The Senate

Legal and Constitutional References Committee

Migration Zone Excision

An examination of the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 and related matters

October 2002

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The Committee recommends that the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 not proceed.

Recommendation 2:
The Committee recommends that initial assessments of claims for refugee status by offshore entry persons should be reviewed by an external body such as the federal magistracy or Refugee Review Tribunal.

Recommendation 3:
The Committee recommends that the use of declared countries for holding and assessing claims for refugee status by those who have entered Australian territory at an excised offshore place should be abandoned.

Recommendation 4:
In the event that the Government continues to use declared countries for holding and assessing claims for refugee status by offshore entry persons, the *Migration Act 1958* should be amended to incorporate similar requirements as those that apply to safe third countries under section 91D.

Recommendation 5:
The Committee recommends that there be statutory recognition of the standards to be applied in processing claims by offshore entry people, either by way of amendment to the Migration Act or regulations.

Recommendation 6:
In the event that the Government chooses not to adopt the recommendation to abandon the use of declared countries (Recommendation 3), the Committee further recommends that reference to the relevant standards should also be incorporated in Australia's agreements with those countries.

Recommendation 7:
The Committee recommends that the Government review the operation of section 46A of the Migration Act:

(i) to ensure there is no possibility that offshore entry persons in Australian territory may be left in a 'legal limbo', and

(ii) to ensure that those asylum seekers coming directly from a place of persecution are not penalised by virtue of their place of entry into Australia.

Recommendation 8:
The Committee recommends that the Government, in consultation with community representatives, investigate methods of expanding opportunities for island Indigenous communities to undertake aspects of border protection duties.

Recommendation 9:
The Committee further recommends that the Government provide funding for training and employment of Indigenous people in this role.

Recommendation 10:
The Committee recommends that if the Bill proceeds, its application should not be retrospective.

ABBREVIATIONS

A Sanctuary Under Review	Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes,* June 2000
ABS	Australian Bureau of Statistics
CPA	Comprehensive Plan of Action
DFAT	Department of Foreign Affairs and Trade
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
Excision Act	*Migration Amendment (Excision from Migration Zone) Act 2001* (Cwlth)
Excision Consequential Provisions Act	*Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cwlth)
ICCPR	International Covenant on Civil and Political Rights
IOM	International Organisation for Migration
Migration Act	*Migration Act 1958* (Cwlth)
PNG	Papua New Guinea
Refugee Convention	Convention Relating to the Status of Refugees
RILC	Refugee & Immigration Legal Centre Inc
Torres Strait Treaty	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
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

GLOSSARY

refoulement	return (of refugees)

CHAPTER 1

INTRODUCTION

Background

1.1 On 20 June 2002, the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 was introduced into the Senate. On 25 June 2002, the Senate referred the following matters to the Senate Legal and Constitutional References Committee for inquiry and report by 29 August 2002:

a) the implications of excision for border security;

b) the effect of excision on affected communities, including Indigenous communities;

c) the financial impact on the Commonwealth;

d) the nature of consultation with affected communities in relation to the Governments' excision proposals;

e) the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002; and

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

1.2 On 27 August 2002, the Senate agreed to extend the time for reporting to 26 September 2002. On 25 September, the Senate agreed to extend the time further to 21 October 2002.

Conduct of the inquiry

1.3 The Committee advertised the inquiry in *The Australian* newspaper of 3 July 2002 and wrote to over one hundred and sixty organisations and individuals, inviting submissions by 26 July 2002. The Committee received submissions from 45 organisations and individuals, and these are listed at Appendix 1. Submissions were placed on the Committee's website for ease of access by the public.

1.4 The Committee held hearings in Canberra on 6, 19 and 21 August and 17 September 2002, in Sydney on 7 August 2002 and in the Northern Territory in Darwin, Elcho Island and Goulburn Island on 11 September 2002. Proof transcripts of these hearings were placed on the Hansard website as they became available.

1.5 A list of witnesses who appeared at these hearings is at Appendix 2.

Scope of the report

1.6 Chapter 2 discusses the background to the Bill. Because the Bill extends the definition of 'excised offshore place' that was inserted by amendments to the *Migration Act 1958* in September 2001, the chapter outlines the relevant provisions and how the legislative scheme operates. It also explains the proposed operation of the Bill and provides maps of the affected areas.

1.7 Chapter 3 considers the stated purpose of the Bill and its implications for border security.

1.8 Chapter 4 considers whether the legislation is consistent with Australia's international obligations, particularly the obligation of non-refoulement of refugees. This was the issue on which most submissions focussed.

1.9 Chapter 5 considers other international obligations, including the obligations not to impose penalties on refugees, not to restrict the movements of those refugees lawfully in Australia and to respect family unity.

1.10 Chapter 6 considers a range of other issues, including the remaining terms of reference such as the Bill's effect on affected communities, and its proposed retrospective application.

1.11 Chapter 7 presents the Committee's conclusions and recommendations.

Acknowledgements

1.12 The Committee thanks all those organisations and individuals who made submissions and gave evidence at public hearings.

1.13 The Committee also thanks Mr David Robertson and other staff of the National Mapping Division, Geoscience Australia, for their assistance in preparing the maps featured in this report.

Note on references

1.14 References in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Hansard transcript are to the proof Hansard. Page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

BACKGROUND TO THE BILL

2.1 The Bill, which seeks to extend the definition of 'excised offshore place' under the *Migration Act 1958,* was introduced on 20 June 2002, following disallowance by the Senate of regulations that sought to achieve the same result. This chapter discusses the background to the proposed changes and explains how the proposed provisions will operate.

Background to the Bill

2.2 On 26 September 2001 two Acts that amended the *Migration Act 1958* were passed:

- the Migration Amendment (Excision from Migration Zone) Act 2001 ('the Excision Act'); and
- the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 ('the Excision Consequential Provisions Act').

2.3 The amendments excised Christmas Island, Ashmore Reef and the Cocos (Keeling) Islands from Australian territory for the purposes of visa applications under the *Migration Act 1958* by declaring them to be 'excised offshore places'.[1] They also allowed for the excision of further offshore places by regulation, with the 'excision time' to apply from the time the regulations were made. A new protection, humanitarian and refugee visa regime for asylum applications was also created. The Acts commenced on 27 September 2001.

2.4 More detail on those amendments is provided below.

The Excision Act

2.5 The first Act inserted a new section 46A to the Migration Act to provide that an 'offshore entry person' (a person who enters the migration zone via an 'excised offshore place') may not make a valid visa application while he or she

- is in Australia; and
- remains an 'unlawful non-citizen' (a non-citizen in the migration zone without a visa),

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1 Australian sea installations and Australian resource installations were also included in the definition of excised offshore places (*Migration Act 1958*, s. 5).

unless the Minister for Immigration determines that it is in the public interest to allow an application. In such a case, the Minister must lay a statement before Parliament within 15 sitting days, setting out the reasons for the determination.

2.6 The 'migration zone' is defined as the area consisting of land that is part of the States and Territories at mean low water, Australian resource installations and sea installations, sea within a port and piers or similar structures, but not including sea that is within the State and Territory limits but not within a port.[2]

2.7 The Act does not prevent non-citizens from making valid applications if they do not enter the migration zone but stay offshore. Moreover, the Act only affected the right to make visa applications: it has no effect on customs, quarantine or fishing laws. However, the interaction of the provisions of the *Immigration (Guardianship of Children) Act 1946* with the excision provisions was raised during this inquiry. That issue is discussed in Chapter 5.

2.8 In his Second Reading Speech the Minister stated that the package of Bills[3]:

> … will significantly reduce incentives for people to make hazardous voyages to Australia territories. It will help ensure that life is made as difficult as possible for those criminals engaged in the people smuggling trade. Most of all, it will ensure that the integrity of our maritime borders and our refugee program is maintained.[4]

The Excision Consequential Provisions Act

2.9 The second Act complemented the Excision Act by providing a power to take offshore entry persons to 'declared countries'.[5] The Minister may declare that a specified country:

- provides access for asylum-seekers to effective procedures for assessing their need for protection;
- provides protection for them pending determination of their refugee status;
- provides protection to those given refugee status pending their voluntary repatriation to their country of origin or resettlement in another country; and
- meets relevant human rights standards in providing that protection.[6]

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2 *Migration Act 1958,* s. 5.

3 The two Acts discussed here, plus the Border Protection (Validation and Enforcement Powers) Bill 2001 which Parliament also passed.

4 *House of Representatives Hansard,* 18 September 2001, p. 30871.

5 *Migration Act 1958*, s. 198A(1).

6 *Migration Act 1958*, s. 198A(3).

