representatives told the Committee that Australia had 'fully met the Convention requirements in respect of these people'[37] and that no person had been refouled from either Nauru or Manus Island.[38]

Have there been instances of refoulement?

4.35 In light of the criticisms that were made, the Committee was interested to ascertain if there was evidence that instances of refoulement had actually occurred.

4.36 In response to questions, several witnesses who had expressed concern about possible refoulement acknowledged that they did not have direct evidence that such instances had occurred, either from declared countries or from Indonesia.[39] However, Dr Mathew noted that an ongoing problem with considering such matters was that:

> … often people like me are not in a position to assess where a person is being sent, whether they will get back safely or whether they will be admitted. In the case of the [boats being turned around] … it looks as though they are returning to Indonesia. It may be that Indonesia ha[s] accepted all of those people back onto their territory, but I do not know that.[40]

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34 *Submission 37*, p. 6.

35 *Submission 37*, p. 9.

36 *Hansard*, 17 September 2002, pp. 239-240.

37 *Hansard,* 17 September 2002, p. 240.

38 *Hansard,* 17 September 2002, pp. 239, 240.

39 For example, Amnesty International, *Hansard*, 7 August 2002 p. 122; Dr Susan Kneebone, *Hansard*, 7 August 2002, p. 140, where she referred to people who could potentially be returned in the future; Dr Pene Mathew *Hansard*, 21 August 2002, p. 186.

40 *Hansard,* 21 August 2002, p. 186. Amnesty International made the same point (*Submission 29*, p. 14).

4.37 Dr Mathew argued that DIMIA should track those people to ensure that they were safe.[41] Amnesty International also advocated monitoring by Australia of those people who are returned to Indonesia, stating:

> Amnesty International believes that there is sufficient concern regarding the Indonesian Regional Cooperation arrangements to invoke an obligation for Australia to monitor those to be processed and those returned under these arrangements … Our experience of deportation of asylum-seekers from Australia and from many other countries is that on most occasions, the deportee is not heard of again - either through assimilation into local society or for more sinister reasons.[42]

4.38 Amnesty International called for an urgent 'objective assessment' of whether the arrangements with Indonesia meet the requirement of non-refoulement.[43]

4.39 Law lecturers Ms Rebecca La Forgia and Mr Martin Flynn also expressed concern about the lack of certainty as to whether Australia was complying with its non-refoulement obligations. Ms La Forgia told the Committee:

> 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 [Australia is] not complying with the non-refoulement provision, because we have to be sure that we are - and it is ambiguous.[44]

4.40 At the Committee's last public hearing, DIMIA responded to some of the concerns expressed about return of people to Indonesia and denied that there was any need for monitoring by Australia. Stating that the issue was whether Australia was satisfied that there was a process for determining claims and that Indonesia was a safe place for asylum seekers, a DIMIA representative noted:

> In that context, we provide support for [the International Organisation for Migration] to provide support to asylum seekers. We provide assistance to the UNHCR to operate their refugee assessment process in Indonesia. As a matter of practical fact, we are confident that the Indonesian government is allowing these people to stay within their territory while they go through that process and, if they are found to be refugees, while they await international resettlement arranged by the UNHCR. With those elements

41 *Hansard*, 21 August 2002, p. 186.

42 *Submission 29*, p. 19.

43 *Submission 29*, p. 15.

44 *Hansard*, 6 August 2002, p. 79.

addressed, there is no need to consider some form of tracking mechanism for individuals.[45]

Lack of statutory requirements in relation to declared countries

4.41 Several witnesses, including the UNHCR, Dr Mathew and Mr Francis, expressed concern that there was no requirement in the Migration Act as to an undertaking of non-refoulement by a declared country. For example, the UNHCR pointed out that section 198A of the Migration Act did not require a pre-admission agreement so as to protect against non-refoulement.[46]

4.42 In responding to concerns about possible refoulement from declared countries, DIMIA asserted that one of the core criteria for the Minister to declare a country under section 198A of the Migration Act was the obligation not to refoule.[47] The Committee notes that in fact the provision refers to a declaration by the Minister that a country 'provides protection' for asylum seekers pending assessment and refugees pending voluntary repatriation or resettlement, and 'meets relevant human rights standards' in providing that protection. There is no restriction, for example, stating that the Minister may not declare a country unless the country has undertaken not to refoule refugees. While section 198A(3) gives the Minister power to revoke a declaration, there is no obligation for him or her to do so or to consider doing so where circumstances change. In addition, the Committee notes that legal proceedings relating to the Minister's exercise of powers under the section are barred under section 494AA.

4.43 A DIMIA representative also told the Committee that Australia's agreements with Nauru[48] and PNG[49] include a clause on non-refoulement.[50] However, in relation to those Memoranda of Understanding, Dr Mathew noted that 'normally Australia would take the view that those agreements are not legally binding'.[51]

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45 *Hansard*, 17 September 2002, p. 254.

46 *Hansard*, 6 August 2002, p. 47. Mr Angus Francis also referred to this (*Hansard*, 21 August 2002, p. 174) and the Refugee and Immigration Legal Centre also described section 198A as falling 'well short of the safeguards necessary to ensure that refugees are protected from return to places where they may be persecuted' (*Submission 37*, p. 7).

47 *Hansard*, 6 August 2002, p. 10.

48 *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for cooperation in the administration of asylum seekers and related issues*, 11 December 2001, cl. 30.

49 *Memorandum of Understanding between the Government of Australia and the Government of the Independent State of Papua New Guinea, relating to the processing of certain persons, and related issues*, 11 October 2001. There is no express statement as to non-refoulement, but paragraph 2 requires all activities to be conducted 'in accordance with international law and the international obligations of both Parties'. PNG is a party to the Refugee Convention and the 1967 Protocol.

50 *Hansard*, 6 August 2002, p. 10.

51 *Hansard*, 21 August 2002, p. 186.

4.44 Mr Angus Francis also pointed out the absence of other statutory guarantees. He argued that there was no requirement in the Migration Act for Australian officials to assess whether or not those removed to declared countries were refugees or at risk of refoulement. Nor was the Minister required by the Act to exercise his discretion in such a way as to comply with Australia's non-refoulement obligations.[52]

4.45 Mr Francis contrasted the lack of statutory protection in Australia with Canada's new Immigration and Refugee Protection Act 2002, which sets out clear objectives in relation to refugees (distinct from a set of objectives relating to immigrants), and implements a Pre-Removal Risk Assessment scheme designed to ensure against refoulement. He recommended that similar provisions should be introduced in Australia.[53]

A legal limbo?

4.46 Law lecturers Ms Rebecca LaForgia and Mr Martin Flynn told the Committee that they were concerned about the 'legal limbo' in which offshore entry persons could be placed. They argued that while the excision legislation allowed these people to be taken to declared countries, there was no obligation for Australia to take any action at all.[54] Moreover, an offshore entry person could not take legal action in the Federal Court concerning his or her offshore entry, status or detention because of the statutory bar on such proceedings.[55] Ms LaForgia explained:

> … 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.[56]

4.47 Ms LaForgia and Mr Flynn argued that it would be 'curious' to create more excised offshore places without first clarifying the domestic legal regime that would cover those places.[57] Other witnesses noted that Australia's domestic laws, such as those relating to child protection or the guardianship of unaccompanied children, would continue to apply in the excised offshore places.[58]

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52 *Submission 26*, p. 21.

53 *Submission 26*, pp. 22-23.

54 *Submission 20*, p. 2.

55 *Migration Act 1958*, s. 494AA, discussed in Chapter 2.

56 *Hansard*, 6 August 2002, p. 78.

57 *Submission 20*, p. 2.

58 For example, the Hon Justice John Dowd AO, *Hansard*, 7 August 2002, pp. 105-106.

4.48 DIMIA was asked how it was determined whether an offshore entry person would be taken to a declared country or be dealt with on Christmas Island, given that different outcomes in terms of access to visas would apply if the person was found to be a refugee. A DIMIA representative told the Committee there was a 'general expectation' that offshore entry persons would be taken to Manus Island and Nauru. However, some exceptions had been made in relation to particular boats: these were mainly due to medical conditions and, in one case, where a boat had arrived at Cocos Island and its occupants had been taken to Christmas Island, they were not later transferred to a declared country. DIMIA noted that Government policy was to make a decision at the time of each boat arrival as to the appropriate place to process asylum seekers.[59]

The spirit of the Refugee Convention

4.49 While not all witnesses agreed that the legislation was in breach of particular articles of the Refugee Convention or other international instruments, many acknowledged that it could at least be argued that the legislation offended against the spirit of the Refugee Convention and other principles of international cooperation.

4.50 One such body was the Human Rights Council of Australia, which stated:

> The islands being excised are territories within Australian sovereignty. Those who arrive at the excised places will effectively find themselves in a no man's land … It is highly doubtful whether this responsibility can be assumed by another State Party to the Convention because the excised places are within Australian borders. Thus, it would seem inevitable that persons genuinely seeking refugee status, will be disadvantaged. This can hardly be said to be in keeping with the spirit of international cooperation.[60]

4.51 Further discussion of whether Australia could or should be doing more in cooperation with other countries to address refugee movements is in Chapter 6.

4.52 Another concern was whether the excision legislation was effectively creating a zone where Australia's obligations under the Refugee Convention did not apply. The NSW Council for Civil Liberties argued that there is no provision within the Refugee Convention for creating such a zone.[61] The Hon Justice John Dowd AO, on behalf of the International Commission of Jurists, expressed the same view:

> Australia participated in the [Refugee] Convention and the convention does not contemplate the excision of parts of it. In our view, we are in breach of that convention we contracted to … we ought not to be selective about how we apply that and we ought not to breach it.[62]

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59 *Hansard*, 17 September 2002, p. 252.

60 *Submission 25*, p. 2. See also Ms Emilia Della Torre, *Submission 1*, p. 10.

61 *Submission 17*, p. 1.

62 *Hansard*, 7 August 2002, p. 103.