2.10 Nauru and Papua New Guinea (PNG) have been declared, and offshore processing facilities were established on Nauru and Manus Island in PNG in September/October 2001.

2.11 The amendments also barred certain legal proceedings relating to offshore entry persons. They are proceedings relating to an offshore entry, the status of an offshore entry person during the ineligibility period, the lawfulness of detention based on the person's status as an unlawful non-citizen and proceedings relating to the taking of the person to a declared country.[7]

2.12 The Act also amended the Migration Regulations to create new visa conditions and subclasses for protection, humanitarian and refugee visas. A key change was that a person who flees a country to avoid persecution, but lives for a week in a country where he or she could have obtained protection, may not apply for standard visas under Australia's protection, humanitarian and refugee program. However, he or she may apply for a temporary Refugee and Humanitarian (Class XB) visa which allows a single opportunity to enter Australia.[8]

2.13 Two types of temporary visas are available under the new scheme: a three-year temporary visa for offshore entry persons (Subclass 447) and a five-year temporary visa for other people applying from outside Australia (Subclass 451).[9] If there is a continuing protection need, a holder of the Subclass 447 visa will not be entitled to permanent residence, but will be eligible for successive temporary protection visas. By contrast, a holder of a Subclass 451 visa will be able to gain access to a permanent protection visa after four and a half years where there is a continuing need for protection.[10] Appendix 3 sets out the various visas that may be granted to those who arrive in Australia without prior authority, depending on their point of entry. The table also shows the consequences that flow from that entry, such as the person's access to judicial review.

2.14 For both categories of visa, the person must be assessed as being subject to persecution or gross violation of human rights in his or her home country or, in the case of a female, be subject to persecution or a registered person of concern to the

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7 *Migration Act 1958*, s. 494AA. The provision recognises that the jurisdiction of the High Court under section 75 of the Constitution is not affected (s. 494AA(3)).

8 Class XB includes the following permanent entry categories: Refugee (Subclass 200); In-Country Special Humanitarian (Subclass 201); Global Special Humanitarian (Subclass 202); Emergency Rescue (Subclass 203); and Woman at Risk (Subclass 204); plus the two new 'Secondary Movement' subclasses which allow for temporary entry only.

9 Migration Regulations 1994, Schedule 2, Subclass 447 Secondary Movement Offshore Entry (Temporary) for offshore entry persons; Subclass 451 Secondary Movement Relocation (Temporary) for those who are not offshore entry persons.

10 DIMIA *Fact Sheet 65: New Humanitarian Visa System*, accessed at http://www.dimia.gov.au/facts/65humanitarian.htm. Those people in Australia who have not come by way of an excised offshore place are able to apply for a Subclass 785 Temporary Protection Visa, which applies for a period of three years.

UNHCR. The Minister must also be satisfied that there are 'compelling reasons for giving special consideration' to granting the applicant a visa, having regard to such factors as the person's connection with Australia, the capacity of the Australian community to provide for the person's temporary stay and whether there is any other suitable country that can provide protection.[11]

2.15 In his Second Reading speech the Minister stated that the new visa conditions and subclasses were intended to:

> … implement a visa regime aimed at deterring further movement from, or the bypassing of, other safe countries. It does this by creating further disincentives to unauthorised arrival in Australia by those who seek to use people smugglers to achieve a resettlement place they may well not need - a place taken from refugees with no other options available to them.[12]

Outcome of processing of offshore entry persons

2.16 During this inquiry, the Committee asked how many offshore entry people had been taken to declared countries to date and what the outcome of their applications had been.

2.17 At the public hearing on 17 September 2002, the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) advised the Committee of the following:

- 1515 people had been transferred to Nauru and Manus Island. Of those, 931 remained in Nauru and 191 on Manus Island as at 16 September 2002, including 7 people brought to Australia for medical purposes.
- 1495 people in Nauru and Manus Island had sought asylum and all had received the outcome of their initial refugee status assessments. 520 were initially assessed as refugees and 975 were not. All those who were not assessed as refugees asked for review and 858 reviews had been finalised. (DIMIA stated that the remaining assessments were to be finalised within the following ten days, except where the applicant had been brought to Australia for medical or other reasons.)

2.18 The processing outcomes following the reviews as at 16 September 2002 are listed below.

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11 These factors do not apply to a temporary protection visa for onshore applicants (Subclass 785).

12 *House of Representatives Hansard*, 18 September 2001, p. 30872.

Table 1 Outcome of processing of offshore entry persons as at 16 September 2002

	Number of persons
Refugee	**701**
- Iraq	(524)
- Afghanistan	(133)
- Other nationality	(44)
Not refugee	**678**
- Iraq	(90)
- Afghanistan	(569)
- Other nationality	(19)
Otherwise finalised	**35**
Awaiting outcome	**81**
TOTAL	**1495**

2.19 As DIMIA noted, these results show that almost half (47 per cent) of the offshore entry persons who claimed asylum were found to be refugees.

2.20 In terms of resettlement of those people who had been assessed as refugees, DIMIA informed the Committee that 152 people had been granted temporary protection in Australia: 60 on subclass 447 visas (secondary movement offshore entry temporary); 85 on subclass 451 visas (secondary movement relocation temporary); 2 on subclass 785 (temporary protection) and 5 on subclass 449 (humanitarian stay temporary).

2.21 Another 202 had been accepted by other countries: 179 were resettled in New Zealand, 8 were resettled in Sweden; and another 15 were accepted in New Zealand prior to final determination of their refugee status. DIMIA noted that the Government and UNHCR were 'in discussions with other possible countries of resettlement' in relation to the remaining refugees.

2.22 In relation to those persons who were not assessed as refugees, of the 1515 people originally transferred to Nauru and Manus, 1122 remained on those islands as at 16 September 2002. Over 470 persons have agreed to leave voluntarily and are awaiting documentation and transportation arrangements to be made. While a range of nationalities are involved, the majority (approximately 450) are Afghans.[13]

2.23 The Committee notes that the Memoranda of Understanding between the Governments of Australia, PNG and Nauru require Australia to ensure that all persons

13 Based on email advice from DIMIA, 16 October 2002.

processed in those countries depart within six months or in as short a time as is reasonably necessary. The Committee understands that the Australian Government funds the costs of all removals, voluntary and involuntary and also provides reintegration assistance of $2000 per person (up to $10,000 per family) for those who agree to return within 28 days of their status being determined.

Regulations disallowed by the Senate

2.24 On 7 June 2002, the Governor-General signed the Migration Amendment Regulations 2002 (No. 4). These regulations extended the range of 'excised offshore places' to include:

- the Coral Sea Islands Territory;
- Queensland islands north of latitude 12 degrees south;
- Northern Territory islands north of latitude 16 degrees south; and
- Western Australian islands north of latitude 23 degrees south.

2.25 The Explanatory Statement for the Regulations stated that the Regulations 'addressed indications that people smugglers are likely to change the focus of their operations to target landing on islands closer to the Australian mainland'.

2.26 The Senate disallowed the Regulations on 19 June 2002.

Main provisions of the Bill

2.27 The Bill's provisions are almost identical to the disallowed Regulations, except that there is an added provision (clause 4), which clarifies that the new regime under section 46A applies to visa applications made after the 'excision time' (defined below) for the new excised areas.

2.28 Schedule 1, item 1 sets out the excised offshore places, as described in the next section.

2.29 Schedule 1, item 2 applies to these places an 'excision time' of 2pm on 19 June 2002, that is, its application is intended to be retrospective. (Since the Regulations commenced when they were made on 7 June and were disallowed on 19 June 2002, the excision was effective for the period 7 June –19 June 2002.)

2.30 The Committee notes that 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'.

The area that is affected

2.31 **Figure 1** indicates the affected area in which the islands are located, by highlighting the sea surrounding Australia to the limit of the Exclusive Economic Zone (that is, within 200 nautical miles of the coastline). **Figure 2** gives a more

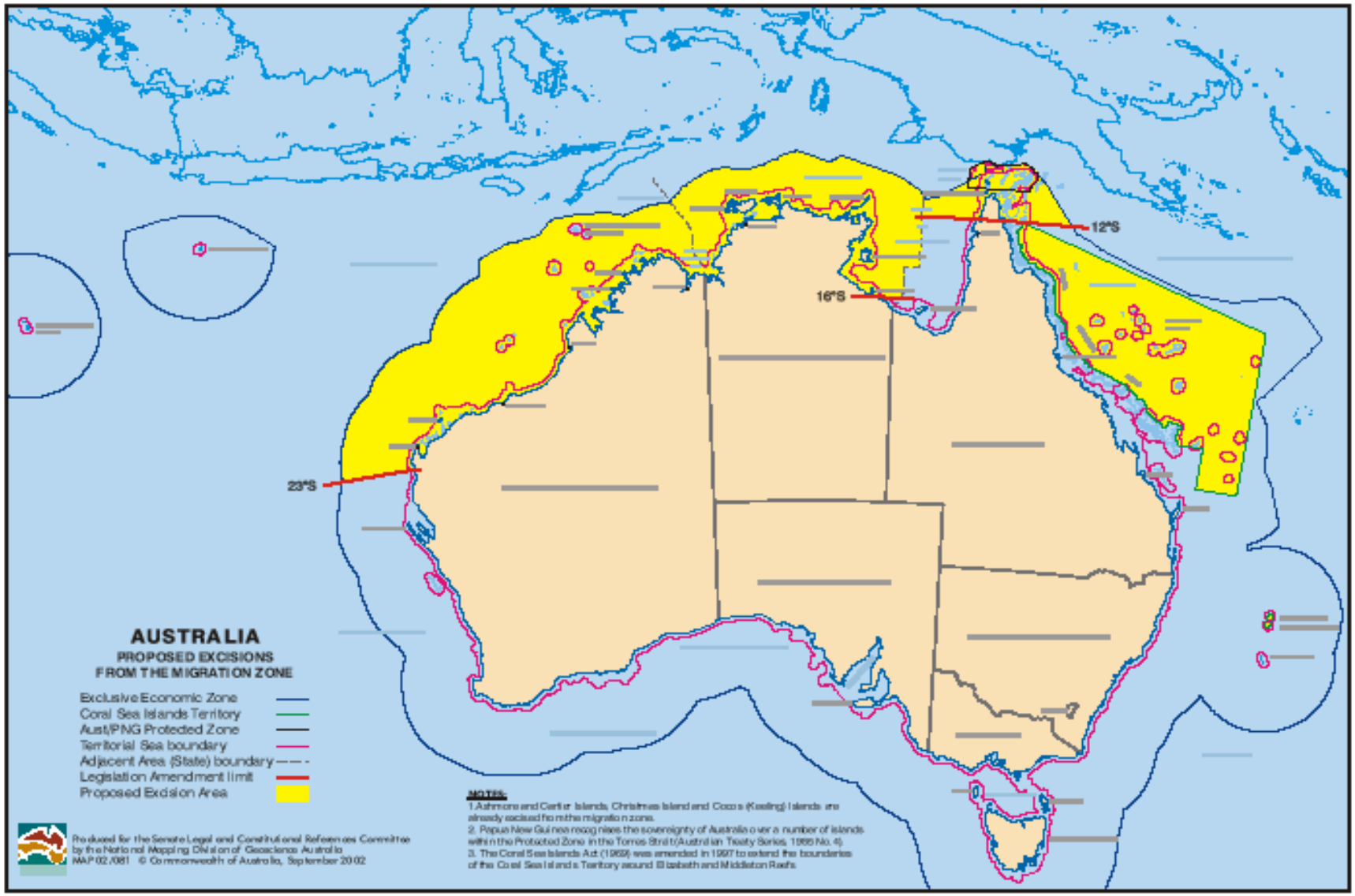
12°S
16°S
23°S
AUSTRALIA
PROPOSED EXCISIONS
FROM THE MIGRATION ZONE
Exclusive Economic Zone
Coral Sea Islands Territory
Aust/PNG Protected Zone
Territorial Sea boundary
Adjacent Area (State) boundary
Legislation Amendment limit
Proposed Exclsion Area
NOTES:
1.Ashmore and Cartier Islands, Christmas Island and Cocos (Keeling) Islands are already excluded from the migration zone.
2. Papua New Guinea recognises the sovereignty of Australia over a number of islands within the Protected Zone in the Torres Strait (Australian Treaty Series, 1985 No. 4).
3. The Coral Sea Islands Act (1969) was amended in 1997 to extend the boundaries of the Coral Sea Islands Territory around Elizabeth and Middleton Reefs.
Produced for the Senate Legal and Constitutional References Committee by the National Mapping Division of Geoscience Australia
MAP 02/081 © Commonwealth of Australia, September 2002

Figure 1

Australia's Maritime Zones in the Torres Strait

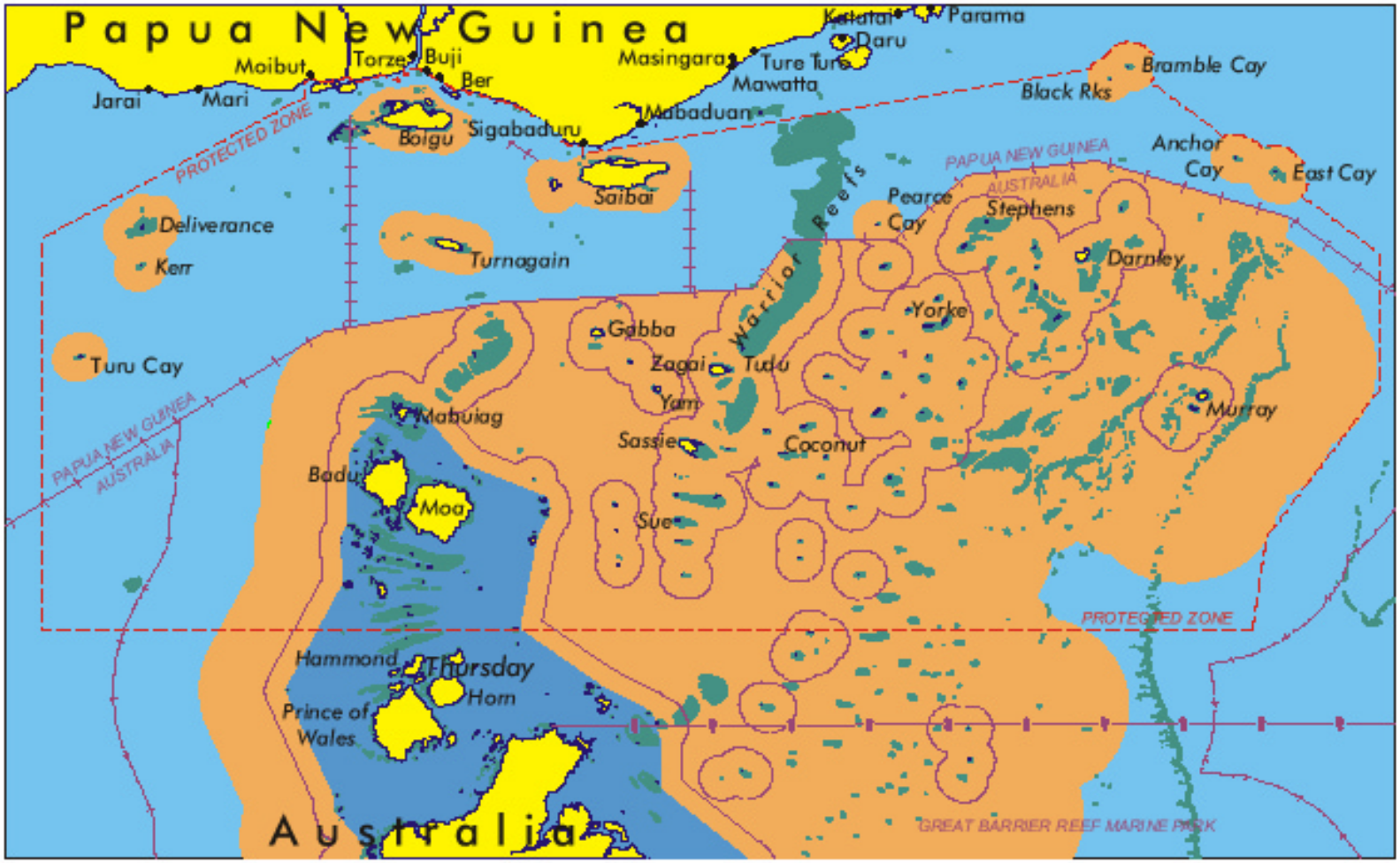

Figure 2

Seabed & Fisheries Jurisdiction Lines
Seabed Jurisdiction Line
Fisheries Jurisdiction Line
Marine Park limits
Limit of 24 nautical miles
Limit of 3 nautical miles
Australian Territorial Sea
Australian Internal Waters

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detailed picture of the Torres Strait area, including the Protected Zone (discussed in more detail in Chapter 4).