4.53 The Australian Catholic Social Justice Council[63] and the RILC made the same point, with the RILC arguing:

> The partial excision of Australian territory breaches an inviolable principle - namely the right to seek asylum in the territory of a Convention signatory. There is no legally justifiable distinction between excising part of a country and the whole of a country.[64]

4.54 Similar concerns have been raised elsewhere by other experts in international law.[65]

4.55 In response, DIMIA repeated its claim that Australia was not in breach of the Refugee Convention, offering the following comments:

> There is nothing in the excision legislation which in any way affects the geographic coverage of Australia's obligations under the Refugee Convention. The excised offshore places remain part of Australia, and Australia's obligations under the Refugee Convention continue to extend to the border of the territorial seas. Australia is discharging its obligations under the Refugee Convention in these places through ensuring that any asylum seeker who arrives at one of those places has his or her claims for recognition as a refugee individually assessed through a process which is consistent with that applied by the United Nations High Commissioner for Refugees.[66]

Summary

4.56 The Committee heard significant concerns from many witnesses that Australia's non-refoulement obligations under the Refugee Convention and other relevant instruments were either being contravened or at risk of being contravened by the excision legislation. Witnesses noted that Australia has traditionally recognised its non-refoulement obligations by granting protection visas under section 36 of the Migration Act, and that offshore entry persons are not entitled to apply for the same visas as those landing elsewhere in Australia. They may not apply for any visas while they remain in Australia, unless the Minister exercises his or her discretion. Moreover, the temporary visas available to people who have stayed in an intermediate country for seven days are much more restrictive in nature, as outlined in Chapter 2.

4.57 While DIMIA was at pains to emphasise that Australia complied with its non-refoulement obligations by ensuring that offshore entry people taken to declared countries have access to adequate refugee determination processes, the Committee heard significant concerns about the use of such declared countries, including:

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63 *Hansard*, 6 August 2002, p. 42.

64 *Submission 37*, p. 3.

65 For example, G Triggs 'International law and asylum seekers: a legal twilight zone', *Asia-Australia Papers*, no. 4, November 2001, pp. 17-31.

66 DIMIA *Answers to questions on notice*, 24 September 2002.

- arguments that the use of unrelated countries to process claims by those to whom Australia has obligations is wrong in principle;
- lack of transparency and accountability in the process of declaring a country under section 198A;
- lack of adequate safeguards to ensure non-refoulement, particularly where a declared country is not a party to the Refugee Convention; and
- lack of transparency in the refugee determination processes (discussed in more detail in the next chapter).

4.58 The Committee notes that no witness could provide evidence that instances of refoulement have actually occurred, but is mindful of the argument that it is difficult to substantiate any such claims when offshore entry persons are held in other countries without any rights to institute legal proceedings.

4.59 The Committee also heard evidence that offshore entry people not taken to declared countries for processing of their claims are in 'legal limbo', since they have no right to make a visa application while in Australia. Instead they must rely on a Ministerial discretion under section 46A. Concerns about that discretion are also considered in more detail in the next chapter.

4.60 The Committee is also mindful of the arguments that where Australian officials have intercepted boats and turned them back to Indonesia, Australia bears some responsibility for monitoring the safety of those on board in terms of the non-refoulement obligation. The Committee notes DIMIA's arguments that it is satisfied that people have access to proper refugee determination procedures in Indonesia and that Australia supports the International Organisation for Migration (IOM) and the UNHCR in that country. However, the Committee cannot ignore the significant concerns expressed by human rights and legal organisations during this inquiry, particularly in light of the perceived lack of transparency, and discusses those issues further in the final chapter of this report.

CHAPTER 5

AUSTRALIA'S OTHER INTERNATIONAL OBLIGATIONS

5.1 Several submissions raised concerns that the excision legislation may be in breach of various other obligations at international law, including:

- by imposing penalties on refugees who enter or are present in Australia without authorisation, and relying on a ministerial discretion to comply with the Refugee Convention;
- by failing to respect family unity; and
- by restricting the movement of those assessed as refugees.

5.2 Concerns were also expressed about:

- the procedures in place for determining the refugee status of offshore entry persons;
- the failure to provide permanent resettlement opportunities for refugees; and
- the detention of offshore entry persons.

5.3 Other relevant rights and obligations at international law concern Australia's rights to protect its national borders and the Torres Strait Treaty between Australia and PNG.

5.4 These issues are discussed in turn below.

Imposition of penalties and reliance on Ministerial discretion

5.5 Article 31 of the Refugee Convention provides that States shall not impose penalties on account of their illegal entry or presence on refugees who, **coming directly** from a territory where their life or freedom was threatened, enter or are present without authorisation, provided they present themselves to authorities without delay and show good cause.

5.6 Several witnesses noted that the existing legislative scheme treats all offshore entry persons in the same way, that is, it does not differentiate between those people who come directly from an alleged place of persecution and those who have stopped in an intermediary country. The RILC argued:

> Article 31 of the [Refugee] Convention allows for the imposition of penalties only on persons who have not directly fled from a territory where their life or freedom was threatened. Direct or secondary movement from

> threats to life or freedom are the differentiating elements - not mode of arrival.[1]

5.7 The RILC had raised similar concerns about people coming directly to Australia from a country of persecution during another inquiry by the Senate Legal and Constitutional Legislation Committee earlier this year. In its report, the Legislation Committee suggested that DIMIA discuss those matters with RILC as a matter of priority,[2] but it appears that no such action has taken place.[3]

5.8 Mr James McGillicuddy of the Australian Political Ministry Network argued that:

> … those who arrive on those excised islands - or those islands that are going to be excised - directly from their country of origin should be allowed through.[4]

5.9 When asked how people who had come directly from a country of persecution would be dealt with under the existing legislation, DIMIA's response was somewhat indirect, referring again to general principles:

> 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.[5]

5.10 DIMIA also referred to the Minister's discretion under section 46A to allow an application to be made on the basis of an individual's circumstances, implying that this mechanism would be used in such cases. DIMIA indicated that the Minister had exercised that discretion earlier in 'in a couple of humanitarian cases … where the people were ill and had family links in Australia'.[6] DIMIA later advised the Committee that the Minister had exercised his discretion in one case for a mother and her child, who applied for a temporary protection visa on 4 June 2002.[7] DIMIA stated that this provision was 'fully consistent with the [Refugee] Convention in that it

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1 *Submission 37*, p. 11.

2 Senate Legal and Constitutional Legislation Committee P*rovisions of the Migration Legislation Amendment Bill (No. 1) 2002*, June 2002, p. 15.

3 See comments by Mr David Manne on behalf of the RILC, *Hansard*, 7 August 2002, p. 153. DIMIA advised the Committee on 21 August 2002 that the Government was considering its response to the report and that no discussions had been held.

4 *Hansard*, 7 August 2002, p. 86.

5 *Hansard*, 6 August 2002, p. 18.

6 *Hansard*, 6 August 2002, p. 18.

7 DIMIA 'Answers to questions on notice*,* 21 August 2002, p. 1, referring to a subclass 785 visa.

provides the legislative framework for Australia to exercise the discretion reserved for contracting States by Article 31'.

5.11 However, reliance on this provision was criticised. The Hon Justice John Dowd AO on behalf of the International Commission of Jurists described the effect of the scheme:

> It takes away Australia's benefit - that is, the right to seek asylum [when] in Australia. It takes away that right, which we Australians confer on the whole world, by attacking those who seek a particular method of coming here to claim their right. If we process them offshore, they do not do it as a right, they do it as a benefit - as a grace-and-favour.[8]

5.12 His Honour argued further:

> However good a minister may be at raising the bar, we are concerned about legal rights rather than ministerial discretions, because ministers change.[9]

5.13 Dr Pene Mathew,[10] Australian Lawyers for Human Rights[11] and Ms LaForgia and Mr Flynn[12] also criticised the provision on the grounds that the Minister's discretion was not compellable. The Human Rights and Equal Opportunity Commission made a similar point, stating:

> An unfettered and non-compellable Ministerial discretion to allow individual offshore entry persons to apply for visas is an inadequate recognition of Australia's international human rights obligations in respect of these persons.[13]

5.14 In answer to questions from the Committee, Mr Flynn commented further that the original jurisdiction of the High Court (under section 75 of the Constitution) recognised by section 494AA(3) of the Migration Act would be of little practical use in this situation:

> 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 … [T]he 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

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8 *Hansard*, 7 August 2002, p. 110.

9 *Hansard*, 7 August 2002, p. 113.

10 *Hansard*, 21 August 2002, p. 188.

11 *Submission 31*, p. 7.

12 *Hansard*, 6 August 2002, pp. 80-81.

13 *Submission 35*, p. 5.

> exercise a power to enable an offshore entry person sitting on Christmas Island to apply for some form of protection visa.[14]

Other concerns about Article 31

5.15 Several witnesses argued more broadly that the Bill was likely to offend against Article 31 because it gave certain people a disadvantage depending on where they entered Australia. For example, Mr Andrew Naylor on behalf of the Human Rights Council of Australia told the Committee:

> Denial to persons in excised places but not others who enter or are present in Australian territory without authorisation and denial of the rights associated with making a valid protection visa application is, in the Council's respectful view, a disadvantage that amounts to the imposition of a penalty, in breach of article 31.[15]

5.16 Amnesty International made a similar claim about the 'inconsistent' approach between different categories of people, depending on where they entered Australia.[16] Mr Robert Lindsay, barrister and chair of the Western Australian Branch of the Refugee Council, told the Committee that it was 'strongly arguable' that failing to give people the same rights when processing their claims was in effect imposing a penalty. In support of his view, he quoted international expert on refugee law Professor Goodwin-Gill, who had written in 1996:

> … 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 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** *(emphasis added)*.[17]

5.17 Dr Pene Mathew expressed similar views, noting that unless the Minister exercised his discretion under section 46A, offshore entry persons were prohibited from applying for refugee status under the 'usual Australian refugee status determination procedures'. She argued:

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14 *Hansard*, 6 August 2002, p. 80.

15 *Hansard*, 7 August 2002, p. 115.

16 *Submission 29*, p. 20.

17 Goodwin-Gill, G S *The Refugee in International Law* (2nd edition) 1996, pp. 30-31, cited by Mr Robert Lindsay *Hansard*, 6 August 2002, pp. 68, 70-71.

> Discrimination among asylum-seekers merely on the basis of their point of entry to Australia is clearly not reasonable and objective.[18]

5.18 Mr Naylor[19] and the RILC[20] also suggested that denial of such rights could amount to discrimination in breach of article 26 of the ICCPR, which states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

5.19 On the issue of discriminatory treatment, DIMIA argued in response that there was no breach of the Refugee Convention:

> The Refugee 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 Refugee 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.[21]

5.20 Dr Mathew argued, however, that there was a real issue as to whether protection was in fact available in intermediary countries:

> Clearly, Australia would point to the words "coming directly" in Article 31 as a basis for its hierarchy of refugees. However, there appears to be little scope for considering whether "protection" was really accessible in countries through which asylum-seekers may have passed, and no consideration as to whether it is accessible now.[22]

5.21 She elaborated on this point in her supplementary submission, referring to summary conclusions on Article 31 by the Geneva Expert Roundtable in November 2001. As Dr Mathew noted, the opinions of eminent publicists are a subsidiary source of international law considered by the International Court of Justice.[23] Amongst the Expert Roundtable's conclusions were the following points that have direct relevance to the Australian legislation:

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18 *Submission 34*, p. 7. Dr Mathew argued that for similar reasons there might be breaches of article 26 of the ICCPR: 'While there is no right to enter Australia, if a person is permitted entry on the basis that protection is required, but the protection differs from other persons equally in need of protection, this may constitute a form of invidious discrimination'.

19 *Hansard*, 7 August 2002, p. 115.

20 *Submission 37*, p. 11.

21 DIMIA 'Comment on matters addressed in submissions to the Committee', 21 August 2002, p. 3.

22 *Submission 34*, p. 6.

23 As recognised in the Statute of the International Court of Justice, art 38.

- Refugees are not required to have come directly from territories where their life or freedom was threatened. Article 31 was intended to apply, and has been interpreted to apply, to people who have briefly transited other countries;

- The asylum-seeker's intention to reach a particular country, for instance for family reunification, is to be taken into account when assessing whether the person stayed in or merely transited another country;

- To 'come directly' from a country via another country where a person is at risk or in which generally no protection is available, is accepted as good cause for illegal entry; and

- Article 31 also applies to any person who claims to be in need of international protection. Consequently, that person is entitled to receive the benefit of the 'no penalties' obligation until he or she is found not to be in need of international protection, in a final decision following a fair procedure.[24]

5.22 Amnesty International argued that the excision legislation did not adequately reflect the wording and intention of Article 31: for instance, it gave asylum seekers 'insufficient opportunity to "show cause" and explain why they have come in the manner they have'. Amnesty International argued succinctly:

> Simply having been present in a country does not make it a first country of asylum. The core issue is the effectiveness of protection to the claimant.[25]

5.23 However, a contrasting view on whether a penalty was imposed on asylum seekers in breach of Article 31 was expressed by the UNHCR, which stated:

> The denial of access to the regular asylum procedure in mainland Australia or the requirement of the Minister to lift the bar for entry to "mainland Australia" is not a penalty within the meaning of Article 31(1).[26]

5.24 Nevertheless, the UNHCR argued that a breach of Article 31 might be committed in another way: if offshore entry persons were detained 'as a deterrent or a punitive measure for illegal entry/presence'. The UNHCR explained:

> As a general principle, asylum seekers should not be detained. The detention of such persons should only be resorted [to] in cases of necessity, and on exceptional grounds, i.e. to verify identity, to determine the elements on which the refugee claim is based, in cases where the asylum seekers have destroyed their travel/identity documents or have used fraudulent documents

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24 *Submission 34A*, pp. 2-3, citing 'Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees - Revised', para 10, accessed at http://www.unhcr.ch/cgi-bin/texis/vtx/global-consultations.

25 *Submission 29*, p. 20.

26 *Submission 30A*, p. 1.

> in order to mislead the country of asylum, and to protect national security and public order.[27]

Family reunion obligations

5.25 Dr Mathew told the Committee that Australia has legal obligations under the ICCPR and the Convention on the Rights of the Child to respect family unity 'which may require the reunion of families separated in the course of refugees' flight'.[28] She noted, for example, that Article 10 of the Convention on the Rights of the Child provides that 'applications by a child or his or her parents to enter or leave a State party for the purpose of family reunification shall be dealt with in a positive, humane and expeditious manner', but that the Australian scheme precludes the possibility of any such application.

5.26 The UNHCR also expressed grave concern about the impact on the unity of families of transferring asylum seekers to third countries, noting:

> This right includes maintaining family unity for members arriving in Australian territory together, as well as assuring family reunion for members arriving separately. When coupled with the use of Temporary Protection Visas by Australia, which do not provide for family reunion as a basic individual right, the impact of such State action may result in a breach of Australia's formal obligations under various human rights instruments, including the Convention on the Rights of the Child, as well as ignoring standards that Australia has helped to create and promote.[29]

5.27 The Committee notes that DIMIA's guidelines for the refugee status assessment of offshore entry people state that:

- Where family unit members arrive together and are found to be refugees in their own right, they should receive protection in the way that maintains the unity of their family; and
- Where they arrive and are processed separately, family members must be assessed in their own right 'as is the case for persons arriving on the Australian mainland'.[30]

Restriction on the movement of refugees

5.28 The UNHCR noted that Article 31(2) of the Refugee Convention states that no restrictions other than those that are necessary should be applied to the movement

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27 *Submission 30A*, p. 2.

28 *Submission 34,* p. 8. Dr Mathew referred to various decisions of the Human Rights Committee and the European Court of Human Rights.

29 *Submission 30*, p. 8, referring to various EXCOM Conclusions. See also *Hansard*, 6 August 2002, p. 53.

30 DIMIA *Onshore Protection Interim Procedures Advice*, No. 16, September 2002, tabled at the Committee's public hearing on 17 September 2002.

of refugees, and then only until their status is regularised. The UNHCR argued that a person who has been recognised as a refugee has obtained a regularised status legalising his or her presence in Australia. However, in order to move from the excised area to the rest of Australia's territory, the Minister must 'lift the bar' under section 46A and allow the person to apply for a valid visa.

5.29 The UNHCR argued that this procedure restricts the refugee's movement within the State's territory and is inconsistent with both Article 31(2) and Article 26 of the Refugee Convention, which provides that a refugee has the right to move freely within a State's territory and to choose his or her place of residence.[31]

5.30 Article 28 of the Refugee Convention also provides that States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order require otherwise. Paragraph 13 of the Schedule reserves the right 'in exceptional cases or where the refugee's stay is authorised for a specific period' to limit the period during which a refugee may return to a period of not less than three months.

5.31 The UNHCR argued that the lack of travel documents was in breach of Article 28 of the Refugee Convention.[32] Dr Mathew also noted that under Article 12(2) of the ICCPR, 'refugees - like all human beings - have the right to leave any country', and that this right is 'rendered ineffective' if they have no right of re-entry.[33]

5.32 In response, the Attorney-General's Department said:

> Article 28 of the Convention and paragraph 13 of the Schedule to the Convention do not dictate the form of a visa facilitating initial entry into/stay in Australia. The fact that such a visa provides for a single entry as opposed to multiple entries is not addressed by those provisions.
>
> The question of a breach of paragraph 13 … could only arise if a person holding a travel document issued by Australia for the purpose of travel outside Australia was subsequently refused re-entry into Australia. At that point, the circumstances surrounding each individual case would need to be considered in determining whether or not there had been a breach.[34]

5.33 However, the Committee finds this interpretation curious in light of the plain statement in Article 28 that parties to the Convention 'shall issue' to refugees lawfully within its territory travel documents for the purpose of travel outside the territory unless there are compelling reasons of national security or public order, and paragraph 13 that deals with the minimum re-entry period. If a person has only a single entry visa, then travelling outside Australia will bar re-entry. This is the heart of the

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31 *Submission 30*, pp. 4-5; *Hansard*, 6 August 2002, p. 53.

32 *Hansard*, 6 August 2002, p. 53.

33 *Submission 34*, p. 8.

34 *Submission 43A*, pp. 1-2.

criticism made by the UNHCR and Dr Mathew, and the Attorney-General's Department's response does not address it adequately.

Processing of offshore entry persons

5.34 The UNHCR's submission noted that neither the current Bill nor the previous excision legislation passed in 2001 outlined the asylum procedure to be implemented in regard to offshore entry people.[35]

5.35 The UNHCR expressed concern about the lack of formal procedures and pointed out that Australia had adopted conclusions of the Executive Committee of the High Commissioner's Programme (EXCOM) that refer to the need for fair and effective procedures for determining refugee status and protection needs. The UNHCR stated:

> The introduction of different systems for determination of refugee status for different asylum seekers depending on their location in Australia raises concerns. Having two different determination systems is discriminatory and in UNHCR's view undesirable. If lesser standards relating to procedures or lesser status accorded under these procedures are envisaged due to the nature of arrival of asylum seekers, this would not be in accord with international protection obligations.[36]

5.36 The UNHCR noted that DIMIA had publicly stated that claims would be assessed against the criteria in the Refugee Convention, and referred to verbal advice from the Department that such procedures were being finalised.[37] The UNHCR acknowledged:

> The processing that the administration has been performing on Australian territory has traditionally been first-class, so we were quite happy with [that] processing. We fear that in the excision territories and perhaps in the third countries there is still a question mark … It is because we do not know.[38]

5.37 During the inquiry, DIMIA representatives told the Committee that the guidelines were 'in the final stages of drafting' and that the Department had been 'at some pains to align with the UNHCR's processes'.[39] This was considered particularly

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35 *Submission 30*, p. 3.

36 *Submission 30*, p. 4.

37 *Submission 30*, p. 4.