2.32 More detail on the islands affected is below:

- The Coral Sea Islands comprise many islands spread over a sea area of approximately 780,000 square kilometres to the east and south of the Great Barrier Reef. The islands became a territory of the Commonwealth in 1969. They are uninhabited apart from an occasional meteorologist on Willis Island. There are also some unstaffed weather stations and a lighthouse on other islands. The northern limit of the Coral Sea Island Territory is latitude 12 degrees south.
- Queensland islands north of latitude 12 degrees south (these are mainly the Torres Strait Islands);
- Northern Territory islands north of latitude 16 degrees south (this covers the whole of the Northern Territory's coastline, with the exception of a small area to the east); and
- Western Australian islands north of latitude 23 degrees south (which runs approximately half way between Exmouth and Carnarvon).

How many islands and who lives there

2.33 When the Bill was introduced, no information about the number of affected islands was provided. Some media reports at the time had quoted a figure of 3,000 islands.[14]

2.34 In response to a question on notice from the Committee, DIMIA stated that advice from Geoscience Australia had revealed that 'approximately 4891' islands were affected.[15] During the public hearings, a Departmental representative noted that 'an island could be anything from a sandbar to what we might think of as an island', and that DIMIA was unaware of how many of the islands were inhabited.[16]

2.35 DIMIA subsequently informed the Committee that figures provided by the Australian Bureau of Statistics (ABS) revealed a total in 2001 of 20,629 'usual residents' on the islands proposed for excision.[17] However, the ABS qualified those figures, noting that it was difficult to determine the population on certain islands where the relevant ABS Collection Districts also included parts of the mainland.

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14 For example, N Rothwell 'Island wants to keep mainland status' *The Australian*, Friday 28 June 2002, p. 1.

15 DIMIA *Response to Questions on Notice*, 2 August 2002, p. 1.

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

17 The statistics were drawn from the Census of Population and Housing 2001. Of the total number, 19,477 were listed as 'Australian', 393 as 'not Australian' and 759 'not stated'. 'Usual residence' is defined as the address where the person has lived or intends to live for a total of 6 months or more in 2001.

2.36 The Committee notes that fourteen of the Torres Strait islands are inhabited by about 8,000 people.[18] The Committee also received informal advice that few of the islands off the coast of Western Australia are permanently inhabited. By implication, most of the remaining residents are on islands off the Northern Territory coastline.

18 DIMIA 'Commonwealth Presence in the Torres Strait', *Fact Sheet*, 30 November 2001, p. 1.

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.
>
> … 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.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

7.1 During this inquiry the Committee has heard a range of views about the rationale for, and expected consequences of, the Bill; whether the Bill complies with Australia's international obligations, particularly the obligation of non-refoulement; as well as other aspects of the terms of reference. The Committee's conclusions and recommendations are detailed below.

Implications of excision for border security

7.2 The proposed excised areas covered by the Bill are very extensive, as demonstrated clearly in Figure 1. They include islands off almost the entire northern coastline of Australia, from a point south of Exmouth in WA to Rockhampton in Queensland, excluding part of the Gulf of Carpentaria and the islands inside the Great Barrier Reef. Almost 4,900 islands lie within this area.

7.3 The Committee heard conflicting evidence as to what the effect of the Bill would be. Various statements by Government spokesmen and Government agencies suggested that its effect would be to deter people smuggling by making it harder for people to reach parts of Australia where they can apply for the usual range of visas.

7.4 However, the Committee also heard evidence that the Bill could drive asylum seekers closer to the mainland, either with the intent of landing there, or incidentally, as part of a journey to another country. DIMIA's evidence acknowledges this possibility:

> 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]….[1]

7.5 The Committee found the evidence of the AFP that the likely effect will be to drive people onshore to be persuasive:

> 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...[2]

7.6 Further to this, DIMIA also suggested that asylum seekers in sight of the mainland, for example, when travelling through the Torres Strait, may well demand to be put ashore. The Committee is also mindful of the many submissions that argued that moves to excise parts of Australia's territory are unlikely to stop the flow of

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1 Answers to Questions on Notice, p. 5.

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

refugees: desperate people will not be deterred from fleeing their situations, particularly if they have family connections or other strong links in Australia.

7.7 There is also evidence that far from 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, in an attempt to reach New Zealand or other destinations in the Pacific.

7.8 Consequently, the Committee considers that the Bill will not achieve the Government's stated purpose and is self-defeating.

7.9 Because of these concerns and the Committee's concern about possible breaches of Australia's international obligations to refugees and asylum seekers, as outlined below, the Committee does not support the Bill.

Recommendation 1: The Committee recommends that the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 not proceed.

Australia's international obligations

7.10 Much of the evidence that the Committee received concerned Australia's international obligations, particularly the obligation of non-refoulement of refugees under the Refugee Convention and other international treaties to which Australia is a party. Different views have been expressed during this inquiry about whether and to what extent Australia is in breach of its non-refoulement obligations. Many argued that even if Australia was not in breach of the law, its actions in relation to unauthorised boat arrivals is contrary to the spirit of the Refugee Convention.

7.11 DIMIA acknowledges that Australia's obligations to asylum seekers are engaged as soon as they enter Australian territory, but has argued that the existing scheme whereby claims for asylum are processed in declared third countries is sufficient compliance with the non-refoulement obligations. The Committee notes that the Attorney-General's Department dismissed concerns about refoulement as a 'red herring', but finds that this description is limited and inaccurate.

7.12 The Committee is concerned at the weight of evidence from international law experts such as Dr Pene Mathew, human rights and law reform agencies such as the International Commission of Jurists, the Human Rights Council of Australia, Australian Lawyers for Human Rights and Amnesty International, as well as from the UNHCR, expressing serious concerns about possible refoulement, including chain refoulement from third countries. It is accepted that Australia is responsible for chain refoulement, and the Committee notes that many countries in the region, including Nauru and Indonesia, are not parties to the Refugee Convention.

7.13 The Committee notes that no witness to this inquiry could offer evidence of particular instances of refoulement from Nauru or Manus Island, but acknowledges the difficulty in ascertaining the occurrence of such matters in other countries where there is no monitoring.

7.14 While the Committee does not consider it possible to finally determine issues of international law on which such diverging views are held, there is clearly significant concern amongst experts in international law, human rights organisations and other groups and individuals about whether Australia is complying both with the spirit and the letter of the international obligations it has voluntarily assumed.

7.15 The Committee notes the UNHCR's acknowledgement that it has been very satisfied with Australian refugee determination processes in the past, but that it has been concerned about the lack of open and accountable guidelines in processing claims in declared countries. The Committee notes advice from DIMIA that it has been concerned to model the guidelines on those of the UNHCR. Towards the end of this inquiry, a copy of those guidelines was finally made available - after almost all the claims for review of refugee status in those declared countries have been finalised.

7.16 ***Finding:*** *The Committee finds that Australia has a responsibility to ensure both that it complies and is seen to comply with those obligations it has voluntarily assumed. In matters of international law, even more than in relation to domestic legal issues, there will always be room for argument as to whether and to what extent particular obligations are being met. In particular, the Committee is concerned that the excision scheme creates parts of Australia where different rights apply.*

7.17 The Committee is concerned that the review process of DIMIA determinations in declared countries is internal. While the Department has argued that this accords with UNHCR guidelines, the Committee notes that the processes do not match Australia's existing external review processes for other determinations through the Refugee Review Tribunal, and is concerned that justice must not only be done but be seen to be done. The figures provided by DIMIA show that a significant number of determinations were in fact overturned on review. However, the Committee considers that internal review processes do not engender confidence that Australia is not effectively sending back some refugees. The UNHCR guidelines are a basic standard; Australia has a long tradition of providing review through external bodies, such as the Refugee Review Tribunal and the court system.

7.18 Accordingly the Committee recommends that review of initial assessments as to refugee status should not be conducted by DIMIA officers, but by an external body such as the federal magistracy or the Refugee Review Tribunal. Although it would be preferable if such reviews were to occur in Australia, the Committee recommends that such external review should be mandatory wherever the processing of claimants occurs.

Recommendation 2: The Committee recommends that initial assessments of claims for refugee status by offshore entry persons should be reviewed by an external body such as the federal magistracy or Refugee Review Tribunal.

7.19 The Committee also notes the various concerns expressed about the process under section 198A of the Migration Act of declaring countries where offshore entry people may currently be taken for determination of their refugee status. This statutory power is not reviewable, requires no undertaking by the country concerned as to non-

refoulement and does not require the Minister to revoke the declaration if no longer satisfied that the country meets appropriate human rights standards. While DIMIA has argued that there is reference to non-refoulement in the MOUs signed with Nauru and PNG, such MOUs are difficult to enforce and do not in themselves create confidence that human rights obligations will be observed.