38 *Hansard,* 6 August 2002, p. 49. Mr Michel Gaubaudan, the UNHCR Regional Representative, referred to one issue where the UNHCR considered that Australia's position differed, namely derivative status. Australia requires the spouses and minor children of recognised refugees to apply on their own merits, rather than to be given refugee status and be immediately reunited with the refugee family member. The UNHCR told the Committee that it considered the issue 'fairly substantial' and that it had addressed the Government on this matter (*Hansard*, 6 August 2002, p. 48).

39 *Hansard*, 6 August 2002, p. 9.

important because in Nauru there were two processing systems: the UNHCR was responsible for processing some people who were not offshore entry persons and DIMIA was processing the rest.[40]

5.38 A DIMIA representative explained the procedure:

> 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 …[41]

5.39 DIMIA also noted that Australia also formally considered whether claimants met the test for protection under other conventions, such as the Convention Against Torture.[42] DIMIA's guidelines were tabled at the Committee's last public hearing on 17 September 2002.[43]

5.40 The UNHCR noted that while EXCOM conclusions required an appeal process as part of the assessment procedures, that process need not involve an external review.[44] However, some submissions criticised the internal review process. Dr Mathew noted that while in Australia there was independent review by the Refugee Review Tribunal of decisions by DIMIA officers, there was no such independent review of offshore entry persons in Nauru and PNG. As discussed in Chapter 4,[45] Dr Mathew argued that comparing Australian internal reviews with UNHCR processes was 'inapt' because:

> UNHCR has a rather different philosophy to the national immigration departments of countries. UNHCR is established in order to care for refugees. National immigration departments, even when refugee status is dealt with in a branch specifically designed for this purpose, are often driven by a philosophy of exclusion.[46]

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40 *Hansard*, 17 September 2002, p. 249.

41 *Hansard*, 6 August 2002, p. 4.

42 *Hansard*, 6 August 2002, p. 11.

43 DIMIA *Onshore Protection Interim Procedures Advice*, No. 16, September 2002, tabled at the Committee's public hearing on 17 September 2002.

44 *Hansard*, 6 August 2002, p. 48.

45 See paragraph 4.21.

46 *Submission 34A*, p. 2.

5.41 Nevertheless, the Committee notes that DIMIA's statistics on the outcome of refugee assessments on Nauru and Manus Island show an increase in the number assessed as refugees following review: 520 were initially assessed as refugees but, with some reviews still to be finalised as at 16 September 2002, the number assessed as refugees had been increased to 701.[47]

Resettlement

5.42 The UNHCR expressed further concerns about the temporary protection visas granted to those offshore entry people who are assessed as refugees and subsequently resettled in Australia. As outlined in Chapter 2, where an offshore entry person stopped for more than seven days in a intermediary country, the visa that may be granted is for 36 months only and allows a single entry to Australia. The UNHCR argued:

> Resettlement is a durable option, not a transitory solution, and it would be preferable if Australia offered long term resettlement opportunities.[48]

5.43 The UNHCR also criticised the use of the term 'resettlement' to describe Australia's response to offshore entry people subsequently accepted as refugees:

> In early May, the Minister of Immigration announced that included in this year's offshore refugee resettlement quota are those accepted by Australia from excised areas. UNHCR does not consider resettlement to be the appropriate term in this case. Resettlement is a discretionary and voluntary act, which provides for the movement of refugees from one State where they do not have a durable option to another State. This process should clearly be distinguished from the movement of refugees within a State's territory, to whom that State has protection obligations under the Refugee Convention.[49]

5.44 A DIMIA representative sought to explain the use of the terminology:

> … 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.[50]

5.45 DIMIA sought to distinguish the UNCHR's comments from the circumstances relating to bringing offshore entry people into Australia, although the distinction was not entirely clear to the Committee:

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47 See Chapter 2.

48 *Submission 30*, p. 8.

49 *Submission 30*, p. 5. See also *Hansard*, 6 August 2002, p. 53.

50 *Hansard*, 6 August 2002, p. 8.

> 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.[51]

5.46 DIMIA also noted that where an offshore entry person had been assessed as meeting the refugee criterion, Australia then considered other issues such as family connections 'when considering the priorities for bringing people to Australia'.[52] The Committee notes also that the Department's guidelines for assessing offshore entry persons specifies that DIMIA officers 'should not invite visa applications from persons in declared countries unless such an invitation is specifically approved by Humanitarian Branch DIMIA'.[53]

Detention of offshore entry people

5.47 Another issue about which the Committee heard concerns during the inquiry was the detention of offshore entry persons in declared countries. For example, Mr Angus Francis told the Committee that an asylum seeker removed to a declared country might be 'left there in limbo, subject to resettlement or repatriation'.[54] As noted above in paragraph 5.24, the UNHCR also expressed concern about continued detention beyond that which was absolutely necessary.

5.48 During the public hearings, representatives from the Department of Foreign Affairs and Trade (DFAT) and the Attorney-General's Department were asked about this situation. They responded that the centres were not 'detention centres' but 'processing centres', noting that the charter of the International Organisation for Migration (IOM) that is responsible for running the centres did not include administration of detention centres. Following further questioning, a DFAT representative, while stating that the operation of the centres was an issue for DIMIA rather than DFAT, conceded that Australia had not raised with the governments of Nauru and PNG relevant international obligations such as compliance with the Convention on the Rights of the Child.[55]

5.49 For its part, DIMIA stated that offshore entry persons taken to Nauru and PNG were not in immigration 'detention'; instead:

> They are in a place of protection whilst their claims are processed.[56]

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51 *Hansard*, 6 August 2002, p. 9.

52 *Hansard*, 6 August 2002, p. 11.

53 DIMIA *Onshore Protection Interim Procedures Advice*, No. 16, September 2002, para 46.

54 *Hansard*, 19 August 2002, p. 174.

55 *Hansard*, 19 August 2002, pp. 164-166.

56 DIMIA 'Comment on matters addressed in submissions to the Committee' 21 August 2002, p. 3.

5.50 During the Committee's last public hearing DIMIA provided some details about the arrangements for the Nauru and PNG centres, noting that Australia pays not only for DIMIA assessment staff in those centres but also IOM's costs in running the centres and the UNHCR's costs in processing people in Nauru:

> We do not have contracts with either Nauru or PNG: they are actually memorandums of understanding. The centres are run and managed by IOM. We do have a letter of understanding with IOM … and essentially it is a contracting party with a series of other people with whom they have a commercial relationship. They have a contract with Eurest in respect of the provision of food. They have contracts with certain guarding organisations, such as Chubb in respect of Nauru. We do not have access to the details of those contracts but we do meet the total cost through invoicing by IOM.[57]

5.51 Some further details were provided on the security arrangements at the centres:

> IOM provide what you would call perimeter security. That is basically to allow proper regulation of movement through the centre. They have no responsibilities at all in respect of what you might call the internal policing of the centres … the Nauru and PNG police forces have that primary responsibility. In both of those centres we have APS staff who have special constable status under the respective laws of the governments … They provide, in conjunction with the national forces, what you might call policing or community liaison.[58]

5.52 DIMIA went on to explain that in Nauru:

> … there are quite extensive arrangements now for people to leave the centre. For example, the children attend the Nauruan schools, there are regular visits to the swimming centre and they take them on shopping activities et cetera.[59]

5.53 When asked if DIMIA would be happy if the relevant agencies decided to release the asylum seekers from the centres, a DIMIA representative said 'It would be a matter for them'. He stated that while responsibility for ensuring that offshore entry people stayed at the centres was 'shared', ultimately it was the responsibility of the national government concerned.[60]

5.54 The Committee asked DIMIA whether the relevant standards of care could be incorporated into the contractual arrangements with IOM and/or the declared countries. DIMIA responded that IOM was internationally recognised in terms of its care for asylum seekers and that the Department regarded it as inappropriate to

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57 *Hansard,* 17 September 2002, p. 237.

58 *Hansard*, 17 September 2002, p. 246.

59 *Hansard*, 17 September 2002, p. 246.

60 *Hansard*, 17 September 2002, p. 246.

include such a level of detail ('100 or 200 pages of detention standards') in such contracts.[61]

5.55 Some submissions to the Committee expressed concern that those offshore entry persons who had been assessed as meeting the definition of 'refugee' might continue to be detained following that assessment. DIMIA noted that Australia was 'making every effort to ensure' that those people were resettled in accordance with UNHCR guidelines. As reported in Chapter 2, DIMIA advised that 152 of the 701 people assessed as refugees in those countries had now been provided with temporary protection in Australia. Just over two hundred had been transferred to New Zealand and Sweden, and the Australian Government and UNHCR were 'in discussions' with other possible countries of resettlement about the remainder.

Interaction of other laws

5.56 Another issue on which the Committee took evidence was the interaction of other laws with the excision scheme.

5.57 As stated in the Explanatory Memorandum, the excision of offshore places affects only the ability of non-citizens who arrive there to make valid visa applications while in Australia. Those people may also be taken to declared countries for processing of their refugee claims.

5.58 The Committee was interested to explore whether any other laws were affected by the excision scheme, particularly in relation to the care of unaccompanied children. The Hon Justice Dowd AO confirmed that the full range of domestic laws would apply to offshore entry persons:

> Anyone on the territory of Australia, be they a citizen or a non-citizen, is subject to and has the benefit of all Australian legislation … It may well be that people who land on these excised areas are entitled to social services, humanitarian benefits, medical treatment or the protection of police ... If they were starving, Australian would have to intervene if they were on Australia territory… For instance, the child welfare laws of the state of Queensland would apply to those children because they are children within the state. There is no requirement for citizenship under state laws conferring benefits or conferring duties.[62]

5.59 DIMIA also noted that some offshore entry people had been brought to Australia for medical treatment.[63]

5.60 The Committee asked DIMIA about the Minister's guardianship of unaccompanied children who land at an excised offshore place. The Minister's

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61 *Hansard*, 17 September 2002, p. 247.

62 *Hansard*, 7 August 2002, pp. 105-106.

63 DIMIA *Outcome of processing of offshore entry persons*, tabled at the Committee's public hearing on 17 September 2002.

responsibility arises under the *Immigration (Guardianship of Children) Act 1946,* which provides that the Minister shall be the guardian of every 'non-citizen child' who arrives in Australia.[64] DIMIA provided the Committee with a copy of advice from the Australian Government Solicitor's office, stating that it was not inconsistent with the Minister's guardianship responsibilities for him to decide that such children should be taken to a declared country, at which point his guardianship responsibilities would cease.[65]

5.61 The Committee finds this situation somewhat curious given that, as discussed in Chapter 4, the Convention on the Rights of the Child obliges countries to make the best interests of asylum seeker children a primary consideration and to give appropriate protection and assistance to unaccompanied asylum seeker children. It appears that the Minister is able effectively to shunt the responsibility to a declared country that may not be a party to the Convention on the Rights of the Child, where the processing centres are effectively under Australian control and yet his guardianship ceases.

Summary

5.62 In addition to the concerns expressed about possible contraventions of Australia's non-refoulement obligations, the Committee heard compelling evidence that the current legislative scheme may contravene certain other obligations at international law.

5.63 In particular, the Committee heard concerns that by treating different categories of asylum seekers differently, Australia was arguably in breach of the prohibition on imposing penalties on refugees coming directly from a place of persecution.

5.64 Of significance to the Committee was the fact that the UNHCR criticised Australia's failure to promote the family unity of offshore entry persons, as did Dr Pene Mathew. Given that, as the UNHCR has indicated, Australia has emphasised family reunion in its immigration policies and that various international conventions such as the Convention on the Rights of the Child reflect the importance of this issue, this is of serious concern.

5.65 The Committee is also concerned that there are arguably breaches of international obligations in relation to the restricted movement of those offshore entry persons assessed as refugees in Australia, and their inability to travel outside Australia if given a temporary protection visa. The situation in which unaccompanied asylum seeker children processed in a declared country are no longer under the guardianship

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64 Section 6. 'Non-citizen child' is defined in section 4AAA as a child either not in the charge of, or for the purposes of living with, a parent, intending adoptive parent or relative.

65 Section 6A provides that such children may not leave Australia without the Minister's consent, but that the section does not affect the operation of any other law governing departure from Australia.

of the Minister, unlike their counterparts if their claims are processed in Australia, is also of concern.

Protection of Australia's borders

5.66 A further issue of international law that this report considers is Australia's protection of its national borders. As outlined in Chapters 2 and 3, one of the stated purposes of the excision legislation is to promote the integrity of Australia's maritime borders. Australia has recognised rights to protect its borders against threats to its peace, order and security, including rights under the UN Convention on the Law of the Sea. Australia has also been involved in international efforts to address transnational organised crime such as people smuggling.

5.67 The Committee did not receive direct evidence on these issues, but a brief discussion is included below for the sake of completeness.

Boats in Australian waters

5.68 As a party to the Convention on the Law of the Sea, Australia must allow innocent passage of ships in its territorial sea (sea within 12 nautical miles of the coastline), as long as such passage is not prejudicial to Australia's peace, good order or security.[66] Passage of a ship is considered prejudicial if the ship engages in loading or unloading any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.[67] A State may take the necessary steps in its territorial sea to prevent passage that is not innocent.[68] In addition, in the contiguous zone (sea between 12 and 24 nautical miles of the coastline), a State may exercise the control necessary to prevent infringement of its laws within its territory or the territorial sea.[69]

5.69 Division 12A of the Migration Act gives Commonwealth officers powers to chase, board, search and detain ships and to detain and move the people on board in various circumstances, for example, where an officer reasonably suspects the ship has contravened or will contravene the Act.[70] Section 7 of the Act also seeks to recognise any executive power of the Commonwealth[71] to protect Australia's borders, including by ejecting people who have crossed those borders.

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66 Article 19.1.

67 Article 19.2(g).

68 Article 25.

69 Article 33(1).

70 See s. 245F.

71 The existence of such an executive power was considered by the Federal Court in *Ruddock v Vadarlis* [2001] FCA 1329, but has not been decided by the High Court.

5.70 A submission from Ms Emilia Della Torre referred to the presumption at international law of an obligation to rescue persons and ships in distress at sea, noting that:

> … international law does not give any guidance as to how the obligation to rescue is to be balanced against territorial sovereignty particularly in relation to asylum seekers.[72]

5.71 The Committee did not receive any other evidence to suggest that Australian laws or policies were in breach of its obligations under the Convention on the Law of the Sea and accordingly makes no finding on that issue.

People smuggling

5.72 In recent years there have been increasing efforts to combat transnational organised crime, particularly in relation to illegal movements of people. As discussed in Chapter 3, one of the main justifications given for the introduction of the current Bill has been as a means to address people smuggling.

5.73 Australia signed the Convention against Transnational Organised Crime in December 2000 but has not yet ratified it, and consequently is not bound by its provisions. Australia has also signed but not yet ratified two optional protocols to that convention, one of which deals with people smuggling.[73]

Consultation with other countries

5.74 While acknowledging Australia's rights to protect its borders, there is one issue on which the Committee wishes to express its concern. Evidence from DFAT and the Attorney-General's Department during this inquiry revealed that Australia did not consult with PNG or New Zealand prior to announcing the proposed excisions. It appears that the governments of those two countries were only advised on the day that the proposals were publicly announced.[74]

5.75 Given that Australia envisaged and indeed intended that the flow of refugees would be affected, particularly in terms of an anticipated diversion of boats to New Zealand as outlined in Chapter 3, the Committee finds this approach less than desirable in terms of Australia's ongoing bilateral relations with those two countries.

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72 *Submission 1*, p. 7. She argued that 'The Tampa incident clearly exposes the problem caused by the gaps in the implementation in domestic law of international treaties and norms, including rescue at sea and the protection of asylum seekers against arbitrary detention.'

73 The three protocols are the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol Against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. Australia has not signed the first Protocol, and has signed (in December 2001) but not yet ratified the two other Protocols.

74 *Hansard*, 19 August 2002, pp. 158-159.

The Torres Strait Treaty

5.76 The final area of examination of Australia's obligations and rights at international law relates to the Torres Strait. In 1985 a treaty between Australia and PNG concerning maritime boundaries and sovereignty in the Torres Strait (the 150 kilometre wide passage between the two countries) entered into force. This treaty, which established the Torres Strait Protected Zone (shown at Figure 2 in Chapter 2), is known as the Torres Strait Treaty.

5.77 The principal purpose of the Protected Zone is to acknowledge and protect the traditional way of life and livelihood of the indigenous inhabitants of the area, including their traditional fishing and freedom of movement.[75] Under this arrangement, inhabitants from both countries who maintain traditional customary associations with the area move freely (without passports or visas) within the Protected Zone.

5.78 In the Protected Zone, international laws relating to navigation and overflight, such as the right of innocent passage in the territorial sea, continue to apply.[76] Except where the Treaty provides otherwise, a party's immigration, customs, quarantine and health procedures must be applied in such a way as not to prevent or hinder free movement or the performance of traditional activities in and in the vicinity of the Protected Zone.[77] In doing so, the parties are to act 'in a spirit of mutual friendship and good neighbourliness', bearing in mind the relevant principles of international law and established international practices, and the importance of discouraging illegal entry and evasion of justice.[78] Each party has the express right to limit free movement to the extent necessary to control abuses involving illegal entry or evasion of justice and to meet 'necessary problems' as they arise.[79]

5.79 The Explanatory Memorandum for the current Bill states that:

> … the *Migration Act* currently allows inhabitants of the Protected Zone (as established by the Torres Strait Treaty) to move about freely with the performance of their traditional activities. The traditional inhabitants of the Torres Strait will not be affected [by the Bill].[80]

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75 The Treaty also requires the Australian and PNG Governments to protect the marine environment and indigenous fauna and flora of the area (Articles 13 and 14), and regulates commercial fisheries in the Protected Zone (Part 5). It establishes a Joint Advisory Council to review and make recommendations on relevant matters (Article 19).

76 Article 7.

77 Article 16.1.

78 Article 16.2.

79 Article 16.3.

80 Explanatory Memorandum, p. 2.

Evidence on the Torres Strait Treaty

5.80 The Committee did not receive any evidence to suggest that the Bill would affect the operation of the Torres Strait Treaty or the lives of those who live in the area.

5.81 A submission from the Torres Strait Regional Authority noted that there are currently 39 Migration Movement Officers based in the Torres Strait region, of whom 34 are based on the outer islands.[81] The submission also stated that in light of 'a growing number of illegal immigrants using the Torres Strait as an entry point to Australia' in recent years, the people of the Torres Strait were concerned about border protection and supported greater efforts in this area.[82]

5.82 During public hearings, Mr Terry Waia, Chair of the Torres Strait Regional Authority, told the Committee that 'about 30' unauthorised people had arrived in small groups in the Torres Strait since December 2000. When questioned about their origins, Mr Waia said:

> … I know that some of them did come through Papua New Guinea, where Papuans were offered money to take them over to places in the Torres Strait. As you know, there is very little employment or none at all on the other side, and this is what encourages the local inhabitants to accept the money they receive from these people who are coming over from the other side … [B]ecause of the set-up of the villages in the Torres Strait - they are very small communities, everybody knows each other - if someone walks around our village, they will certainly stand out as a different person altogether.[83]

5.83 Mr Waia told the Committee that he did not know from which country such people had come, but that they were not Papua New Guineans.

5.84 While the Torres Strait Regional Authority welcomed measures to enhance border protection, it criticised the lack of consultation by the government. This issue is addressed in more detail in chapter 6.

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81 *Submission 16*, p. 2. In evidence on 21 August 2002, the Chair, Mr Terry Waia, told the Committee that the role of those officers was to monitor the arrival of people and report back to the authority on Thursday Island.

82 *Submission 16*, p. 1.

83 *Hansard*, 21 August 2002, p. 194.