7.20 By comparison, existing provisions under the Migration Act concerning the prescription by regulation of 'safe third countries' require the Minister to table a statement in Parliament about certain matters: the countries' compliance with relevant international law concerning the protection of asylum seekers; their meeting of relevant human rights standards and their willingness to allow people to remain in the country until their claims are determined and, in the case of those determined to be refugees, until a durable resettlement solution is found.[3]

Recommendation 3: The Committee recommends that the use of declared countries for holding and assessing claims for refugee status by those who have entered Australian territory at an excised offshore place should be abandoned.

7.21 In the event that the Government chooses not to adopt this recommendation, the Committee wishes to put forward a number of other recommendations (the following recommendation and that following paragraph 7.23) in respect of persons claiming refugee status who are held and processed offshore in declared countries.

Recommendation 4: In the event that the Government continues to use declared countries for holding and assessing claims for refugee status by offshore entry persons, the *Migration Act 1958* should be amended to incorporate similar requirements as those that apply to safe third countries under section 91D.

7.22 The Committee has other concerns about the processing of people in declared countries. Despite the involvement of the IOM and the UNHCR in the 'processing centres', the Committee considers that Australia is effectively running those centres. As discussed in Chapter 6, Australia pays the IOM's running costs, which includes the cost of providing security. In addition, the Committee considers that the arguments that the people are not in 'detention' but rather are there for their 'protection' whilst their claims for refugee status are determined are disingenuous.

7.23 The Committee finds that such people are in detention and are in centres that are effectively Australian.

7.24 The Committee also heard concerns from the UNHCR and others about the lack of transparent and accountable procedures in the processing of offshore entry persons in declared countries, as well as the lack of binding obligations to ensure that those seeking asylum are properly dealt with in declared countries and are not

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3 *Migration Act 1958*, s. 91D. The provisions were enacted in 1994 to address concerns about Indo-Chinese refugees who were covered by the UNHCR-sponsored Comprehensive Plan of Action. The provisions also extend to other asylum seekers who are covered by an agreement between Australia and a safe third country.

detained for longer than is necessary. As several witnesses pointed out, it is difficult to ascertain whether proper procedures are being followed and proper safeguards in place where information is lacking. The Committee considers that one of the valuable effects of its inquiry has been to gather more information about what is happening to offshore entry people held in those countries. It was only towards the end of this inquiry that DIMIA released a copy of the procedures applied by its officers when assessing refugee claims by offshore entry people, whether held in Australia or in declared countries.

Recommendation 5: The Committee recommends that there be statutory recognition of the standards to be applied in processing claims by offshore entry people, either by way of amendment to the Migration Act or regulations.

Recommendation 6: In the event that the Government chooses not to adopt the recommendation to abandon the use of declared countries (Recommendation 3), the Committee further recommends that reference to the relevant standards should also be incorporated in Australia's agreements with those countries.

7.25 A point of concern to the Committee in terms of Australia's international relationships was that the Bill was introduced without consultation with PNG or New Zealand, despite the anticipated effect that the proposed excisions would divert at least some boats to New Zealand. The Committee is concerned that Australia's international relations are being treated in such a cavalier fashion.

Reliance on Ministerial discretion

7.26 The Committee is also concerned about the reliance on the Ministerial discretion under section 46A of the Migration Act to lift the prohibition on an offshore entry person applying for a visa while in Australia. There is no obligation on the Minister to take any action, even to consider an application. Moreover, it appears that recourse to the High Court will be of little practical benefit.

7.27 In addition, the Committee heard evidence from law lecturers Ms LaForgia and Mr Flynn that the Migration Act does not oblige Australia to take any action in relation to offshore entry persons, but merely allows the Government to detain and transfer them. Consequently such people could remain, for example, on Christmas Island, and be left in a legal limbo: unable to apply for a visa while still in Australia and barred from initiating any legal proceedings because of section 494AA.

7.28 The Committee also heard evidence that the policy of treating all offshore entry persons in the same way discriminates against those who come directly from a country of persecution, rather than having stopped in an intermediary country, and that this is potentially a breach of Article 31 of the Refugee Convention. The Committee notes that this issue was raised in an earlier inquiry by the Senate Legal and Constitutional Legislation Committee, with that Committee suggesting that DIMIA

confer with the Refugee and Immigration Legal Centre on the issue 'as a matter of priority'.[4] It appears that nothing has eventuated.

7.29 Consequently the discretion under section 46A to 'lift the bar' is of little comfort to those concerned about the situation of offshore entry persons; it compares unfavourably with the rights available to those people who have arrived unlawfully in Australia by other means, such as by plane, those who have overstayed their visas, or indeed those who reach the mainland rather than stopping at an island just offshore.

7.30 The Committee heard strong arguments, including from the Human Rights and Equal Opportunity Commission, that reliance on a non-compellable ministerial discretion is an inadequate recognition of Australia's human rights obligations.

Recommendation 7: The Committee recommends that the Government review the operation of section 46A of the Migration Act:

(i) to ensure there is no possibility that offshore entry persons in Australian territory may be left in a 'legal limbo', and

(ii) to ensure that those asylum seekers coming directly from a place of persecution are not penalised by virtue of their place of entry into Australia.

Addressing the flow of refugees in other ways

7.31 During discussion of this Bill and the inquiry, the Government has also emphasised that it is for Australia to determine who is allowed to come to this country. The Committee acknowledges that this has been a policy underlying Australia's migration laws over the last fifty years. However, as a relatively wealthy country in the region, the Committee considers that Australia has a responsibility to ensure that those people who flee persecution have the opportunity to have their claims for asylum properly assessed and have a chance for resettlement here, regardless of their method of arrival.

7.32 The Committee is concerned that to date, New Zealand has been more generous towards those people who have met the refugee criteria in Nauru and Manus Island than Australia has been.

7.33 While acknowledging that Australia has been involved on a number of different levels in addressing the problems of refugee flows and people smuggling, the Committee considers that more proactive and preventative steps could be taken in cooperation with other countries and the UNHCR.

7.34 An example of such a coordinated approach occurred during the 1990s. The international community responded to the flow of over one million people from Vietnam and Laos by approving a Comprehensive Plan of Action (CPA) for

4 *Provisions of the Migration Legislation Amendment Bill (No.1) 2002*, June 2002, p. 15.

Indochinese Refugees. The plan, brokered by the UNHCR, was approved by the 76 countries that attended the Geneva international conference in 1989. Australia enacted legislation that reflected the terms of the CPA plan, particularly by ensuring that domestic law was consistent with international refugee assessment arrangements, in 1994.[5] Australia also accepted a significant number of Vietnamese refugees from camps in the countries of first asylum, following refugee assessments carried out in accordance with UNHCR-approved processes.

7.35 The Committee urges the Government to engage with the UNHCR in an effective regional response to the current and any anticipated flow of refugees.

Effect on affected communities

7.36 The Committee is aware of the general nature of the concerns expressed by Indigenous communities about border protection issues. While there are undeniably concerns about unauthorised arrivals seeking a migration outcome, there is a wider concern that includes any unauthorised intrusion.

7.37 The Committee notes that the Indigenous communities it consulted wish to have a much greater border protection role. There are a number of reasons for this, including local knowledge, dissatisfaction with current arrangements and the need for local employment opportunities which are very much lacking in such areas. Australia's coastline is long and in many places sparsely inhabited, which increases the challenge of detecting unauthorised arrivals of any kind. The Committee considers there is much merit in investigating the possibility of working with local communities to enhance the effectiveness of Australia's response.

7.38 The Committee therefore makes the following recommendations.

Recommendation 8: The Committee recommends that the Government, in consultation with community representatives, investigate methods of expanding opportunities for island Indigenous communities to undertake aspects of border protection duties.

Recommendation 9: The Committee further recommends that the Government provide funding for training and employment of Indigenous people in this role.

The financial impact on the Commonwealth

7.39 The Committee notes that the Explanatory Memorandum for the Bill stated that the Bill would have 'minimal' financial impact. As discussed above, various and conflicting consequences of excising more islands have been suggested, from driving people onto the mainland to sending them further afield to countries such as New

5 *Migration Legislation Amendment Act (No. 4) 1994.*

Zealand. Consequently it is difficult to gauge the effect that the legislation might have on future movements of people.

7.40 However, the Committee notes concern about the cost of managing offshore processing facilities at Nauru and Manus Island, as well as Christmas Island. By the end of May 2002, $56.2 million had been spent on Nauru and Manus. Another $138 million has been allocated to build the facility at Christmas Island, out of a total Budget allocation for 2002-03 of $353 million for 'unauthorised boat arrivals'. The Committee considers that the so-called 'Pacific Solution' is not a cost-effective way to deal with this issue.

Other aspects of the Bill

7.41 Two other issues arose during this inquiry: the proposed retrospective application of the Bill, and quarantine issues.