CHAPTER 6

OTHER ISSUES

6.1 This chapter considers a range of other issues that arose during the inquiry, including:

- the language used in debate about these issues;
- whether the flow of refugees can be better addressed in other ways;
- the effect on affected communities, including Indigenous communities (term of reference (b));
- the nature of consultation with Indigenous communities (term of reference (d));
- the financial impact on the Commonwealth (term of reference (c));
- other aspects of the Bill (term of reference (e)), including its proposed retrospective application.

Criticism of the terminology used in debate

6.2 Australia's use of the terms 'resettlement', 'safe third country' and availability of 'protection' were also criticised during the inquiry. In particular, the UNHCR criticised the use of the term 'resettlement' in relation to offshore entry people.

6.3 As discussed in Chapter 5, (paras 5.42-46) the UNHCR disagreed with Minister Ruddock's use of the term 'resettlement' in an announcement made in May 2002, in which the Minister stated that this year's offshore refugee resettlement quota included people accepted by Australia from excised areas. The UNHCR saw this as an inappropriate use of the term because such people were being moved within Australia's territory, and as such, Australia already had obligations to them under the refugee convention. The UNHCR considers the term should only be used in respect of movement between one State where refugees do not have a 'durable' solution to another State.[1] Mr Michel Gabaudan, UNHCR's regional representative, contended that Australia's use of the term was not in accordance with international understanding:

> 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

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1 Submission No.30, p5-6.

> not mean to make any derogatory comments vis-à-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.[2]

6.4 Several submissions also argued that the use of terminology such as 'illegals' is misleading and should cease. For example, the International Commission of Jurists stated:

> … traditionally a large proportion of asylum seekers are inevitably entering a country in breach of migration and sometimes customs laws, when in fact as asylum seekers, as such, they are lawful asylum seekers whether they succeed in their application for asylum or not. The application is legal, however tenuous or false the basis for that claim. A person should be treated with dignity as a lawful applicant and should be dealt with equal dignity, whether such application has been acceded to or refused.[3]

6.5 The UNHCR also argued that the language used in the Bill, related legislation and debate 'diverges from accepted meanings'. In particular, the UNHCR criticised the use of the expression 'unlawful asylum seeker' during parliamentary debate on the Bill:

> Although an asylum seeker may arrive unlawfully, either as a result of a lack of appropriate documents or a failure to seek access to sovereign territory through legal entry points, the right to seek asylum, including for those arriving illegally, is a lawful act under international law. Linking the word "unlawful" to the term "asylum seeker" is therefore incorrect as entry in search of refuge and protection should not be considered an unlawful act.[4]

6.6 During public hearings, the UNHCR elaborated:

> We just wanted to make it clear that in our view there is no such thing as an unlawful asylum seeker.[5]

6.7 The Catholic Commission for Justice, Development and Peace, Melbourne suggested that the Committee recommend to the government that it :

> Stop demonising those who do come and claim asylum and an immediate cessation in the use of spurious concepts such as the "queue" and "illegals" in regard to asylum seekers.[6]

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2 *Hansard*, 6 August 2002, p. 53.

3 *Submission 36*, pp. 1-2. See also the Sisters of the Good Samaritan Social Justice Catalyst Committee, *Submission 22*, p. 3 and Network for International Protection of Refugees, *Submission 24,* p. 5.

4 *Submission 30*, p. 2.

5 *Hansard*, 6 August 2002, p. 50.

6.8 The use of such language is not new, nor is it confined to Australia, as a submission from barrister Mr Robert Lindsay quoting international expert Professor Goodwin-Gill pointed out:

> Recent examples show that, while States are conscious of the potential threat to their own security that a massive influx can pose, none claims an absolute right to return a refugee, as such, to persecution. A State may try to assert for itself greater freedom of action, however, by avoiding any use of refugee terminology. Asylum seekers are thus classified as 'displaced persons', 'illegal immigrants', 'economic migrants', 'quasi-refugees', 'aliens', 'departees', 'boat people' or 'stowaways'.[7]

6.9 DIMIA, however, justified the use of the term 'unlawful' by saying:

> 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 [who] 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".[8]

Whether the flow of refugees can be better addressed in other ways

6.10 Many submissions argued that a broader approach should be taken to addressing the flow of refugees, and suggested various strategies that should be considered. For example, Amnesty International argued that there was a lack of policies to address the root causes of the primary and secondary movement of refugees and a lack of a 'sufficiently protection orientated approach - that is, concern for the human rights of refugees'.[9] It argued that additional resources and information needed to be provided to asylum seekers, as well as support for first countries of asylum.

6.11 Similar views were expressed by others, including Dr Pene Mathew,[10] the Combined Community Legal Centres' Group (NSW) Inc,[11] the Catholic Commission

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6 *Submission 28*, p. 39.

7 *Submission 10*, citing *The Refugee in International Law.*

8 DIMIA 'Comment on matters addressed in submissions to the Committee', 21 August 2002, p. 3.

9 *Hansard*, 7 August 2002, p. 121.

10 *Submission 34*, p. 11.

for Justice, Development and Peace,[12] the Human Rights Council of Australia[13] and the Australian Lawyers for Human Rights.[14] The RILC urged the Government 'to increase its use of internationally acceptable mechanisms' for dealing with concerns about border security and people smuggling, referring to the following:

- Assistance to countries of first asylum to allow them to shoulder their refugee burdens
- Encouraging non-signatories to sign the Refugees Convention and other human rights treaties
- Making available greater numbers of refugee places in Australia to ease the burden on countries of first asylum
- Participation in international fora dealing with the issue of people smuggling and global migration trends within the framework of refugee protection
- Targeting people smuggling rackets in ways which do not breach the rights of refugees caught in the 'smuggling trap'.[15]

6.12 The last point, that people smuggling should be addressed in ways that did not hurt refugees, was echoed by the St Vincent de Paul Society:

> People-smuggling, like any other international crime, is most appropriately dealt with at the level of international arrangements, laws and protocols. Australia effectively engages in international cooperation in the fields of trade, culture, transport and communications. People-smuggling is a crime that should be dealt with in the same way as the crimes of those who act illegally in any international activity. In a globalised world, people, especially the most vulnerable, should be our prime concern.[16]

6.13 Several groups submitted that Australia should take more refugees. Reverend John Murphy, Director of the Australian Catholic Migrant and Refugee Office, argued that the proposed legislation failed 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 —

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11 *Submission 21*, p. 3.

12 *Submission 28,* pp. 30-35, 39.

13 *Submission 25A*, p. 2.

14 *Submission 31*, pp. 3-4.

15 *Submission 37*, p. 16.

16 *Submission 19*, p. 6.

> 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.[17]

6.14 The Catholic Commission for Justice, Development and Peace also argued that Australia could take more refugees:

> Australia has maintained a Humanitarian quota of 12,000 since 1991. It has sat, static, and inflexible to the growing number of refugees globally, and has been particularly useless in regards to the main refugee source countries in the Middle East … In the past our refugee quote was higher: 16,000 in 1989 and 20,000 in 1980; and there is no reason why it could not be so again.[18]

6.15 A similar argument was made by the Sisters of the Good Samaritan Social Justice Catalyst Committee, who submitted that Australia as a 'relatively wealthy society' should be willing to accept greater responsibility for displaced people:

> A country such as Australia benefits enormously by its capacity to trade and negotiate in the global community. It is only fair that this country should also shoulder a significant burden of the problems faced by the international community. In light of Australia's comparatively small contribution to the placement of refugees it is difficult to countenance legislation that reflects even less of a desire to assist those seeking asylum. Now more than ever there is a need to recapture the spirit of the authors of human rights declarations, treaties and conventions that was evident after World War II.
>
> … If countries like Australia become more isolationist in regards to those seeking asylum then there will be an even greater divide between countries of great fortune and countries of great misfortune.[19]

6.16 In response to those comments, DIMIA submitted that the Bill was only a part of the Government's 'comprehensive strategy to combat irregular migration and people smuggling' and that:

> 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.[20]

6.17 DIMIA noted that the Government's approach had three main elements:

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17 *Hansard*, 6 August 2002, p. 37.

18 *Submission 28*, p. 34. The submission also quoted statistics from the 2002-03 Australia Council for Overseas Aid Budget Analysis that show a substantial decline in Australian overseas aid since 1995/96.

19 *Submission 22*, p. 5.

20 DIMIA 'Comment on matters addressed in submissions to the Committee' 21 August 2002, p. 4.

- prevention of the problem by minimising the outflows from countries of origin and secondary outflows from countries of first asylum;

- 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

- 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.[21]

6.18 In relation to the first element, prevention, DIMIA highlighted the following key actions by Australia:

- 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;

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21 DIMIA 'Comment on matters addressed in submissions to the Committee' 21 August 2002, pp. 4-5.

- 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.[22]

6.19 DIMIA also pointed to Australia's 'active participation' in international programs to combat people smuggling, including inter-governmental consultations on asylum, refugee and migration policies in Europe, North America and Australia; Asia-Pacific consultations on refugees, displaced persons and migrants; irregular migration and migrant trafficking in east and south east Asia; and the Pacific Rim immigration intelligence officers conference.

Summary

6.20 The Committee notes DIMIA's advice that the excision of islands to the north of Australia is only part of a wider strategy to combat people smuggling and address the flow of refugees.

6.21 The Committee notes also DIMIA's advice that Australia has provided aid to countries of first asylum and support to agencies such as the UNHCR, as well as making 'concerted multilateral and bilateral efforts to try to eliminate the reasons why people leave their homelands to seek refugee protection in other countries'. However, the Committee agrees with those submissions that suggest that the greater part of the Government's efforts appears to be in deterring and punishing people smuggling, rather than aiding those people forced to leave their home countries because of fear of persecution. While Australia is clearly making some contribution to addressing the causative factors, the Committee notes that the number of humanitarian places Australia offers has remained static in the last decade at approximately 12,000 places,[23] despite the presence of more than 12 million refugees worldwide.[24]

The effect on affected communities

6.22 As previously explained in this report, the purpose of this legislation is to prevent unauthorised entry persons from lodging a valid visa application if they land at an excised place. As discussed in Chapter 4, the excision will have no impact on movements by the residents of any excised places or on traditional movements in the Torres Strait.

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22 DIMIA 'Comment on matters addressed in submissions to the Committee' 21 August 2002, pp. 5-6.

23 Submission 20, p. 31.

24 Based on UNHCR figures as at the start of 2002, accessed at http://www.unhcr.ch in September 2002.

6.23 The Explanatory Memorandum makes the intention of the Bill clear in this regard:

> Australian citizens and other persons with lawful authority under the Migration Act to be in Australia will continue to be able to move about freely in these areas and make any applications permitted by the Migration Act. These amendments do not affect Australia's sovereignty over those islands. The islands remain integral parts of Australia.

6.24 While there has clearly been uncertainty and anxiety in some indigenous communities arising from a lack of consultation and communication about the Bill, the Committee has not received any evidence of negative effects.

6.25 Mr Richard Gandhuwuy, who spoke at the hearing on Elcho Island, expressed his view on the bill as follows:

> I would like to strongly support the new proposal that the committee is looking into now that is going to be a part of the legislation to control the coast, especially in Arnhem Land, Northern Territory. I would like to strongly support that legislation to go ahead and be approved by parliament and become a law, an act.[25]

6.26 Similarly, the Torres Strait Regional Authority registered support:

> The people of the Torres Strait, just like all Australians, are concerned with border protection and in recent years we have experienced a growing number of illegal immigrants using the Torres Strait as an entry point into Australian territory. Therefore, we are pleased to have greater border protection.[26]

6.27 There appear to be several reasons behind concern among indigenous communities about unauthorised persons landing on their islands, including:

- fear of disease; and
- a general desire to prevent intrusion on their lands.

Fear of disease

6.28 The Committee received evidence from Mr Terry Yumbulul about an outbreak of hepatitis on Elcho Island that he attributed to unauthorised arrivals:

> I remember, going back about six years now, a big ship landed on Cape Wessell. They were refugees and they landed, and they just ploughed right through to a little island at Cape Wessell with 95 people on board… they were brought down here to Galiwinku, Elcho, and shipped out from here to Darwin. After that the epidemic broke out of the sickness hepatitis, and the people copped it here. What you are saying you are about to do and what

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25 *Hansard*, 11 September 2002, p. 201.

26 *Submission* 16.

> this meeting is all about is to protect against that disease and other animals, like those shells—and that is good—to monitor the areas here.[27]

Prevention of intrusions

6.29 Island indigenous communities expressed general concerns about unauthorised incursions onto their lands. While these concerns include asylum seekers, any unauthorised entry or intrusion matters to them. For example, on Goulburn Island, Mr Bunuk Galiminda, the Community Development Employment Program coordinator for the Warruwi community, spoke of the community's concern about a recent landing on North Goulburn Island:

> Yesterday a plane landed at North Goulburn, and the traditional owners did not know about it … We don't know what is being conducted out there or what has been going on … our people did not know about it and they are worried about it ... We need those people to be prosecuted. They should not be out there, unless they have been given the okay from these people here.[28]

6.30 Representatives expressed dissatisfaction with current arrangements, seeing them as too slow. Mr Galiminda spoke of frustrations associated with having to wait for outside assistance:

> Look at it in reality. If we start contacting outside help, like Emergency Services, those people will be gone. But give us a couple of hours and we will be there. By the time outside help comes, that ship will be gone and we will have no chance. [29]

6.31 Mr Yumbulul was also among those who expressed dissatisfaction with current border protection procedures. He told the Committee that the predictable nature of Coastwatch patrols reduced their effectiveness:

> All right, we have got Coastwatch flying around. We see the plane. Every now and then we watch our watch and time them, because every Saturday at about 11 o'clock they fly. That is not right. We time those people when they fly Coastwatch — and don't get me wrong; they're doing a good job — and every time at 11 o'clock exactly on the dot they fly. The people that are immigrating, the refugees, they don't have times; they never have times. They will come across night and day. They are not going to wait for Coastwatch. It is protection for the coast that we are talking about.[30]

6.32 On both Elcho Island and Goulburn Island, community representatives expressed a desire that the local people take a much greater role in detecting and

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27 *Hansard*, 11 September 2002, p. 200.

28 *Hansard*, 11 September 2002, pp. 219-220.

29 *Hansard*, 11 September 2002, p. 220.

30 *Hansard*, 11 September 2002, p. 200.

responding to illegal entry, whether it be people smugglers, illegal fishing by foreign vessels or other unlawful activity.

6.33 Mr Galiminda was amongst those who sought a greater role for the local people:

> Through CDP [Community Development Employment Program] we now have rangers who are looking after the land, but not so much the sea. What we want to do is expand that program and look after the marine park as well. So William is asking, 'Where do we get help?' It is the same question as came from you mob. These boys need to be trained properly so that they have a piece of paper saying that they can arrest foreign vessels. We can go out there and, if we sight someone out there illegally entering into our area, we can confiscate the boat. These are the powers that our people are looking for.[31]

6.34 Mr Joe Gumbula, who spoke on Elcho Island as a representative of the Milingimbi community, gave similar evidence that emphasised the need to involve local Yolngu people and improve opportunities for them:

> If cabinet put through this legislation and it becomes a law, why don't they get another resource of funding for some particular Yolngu people to straighten out these things and give them an opportunity, like in customs? That is recognition too. We need to get some sort of support from that too, and have the Yolngu people start to look around, because of the nature of the area…We live in this country. We know the areas. We know the land. We know the locations. We know the areas, the sacred objects and all that.[32]

6.35 Mr Yumbulul summed up the views of many in the communities:

> In other words, they are asking for funds to do the monitoring and be the eyes of the coast here themselves. In other words, they are asking for employment and to put the funds here so that these people will do it themselves, be trained, everything, instead of Coastwatch going around at 11 o'clock on a Saturday.[33]

6.36 DIMIA was asked for its views on those suggestions, and responded:

> DIMIA acknowledges that local residents do make a valuable contribution in the work of border and law enforcement agencies. DIMIA believes that the arrangements in place with other agencies, such as Customs and the state and federal police, do ensure that immigration border issues are covered.[34]

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31 *Hansard*, 11 September 2002, p. 219.

32 *Hansard*, 11 September 2002, p. 220.

33 *Hansard*, 11 September 2002, p. 203.

34 DIMIA 'Answers to Questions on Notice', 24 September 2002.

Consultation with affected communities

6.37 Government consultation with affected communities prior to the introduction of the bill appears to have been minimal and manifestly inadequate. The Torres Strait Regional Authority told the Committee that there was no consultation other than a phone call from the Minister just prior to the announcement in the national media. The Authority contrasted this approach to that taken with other legislation:

> This is in contrast to the approach taken by Customs in introducing the… *Customs Legislation Amendment Bill 1 of 2002,* which is planned to create a custom declared zone for the whole of Torres Strait. The TSRA Board gave full support to the initiative and wrote accordingly to the Minister. Effective consultation clearly had made an easier passage.[35]

Figure 3: the Committee taking evidence at Elcho Island.

6.38 The lack of consultation or other information caused considerable concern in Indigenous communities about what the excision proposal meant to them. Giving evidence on behalf of the Torres Strait Regional Authority, Mr Terry Waia told the Committee:

> It was of very short notice. The fact that consultation had not been done prior to that letter coming from the Commonwealth government was a concern all over the Torres Strait region.[36]

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35 *Submission 16*, p. 2.

36 *Hansard*, 21 August 2002, p. 193.

6.39 The Committee heard of similar concerns in the islands of the Northern Territory. Giving evidence on behalf of the Warrawi community, Mr James Marrawal recalled the community's concern:

> When you came out that time, we did not know what was going on. In the back of our minds we were thinking: why are we getting kicked out from the rest of Australia? After all, we are enrolled for federal Commonwealth elections.[37]

6.40 Giving evidence on Goulburn Island, Mr Jim Gorey emphasised the need to involve consult communities about such issues:

> You have to understand that consultation is very important to the people- that they be spoken to and their ideas be listened to…[38]

6.41 The Committee notes that DIMIA has commenced a program to address the lack of information among the inhabitants of northern Australia. Somewhat coincidentally, the Department and Minister launched an information program on 10 September, the day before the Committee's visit to northern Australia. A DIMIA public affairs officer then went to Goulburn and Elcho Islands when the Committee visited.

6.42 The Committee notes that DIMIA has acknowledged shortcomings in the process of consultation with the affected communities. A DIMIA representative explained that the regulations that were made on 7 June had been prepared in haste, following preparation of a report by the People Smuggling Task Force 'on about 5 June' and intelligence that suggested a boat was 'on the way soon'. The DIMIA officer said that in the circumstances 'it was the best we could do' but acknowledged:

> … that perhaps more information could be provided in a targeted form for the particular communities that could be affected by such changes.[39]

6.43 The Committee subsequently asked DIMIA whether any visits to affected communities would be undertaken to support the release of the information pack. DIMIA responded that as the information kit 'very clearly' set out the effect of excision and in particular that communities are not affected, no further visits were planned 'unless significant concerns are raised'.[40]

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37 *Hansard*, 11 September 2002, p. 221.

38 *Hansard*, 11 September 2002, p. 221.

39 *Hansard*, 6 August 2002, p. 15.

40 DIMIA *Answers to questions on notice,* 24 September 2002. DIMIA noted that just over $13,000 had been spent on preparing and distributing the information kit, including production of a video.

The financial impact on the Commonwealth

6.44 The remaining term of reference for this inquiry was the financial impact for the Commonwealth (term of reference (c)).