Retrospectivity

7.42 The Bill proposes retrospective excision of the islands under consideration to 19 June 2002, the date on which the regulations were overruled. The Committee is of the view that, even if the retrospectivity provided for in the Bill may have been justified originally because of concerns that boats were en route, the lapse of time has made that retrospectivity unnecessary and excessive.

7.43 If the government were to introduce further legislation of this type in the future, serious consideration must be given to the need for any retrospectivity, and a clear and convincing explanation must be provided to the Parliament.

Recommendation 10: The Committee recommends that if the Bill proceeds, its application should not be retrospective.

Quarantine

7.44 The Committee also heard some evidence of concerns about, and the incidence of, exotic pests such as black-striped mussels found on illegal vessels in Northern Territory waters. While the Committee does not in any way diminish the seriousness of those concerns, the Committee does not consider this to be justification for the passage of the current Bill, whose stated aim is to deter people smuggling.

Senator the Hon. Nick Bolkus

Chair

DISSENTING REPORT BY

GOVERNMENT SENATORS

1. This bill is the second excision bill introduced into the Parliament, the previous being the Migration Amendment (Excision from Migration Zone) Bill 2001. The current bill extends the concept embodied in the first Bill.

2. Government Senators on the Committee largely disagree with the majority report, which would reject the Bill and undermine the Pacific solution adopted last year. They do not support the recommendation that the Bill not proceed.

3. In relation to the majority's recommendation that the bill not proceed, Government Senators note that the Australian Labor Party not only supported the original bill, but also announced a bipartisan approach to Bills of that nature. The Hon Con Sciacca MP, then Shadow Minister for Immigration, said in the Second Reading debate:

> The opposition will support these migration measures contained in the Migration Amendment (Excision from Migration Zone) Bill 2001 and related bills . . . The measures are in accordance with the bipartisan approach to matters of this nature . . .It is very important when . . . we talk about the integrity of our borders, when we talk about people who come here on an unauthorised basis, that we do so in a way that both governments, of whatever political persuasion, and oppositions do their best to think about the nation and the security of the nation and ensure that, wherever possible, these matters are looked at in a bipartisan way.[1]

4. The Australian Labor Party was quite aware that the Bill for the Excision Act enabled regulations to be made excising islands that were part of a State or Territory but specifically declined to support a motion by Senator Brown for deletion of the power to make regulations prescribing islands which are part of a State or territory.[2]

5. Government Senators note Labor's decision to oppose the bill, completely reversing their earlier position.

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[1] *House of Representatives Hansard*, 19 September 2001, pp. 30954-5.

[2] *Senate Hansard*, 25 September 2001, pp. 27867, 27869.

Is the Bill self-defeating?

6. The report justifies its recommendation that the Bill not proceed by claiming that it is self-defeating and will not reduce incentives for people to make hazardous journeys to Australian territories. It claims that 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, in an attempt to reach New Zealand or other destinations in the Pacific. Government Senators do not support this position.

7. DIMIA gave evidence that the Excision Act, in the context of other government arrangements in relation to unlawful asylum seekers,[3] had been effective in reducing the incentives for asylum seekers to try to reach Australian territory. As DIMIA representatives noted:

> . . . When you put it all together and look at the fact that we have not had a boat since last November, I think the assessment would have to be that the full range of strategies – including the excision measures – has been very successful in terms of preventing people smuggling.[4]

8. It was made quite clear to the Committee that it was understood that people smugglers, deterred from targeting Australian territory by the Excision Act and other measures, were changing their tactics. As DIMIA said in evidence:

> 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 . . . 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.[5]

9. The purpose of the Bill is in fact to prevent people smugglers aiming for Australia or deciding to divert to Australia while on their way to New Zealand or elsewhere in the Pacific. The Bill will discourage people smugglers from undertaking the hazardous journeys which they already propose to New Zealand or elsewhere in the Pacific because there will be no fall-back position.

10. Government Senators note that at paragraphs 3.25 - 3.26, the majority report seeks to highlight alleged inconsistencies in statements made by Senator Hill on the anticipated routes of people smugglers. In fact, both statements make it quite clear that the anticipated route of people smugglers is through the Torres Strait.

International obligations and non-refoulement

11. Government Senators note that, while concerns were expressed during this inquiry about possible breaches of Australia's international obligations, particularly in

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[3] Including increased penalties for people smugglers

[4] *Hansard*, 6 August 2002, pp. 15-16.

[5] *Hansard*, 6 August 2002. p. 6.

relation to refoulement of refugees to places of persecution, both DIMIA and the Attorney-General's Department strongly denied that there was any question of refoulement. As the Attorney-General's Department stated:

> 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.[6]

12. DIMIA further explained:

> 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.[7]

13. Both agencies emphasised that asylum seekers who had arrived at excised offshore places and had been taken to declared countries are given the opportunity to apply for refugee status. All such claims have been processed in accordance with UNHCR guidelines, including the opportunity for review of initial decisions.

14. In relation to possible refoulement from declared countries, DIMIA stated:

> The declaration process ensures that the Minister is satisfied that appropriate arrangements are in place in the declared country to provide protection for persons seeking asylum, pending determination of their refugee status, and to provide protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country. Provision exists for the Minister to revoke declared status if satisfied that appropriate arrangements no longer existed. At present, the only two declared countries are Papua New Guinea and Nauru. In Australia's agreements with Nauru and Papua New Guinea, those countries have made commitments to provide such protection.[8]

15. Government Senators note the UNHCR's comments that Australian processing of applications has 'traditionally been first-class'.[9] Government Senators note that during this inquiry DIMIA made public the assessment guidelines for offshore entry persons, so that possible concerns about accountability and transparency have been addressed.

16. In relation to concerns expressed about possible refoulement of persons from Indonesia and suggestions about the need for monitoring by Australia, Government Senators note the evidence given by DIMIA as to its satisfaction with existing processes (discussed at paragraph 4.40 of the report):

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[6] *Hansard*, 19 August 2002, p. 160.

[7] DIMIA *Answers to questions on notice*, 21 August 2002, p. 5.

[8] DIMIA *Comment on matters addressed in submissions to the Committee*, 21 August 2002, p. 2.

[9] *Hansard*, 6 August 2002, p. 49.

> … 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 addressed, there is no need to consider some form of tracking mechanism for individuals.[10]

17. Government Senators acknowledge the concerns behind the monitoring suggestions. In the last parliament, such suggestions were considered at length in this Committee's report 'A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes'. This Committee stated:

> . . . the Committee considers that for Australian overseas officials to go beyond the current nature and level of involvement in making representations on behalf of foreign nationals would likely draw undue or unwelcome attention to returned persons. The Committee is also concerned about the diplomatic ramifications if Australia were seen to be interfering in the domestic affairs of other nations. (p. 328)[11]

18. The Committee considered the possibility of Non-Government Organisations undertaking monitoring but rejected it for various reasons, including the risks for NGOs (p.338), the limited resources of potential monitors, (p. 339) and their accountability for Australian government funds (p. 340). Government Senators consider that this Committee's view in the year 2000 that suggestions for a monitoring system are impractical is still valid.

19. Government Senators also note that no witness provided evidence of any instance of refoulement having occurred (as reflected in paragraphs 4.35-4.36 of the majority report, referring to evidence from Amnesty International, Dr Susan Kneebone and Dr Pene Mathew). While the difficulties in gathering evidence are acknowledged, Government Senators consider the lack of any such evidence supports government agencies' claims that refoulement is not occurring. Given the sensitivity of the refoulement issue, there is little doubt that any possible example among recent arrivals would have been brought to the Committee's attention.

20. The Government has already taken steps for the establishment of a detention centre on Christmas Island, which may well make it unnecessary for the claims to refugee status of offshore entry persons to be assessed in other countries.

21. As noted above, it was made clear from evidence given by DIMIA and the Attorney-General's Department that in their view Australia has fully met its international obligations under treaties to which it is a signatory. There was no

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[10] *Hansard*, 17 September 2002, p. 254.

[11] A Sanctuary Under Review

specific evidence advanced to suggest that the current legislative scheme contravenes any obligation at international law.

22. However, if the Opposition is in committed to this argument, then to be consistent, they would have to conclude that the original Act also failed to uphold Australia's international obligations under various treaties and they would have to seek to repeal it. Yet they not only fully supported the original bill, but have based their entire border protection strategy on using Christmas Island as a processing centre for asylum seekers because of its excised status. This is simply illogical.

23. Concerns about this Bill failing to meet Australia's obligations under international treaties would also extend to the original Act yet were not expressed by the authors of the majority report or by the Opposition during debate. We must conclude, therefore, that the Opposition is not clear about the impact of the Excision Act or that the majority report is a precursor to winding back the Government's comprehensive border protection measures.