6.45 The Explanatory Memorandum for the Bill stated that the proposed amendments would have 'minimal' financial impact, and gave no other details.[41] When questioned by the Committee as to the possible impact on resources, the AFP said that the proposed excisions might in fact assist that agency:

> Fro 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 … it assists us because they do not arrive in remote locations where we would have to deploy our resources.[42]

6.46 By contrast, Dr Susan Kneebone of the Castan Centre for Human Rights Law at Monash University argued that the proposed legislation was 'objectionable':

> … because it will increase the cost of the 'Pacific Plan'. It is our view that the cost of this scheme is already disproportionate to the scale of the problem. The reality is that Australia receives a very small proportion of the world's asylum seekers. The cost of the Pacific Plan reduces Australia's capacity to give aid to those countries most in need of it, and from which coincidentally a large proportion of asylum seekers originate.[43]

6.47 The Government's funding for initiatives to address the flow of people attempting unauthorised arrival in Australia is not insubstantial. An amount of $159 million was provided in the 2001-02 Additional Estimates for offshore asylum seeker management,[44] and in the 2002-03 Budget a total of $353 million was allocated for 'unauthorised boat arrivals', including $138 million for a purpose built facility on

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41 Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, *Explanatory Memorandum*, p. 3.

42 *Hansard*, 6 August 2002, p. 27.

43 *Submission 23*, p. 2.

44 Senate Legal and Constitutional Legislation Committee *Examination of Additional Estimates 2001-2002: Additional Information Volume 3, Immigration and Multicultural and Indigenous Affairs Portfolio*, May 2002, Answer to Question on Notice 100, p. 604.

Christmas Island.[45] The Committee notes that as at the end of May 2002, $56.2 million had been spent on Nauru and Manus Island.[46] The costs were as follows:

Table 2 Expenditure on offshore asylum seeker management on Nauru and Manus Island to end May 2002

	NAURU $m	MANUS IS. $m
Departmental costs	2.5	1.5
Escorting/guarding	0.9	0.1
IOM	31.3	19.0
UNHCR	0.7	0
Other	0.2	0
TOTAL	**35.6**	**20.6**

6.48 Following the Committee's request for updated information on the costs of offshore asylum seeker management, DIMIA provided the following figures.[47]

Table 3 Estimated expenditure for offshore asylum seeker management in 2001/02

	BUDGET $m	ACTUAL EXPENDITURE $m
Nauru	70.0	48.4
Manus	42.5	29.4
Christmas Island	36.6	20.5
Cocos Island	7.6	5.6
Regional Cooperation	0.5	5.9
DIMIA costs	2.0	1.1
TOTAL	**159.2**	**110.9**

Summary

6.49 The Committee did not receive compelling evidence to suggest that the Bill if enacted would result in significant extra costs or savings to the agencies involved.

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45 *Budget Strategy and Outlook 2002-03*, Budget Paper No. 1, Table 4, p. 1-17.

46 Senate Legal and Constitutional Legislation Committee *Examination of Budget Estimates 2002-2003: Additional Information Volume 4, Immigration and Multicultural and Indigenous Affairs Portfolio*, August 2002, Answer to Question on Notice 116, p. 1134.

47 DIMIA *Answers to questions on notice*, 4 October 2002.

However, the Committee notes concerns about the cost of managing offshore processing facilities at Nauru and Manus Island and considers this issue in the final chapter.

Other aspects of the Bill

6.50 This section considers some remaining aspects of the Bill, including:

- its retrospective application; and
- the likely effect on quarantine matters.

Retrospective application

6.51 Schedule 1, item 2 of the Bill (which was introduced on 20 June 2002) applies to the proposed places an 'excision time' of 2pm on 19 June 2002, that is, its application will be retrospective if the Bill is enacted. (Since the regulations commenced when they were made on 7 June and were disallowed on 19 June 2002, the excision effected by the regulations was effective for the period 7 June – 19 June 2002).

6.52 The Senate Scrutiny of Bills Committee drew attention to the retrospective application of this provision on the basis that it 'may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference'. The Committee commented that the provision 'is similar to "legislation by Press Release", in that it assumes that both Houses of the Parliament will accept and approve this bill without amendment'.[48]

6.53 The International Commission of Jurists opposed the retrospectivity in the Bill, stating:

> If a person has arrived on an affected offshore place after 19 June 2002, that person presently has the right to seek asylum. By setting the excision time retrospectively, these rights would be extinguished by passage of the Bill. That would be an unacceptable move which should be opposed even by proponents of the overall scheme.[49]

6.54 During public hearings, the Hon Justice John Dowd AO, President of the International Commission of Jurists Australian Section, elaborated on the reason for his concerns:

> Retrospective legislation is often done by governments. Firstly, it can never be right to do it but circumstances where an error is seen and corrected, or where there is a tax statute or some sort of matter where people can make arrangements after a government announces it – a measure to avoid that measure – are common and ought to be treated somewhat differently from

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48 Senate Standing Committee for the Scrutiny of Bills *Alert Digest No. 6 of 2002*, 26 June 2002, p. 12.

49 *Submission 36*, p. 4. See also Australian Lawyers for Human Rights, *Submission 31*, p. 5.

> other legislation that retrospectively changes people's rights, particularly in relation to criminal offences. In international law, retrospective criminal offences are anathema and, in terms of the ownership of property and the enjoyment of rights, people ought not to have that altered subsequent to the enjoyment of such rights; there is, otherwise, no certainty in the ownership of property and the enjoyment of rights.[50]

6.55 While acknowledging that he had not had the opportunity to consider the matter closely, Justice Dowd expressed concern that one effect of the Bill might be to apply retrospectively certain criminal offences that appear elsewhere in the Migration Act. However, when asked for its response, DIMIA advised that no criminal offences would be affected by the retrospective operation of the Bill: criminal offences that applied in excised offshore places would have applied in any case.[51]

Summary

6.56 Retrospective application of legislation that takes rights away or imposes new obligations is a serious step which must be fully justified.

6.57 The Committee notes that, contrary to the Hon Justice Dowd's suggestion, a person who lands at an excised offshore place does not actually lose the right to seek asylum. However, his or her rights are not the same as those of a person who lands in mainland Australia. The Committee notes also DIMIA's advice that no person who lands in an excised offshore place will be disadvantaged by the application of existing criminal offences in the Migration Act. However, concerns about the proposed retrospectivity remain.

6.58 The Committee notes that the Excision Act passed on 26 September 2001 was retrospective in its operation by some weeks.[52] In relation to Christmas Island and Ashmore and Cartier Islands, the legislation operated from the day the Prime Minister announced the proposed legislation (8 September 2001),[53] while in relation to Cocos (Keeling) Islands it had effect from the day before the relevant Bill was introduced (17 September 2001). The Committee notes also that the current Bill was introduced just after a boat had been intercepted en route to Ashmore Reef.[54]

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50 *Hansard*, 7 August 2002, p. 103.

51 *Hansard*, 17 September 2002, p. 255.

52 See definition of 'excision time' in s.5. The Excision Act came into operation on 27 September 2001.

53 *Transcript of the Prime Minister the Hon John Howard MP, Doorstop Interview Sydney Airport*, 8 September 2001, accessed at http://www.pm.gov.au/news/interviews/2001.

54 The Prime Minister, when announcing on 8 September 2001 that the Aceng had been intercepted en route to Ashmore Reef, announced that the proposed legislation would take effect from 2.00 pm that day.

Quarantine issues

6.59 The remaining issue on which the Committee received some evidence was the possible impact of the excision of the islands on quarantine matters.

6.60 The Committee invited the Department of Customs to comment on the Bill, but no submission was made. However, the Australian Seafood Industry Council supported the Bill on the basis:

> … that on balance, there is more chance an illegal vessel will be intercepted if it spends additional time in Australian waters heading for the mainland;
>
> that if such vessels succeed in reaching the mainland, there is a greater chance of detection than from a landing on a remote island.[55]

6.61 The Council noted that exotic pests or disease can pose a significant risk to Australian seafood stocks, sometimes in a very short time frame. It referred to the discovery in 1999 of Black Striped Mussel in Darwin Harbour, which led to closure of the harbour and eradication over several weeks at a cost of over $2 million.

6.62 The Committee heard further evidence from the Northern Territory Department of Industry, Resource and Development on its management strategies of such pests. A representative told the Committee that the Northern Territory Government funded an Aquatic Pest Management Unit to minimise risks through public education and targeted monitoring of high risk areas and vessels:

> A precautionary risk assessment of the vessel classes visiting Territory waters identified two classes of high risk vessels; namely, international recreational vessels destined for Darwin marina, and apprehended vessels … International vessels apprehended off our northern coastline originate from ports known to be inhabited by potential marine pest species, such as the black-striped mussel and the Asian green mussel. Routine inspection of high risk vessels in Darwin Harbour by divers located populations of the Asian green mussel on the hull of a suspected illegal entry vessel, and subsequently all vessels are now inspected before they are brought into the Port of Darwin.[56]

6.63 The officer noted that under existing protocols and because of limited resources, the Unit had confined its activities to the Port of Darwin 'and the Territory regulated coastline' rather than the islands.[57] She reported that four of the 75 'unauthorised illegal entry vessels' the Unit had tested had exotic pests.[58] When asked

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55 *Submission 42,* p. 3.

56 *Hansard*, 11 September 2002, p. 227.

57 *Hansard*, 11 September 2002, p. 228.

58 *Hansard*, 11 September 2002, p. 233. The Department's use of the term 'illegal entry vessels' may differ from that used elsewhere in this report.

if there was a threat to the marine environment if boats ended up on the islands, the officer said:

> It being a marine environment, there is a level of connectivity and, if they did island-hop, that brings them one step closer and increases the chance of their coming onshore.[59]

Summary

6.64 The Committee notes that there are significant concerns about control of exotic pests and disease coming in via vessels from other countries, and does not in any way diminish the importance of effective and efficient quarantine practices.

6.65 However, the Committee is not convinced that the danger posed by vessels bearing asylum seekers is necessarily any greater than that posed by illegal fishing vessels or indeed international recreational vessels. In any case, controlling the spread of disease is not the purpose of this Bill. Hence the Committee considers that this issue alone is insufficient justification for the passage of the Bill.

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59 *Hansard*, 11 September 2002, p. 232.