Review of initial assessments

24. Government Senators do not support the recommendation that an external body such as the federal magistracy or the Refugee Review Tribunal should review initial assessments of claims for refugee status by offshore entry persons. The UNHCR stated that:

> . . . DIMIA has noted that all persons who seek asylum in the excised area will have their claims for refugee status assessed against the criteria contained in the Refugee Convention, which would include an internal administrative review of a negative decision.[12]

25. Not only is internal administrative review adequate under the Convention but it is also in accordance with the practice of the UNHCR when it is conducting assessments. This was made clear by the following evidence from the UNHCR:

> Chair: Would you require an independent review process or do you want just a review?
> UNHCR: Under EXCOM conclusions, an independent review process is not required – that is EXCOM conclusion No. 8 – but an appeal is necessary.
> Chair: An appeal is necessary?
> UNHCR: Yes, for a person who has failed to be recognised as a refugee in the first instance decision.
> Chair: To what sort of body should that appeal go?
> UNHCR: In our own refugee status determination, UNHCR also does the appeal by a different officer
> Chair: By a different officer.
> UNHCR: Absolutely.[13]

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[12] *Submission 30*, p. 4.

[13] *Hansard*, 6 August 2002, pp. 48-49.

26. The integrity of the process is illustrated by the figures at paragraph 2.17 and Table 1 in relation to the 'Outcome of processing of offshore entry persons'. Of the 858 reviews of unfavourable assessments completed, 181 produced a favourable result. This suggests that reviewing officers take their role seriously and do not simply rubber stamp the initial decisions.

Abandonment of use of declared countries

27. Government Senators do not support the recommendation that the use of declared countries for holding and assessing claims for refugee status by those who have entered Australia at an excised offshore place should be abandoned at this stage. The concerns expressed in the report relate to the risks that the declared country will refoule a refugee or no longer meet appropriate human rights standards.

28. Government Senators note that the Australian Labor Party supported the Bill for the Excision Consequential Provisions Act which inserted the provisions for the declaration of countries in the Migration Act.[14] In fact, the Australian Labor Party did not support an Australian Democrats motion for an amendment restricting the power of the Minister to declare countries.[15] The Australian Labor Party has not explained why it now wants to undo legislation which it supported last year.

Procedure for declaring countries

29. Government Senators would be pleased to see consideration given to the recommendation that in the event that the Government continues to use declared countries for holding offshore entry persons while their claims for refugee status are assessed, the Migration Act should be amended to incorporate similar requirements to those that apply to safe third countries under section 91D. This would require a 'declared country' to be nominated in regulations and for the Minister to table a statement that it complied with the appropriate human rights standards and was committed against refoulement.

Statutory standards in processing claims by offshore entry persons?

30. Government Senators do not support the recommendation that there be statutory recognition of the standards to be applied in processing claims by offshore entry persons, by way of amendment to either the Migration Act or the regulations, if this means that offshore entry persons would have greater access to Australian administrative review and judicial processes than provided in current arrangements.

Criteria for declared countries to be written into agreements?

31. Government Senators note the majority's recommendation that in the event that the Government chooses not to adopt the recommendation to abandon the use of

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[14] *Senate Hansard*, 24 September 2001, p. 27689.

[15] *Senate Hansard*, 25 September 2001, pp. 27871-73.

declared countries, reference to the appropriate human rights standards and to the commitment against refoulement be inserted in agreements with those countries. Government Senators point out that Papua New Guinea is a signatory to the refugee convention and is therefore already bound by the non refoulement obligations. While Nauru is not a signatory, the Memorandum of Understanding with Nauru includes a clause which provides that:

> …any asylum seekers awaiting determination of their status or those recognised as refugees, will not be returned by Nauru to a country in which they fear persecution, nor before a place of resettlement is identified.[16]

32. Accordingly, Government Senators are not convinced of the need for the majority's recommended course of action.

Section 46A review

33. Government Senators note the concerns raised in relation to the operation of section 46A of the Migration Act. Government Senators would expect processes to be in place to ensure that individuals are not left in a position which witnesses have described as 'legal limbo' and that cases must be dealt with in an appropriate timeframe. If experience shows this not to be the case, Government Senators would support a review of the operation of section 46A.

Consultation with affected indigenous communities

34. Government Senators agree with the report on the manifest inadequacy of government consultation with affected communities – see paragraphs 6.37 to 6.43. In particular, they are disappointed with the passive approach taken by DIMIA, which stated that the information kit was clear and that no further visits were planned unless significant concerns were raised. Government Senators consider that DIMIA should be taking positive steps to ensure that it hears of and is able to deal with any concerns in affected communities as soon as they arise.

35. The inadequate consultative process with affected communities prior to the Bill's introduction does appear to have caused anxiety and concern, as was reflected in the evidence given by Mr James Marrawal of the Warrawi community who met with the Committee on Goulburn Island:

> 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? [17]

36. Similarly, Mr Terry Waia, the President of the Torres Strait Regional Authority, told the Committee:

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[16] Clause 30

[17] *Hansard*, 11 September 2002, p. 221.

> 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.[18]

37. Given that this is an area of significant public discussion, and a debate prone to hyperbole, Government Senators believe that much more strenuous efforts to communicate the plans to expand the excision process should have been made in affected communities, in contrast to the approach taken in this instance.

38. However, it should be noted that all the indigenous communities living in the proposed offshore excised places who made submissions or gave evidence during this inquiry supported this bill, as recorded by the Committee at paragraphs 6.22 to 6.28. For example, the Tiwi Land Council, after regretting its inability to meet the Committee, stated:

> In the event we did further discuss the matter of the Commonwealth legislation at our Land Council meeting number 224 held at Ngulu 12th September. Members expressed surprise that there could be any opposition to the Commonwealth legislation to assist it in the protection of our coastal zone and deny access to foreign persons and vessels on the shores of Bathurst and Melville Island.
>
> Our member for Arafura, Marion Scrymgour MLA was also at our meeting and agreed that it was helpful for there to be such legislation but that it be accompanied by good information for island residents of what the legislation intended.[19]

39. In a similar vein, Mr Richard Gandhuwuy, who spoke at the hearing on Elcho Island, strongly supported the Bill:

> 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.[20]

40. The Bill is also supported in the Torres Strait:

> …we are pleased to have greater border protection.[21]

41. If the Bill does not proceed, it will be necessary for Senators who vote against it to explain their reasons to the communities in the excised offshore places.

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[18] *Hansard*, 21 August 2002, p. 193.

[19] *Submission 44*, p. 1.

[20] *Hansard*, 11 September 2002, p. 201.

[21] *Submission* 16.

Involvement of island Indigenous communities in border protection

42. Government Senators agree with the recommendation for investigation of methods of expanding opportunities for island indigenous communities to undertake aspects of border protection duties.

43. During the Committee's visit to the indigenous communities on Goulburn and Elcho Islands, it was clear to the Committee that indigenous communities participate at a high level in a number of government related activities, including border protection and monitoring of illegal fishing activity. This participation takes place with little recognition and no remuneration.

44. In the interests of effective cooperation, the Government Senators urge the Government to investigate methods of how to best involve and remunerate indigenous communities in these areas, where they have the potential to make a real and valuable contribution.

Quarantine issues

45. Ms Andria Marshall, Program Coordinator of the Aquatic Pest Management Group of the Northern Territory Department of Industry, Resource and Development, gave significant evidence about the dangers and the limited resources available to deal with introduced aquatic pest species. She said:

> 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.[22]

46. She described the capacity of these species to devastate sedentary marine industries:

> Senator Scullion: Can you tell me what sort of impact that the establishment of something like either of these two invasive species would have on the production of the Tiwi Islanders' barramundi farm?
>
> Ms Marshall: As with any cage-farmed fish, water flow is a pretty important consideration. Without the water flow, the fish do not feel, feed or grow very well. The effect of fouling on the cages themselves actually reduces the water flow, and so it impacts on the health of the fish: it stresses them, and they are more susceptible to disease, and their productivity levels are significantly reduced – not to mention how the added weight on the cage structures themselves would affect security type issues. And then there are the internal maintenance issues: there is enough of a cleaning program that goes on as it is, to keep the cages clean of fouling, without the prolific fouling capabilities of theses two animals, should they be introduced.[23]

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[22] *Hansard*, 11 September 2002, p. 227.

[23] *Hansard*, 11 September 2002, p. 230.

47. In relation to the resources to deal with such infestations at the islands to be excised, she gave the following evidence:

> Acting Chair: In the islands off the coast, if a vessel ends up in the sorts of environments in which we met earlier today, does your department have any responsibility for inspecting that vessel there?
>
> Ms Marshall: As the protocols exist at present, no. Due to limited resources, we have actually confined our activities to the port of Darwin and the Territory regulated coastline.[24]

48. Government Senators are therefore disappointed by the dismissive approach taken by the report at paragraph 7.43 to the issue of quarantine for excised offshore places. The point of the legislation is to discourage people smugglers from attempting the journey to Australia or to New Zealand or other places by way of Australia. The risk of exotic pests being brought into Australian waters will be reduced because of the reduction or elimination of voyages to or through them by people-smuggling vessels.

Recommendation

Government Senators recommend that the bill be passed without further delay.

Senator Marise Payne
Senator for New South Wales

Senator Nigel Scullion
Senator for the Northern Territory

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

APPENDIX 1

ORGANISATIONS AND INDIVIDUALS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

1. Miss Emilia Della Torre – The University of New England, School of Law
2. Mr Brian Bond
3. Ms Joan Kinnane
4. Ms Kim Rubenstein – The University of Melbourne
5. Congregation of the Sisters of Mercy
6. Australian Presentation Society
7. Citizens Electoral Council of Australia
8. Ms Alison Murdoch
9. Ms Charlotte Brewer
10. Mr Robert Lindsay
11. Australian Political Ministry Network Ltd
12. Social Action Office – CLRIQ
13. Dominican Sisters of North Adelaide
14. Boolaroo/Warners Bay Social Justice Action Group
15. Ms Judith Roberts
16. Torres Strait Regional Authority
17. New South Wales Council for Civil Liberties Inc.
18. Mr John Young
19. St Vincent de Paul Society
20. Ms Rebecca LaForgia and Mr Martin Flynn

20A. Ms Rebecca LaForgia and Mr Martin Flynn

21. New South Wales Combined Community Legal Centres Group
22. Sisters of the Good Samaritan Social Justice Catalyst Committee

23. Dr Susan Kneebone – Monash University Castan Centre for Human Rights Law

24. Network for International Protection of Refugees

24A. Network for International Protection of Refugees

25. Human Rights Council of Australia Inc.

25A. Human Rights Council of Australia Inc.

26. Mr Angus Francis – School of Law, University of Canberra

26A. Mr Angus Francis – School of Law, University of Canberra

27. Ms Maureen Keady - Brigidine Convent

28. Catholic Commission for Justice, Development and Peace, Melbourne

29. Amnesty International Australia

30. United Nations High Commissioner for Refugees

30A. United Nations High Commissioner for Refugees

31. Australian Lawyers for Human Rights

32. Australian Federal Police

32A. Australian Federal Police

33. Australian Catholic Migrant and Refugee Office and the Australian Catholic Social Justice Council

34. Dr Penelope Mathew – The Australian National University, Faculty of Law

34A. Dr Penelope Mathew – The Australian National University, Faculty of Law

35. Human Rights and Equal Opportunity Commission

36. International Commission of Jurists, Australian Section

37. Refugee and Immigration Legal Centre

38. Refugee Council of Australia

39. The Rockhampton Social Justice Action Group

40. The Social Responsibilities Commission

41. Missionary Franciscan Sisters

42. Australian Seafood Industry Council

43. Attorney-General's Department

43A. Attorney-General's Department

44. Tiwi Land Council

45. Department of Premier and Cabinet, WA

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, Tuesday 6 August 2002

Australian Catholic Migrant & Refugee Office
Reverend John Murphy, Director

Australian Catholic Social Justice Council
Ms Sandra Cornish, National Executive Officer

Australian Federal Police
Commissioner Michael Keelty
Federal Agent Brendan McDevitt, General Manager National Operations

Department of Immigration and Multicultural and Indigenous Affairs (DIMIA)
Mr Edward Killesteyn, Acting Secretary
Mr Vincent McMahon, Acting Deputy Secretary
Mr Desmond Storer, First Assistant Secretary, Parliamentary and Legal Division
Mr Robert Illingworth, Assistant Secretary Onshore Protection
Ms Nelly Siegmund, Assistant Secretary Border Protection Branch
Mr Douglas Walker, Assistant Secretary, Visa Framework Branch

Flinders University
Ms Rebecca LaForgia, Lecturer in Law

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

St Vincent de Paul Society
Mr Terence McCarthy, President, National Social Justice Committee
Mr John Wicks, Vice-President, National Social Justice Committee

United Nations High Commissioner for Refugees
Mr Michel Gabaudan, Regional Representative
Ms Gabrielle Cullen, Resettlement Officer
Ms Ellen Hansen, External Relations Officer

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

Mr Robert Lindsay (private capacity)

Sydney, Wednesday 7 August 2002

Amnesty International Australia
Ms Catherine Wood, Acting Refugee Coordinator, National Refugee Team
Mr Alistair Gee, Member, National Refugee Team

Australian Political Ministry Network Ltd
Mr James McGillicuddy, Coordinator

Catholic Commission for Justice, Development and Peace, Archdiocese of Melbourne
Mr Marc Purcell, Executive Officer

Human Rights Council of Australia
Mr Andrew Naylor, Member

International Commission of Jurists
The Hon. Justice John Dowd AO, President, Australian Section

Monash University Castan Centre for Human Rights Law
Dr Susan Kneebone, Member

New South Wales Council for Civil Liberties Inc
Mr Cameron Murphy, President
Mr Stephen Blanks, Committee Member

Refugee and Immigration Legal Centre Inc
Mr David Manne, Coordinator

Canberra, Monday 19 August 2002

Attorney-General's Department
Mr Mark Zanker, Acting First Assistant Secretary, Office of International Law

Department of Foreign Affairs and Trade
Mr John Oliver, Assistant Secretary, New Zealand and Papua New Guinea Branch
Mr Roderick Smith, Assistant Secretary, International Organisations Branch
Mr Dominic Trindade, Legal Adviser and Assistant Secretary, Legal Branch

Mr Angus Francis (private capacity)

Canberra, Wednesday 21August 2002

Torres Strait Regional Authority
Mr Terry Waia, Chair

Dr Penelope Mathew (private capacity)

Northern Territory, Wednesday 11 September 2002

Elcho Island
Mr Oscar Datjarrangu, Galiwinku Community
Mr Keith Djinyini, Galiwinku Community
Mr Richard Gandhuwuy, Garrawurra Clan
Mr Joe Gumbula, Milingimbi Community
Mr Jeff Leggat, Counil Clerk, Milingimbi Council
Mr Roger McIvor, Manager, Marthakal Homelands Resource Centre
Mr Jeffry Mulawa, Milingimbi Community
Mr Mike Newton, Council Clerk, Galiwinku Council
Timothy, Galiwinku Community
Mr Terry Yumbulul, Galiwinku Community
Mr Charles Yunupingu, Chairman, Galiwinku Community
Aaron
Other community members from Elcho Island

Goulburn Island
Mr Graeme Dobson
Mr Bunuk, Galiminda, CDEP Coordinator, Warruwi Community, Goulburn Island
Mr Jim Gorey, Goulburn Island
Mr Alan Keeling
Mr James Marrawal, Employee, Community Health Centre
Mr William Yarmirr
Other community members from Goulburn Island

Darwin
Ms Andria Marshall, Program Coordinator, Aquatic Pest Management Group, Northern Territory Department of Industry, Resource and Development

Canberra, Tuesday 17 September 2002

DIMIA
Mr Vince McMahon, Acting Deputy Secretary
Mr Desmond Storer, First Assistant Secretary, Parliamentary and Legal Division
Mr Robert Illingworth, Assistant Secretary Onshore Protection
Mr Douglas Walker, Assistant Secretary, Visa Framework Branch

APPENDIX 3

CLASSES OF VISA, MERITS REVIEW AND JUDICIAL REVIEW RIGHTS

Description of visa applicant	**Classes of available visas**	**Merits review rights**	**Judicial review in Australian Courts**
1. Landed on mainland (unauthorised), no previous contact with excised place	Onshore visa classes, particularly subclass 785 (Temporary Protection) (subject to meeting criteria)	MRT or RRT	- High Court under s 75(v) of the Constitution. - Federal Court or Federal Magistrates Court as modified by Part 8 of the Act.
2. Landed on mainland (unauthorised), has previously landed at excised place (eg detained at excised island, transferred to mainland by authorities)	None unless s.46A bar is lifted for onshore visa classes (they are an offshore entry person)	N/A	High Court, but not in relation to a visa decision.
3. Applying while at sea in territorial waters, no previous contact with excised place (eg at anchor, not intercepted)	For making an application not in migration zone, offshore visas. Protection claims would be assessed (subject to meeting criteria and note practical difficulties of applying)	- Visa applicant has no right to review. - The Australian sponsor or relative may have review rights to the MRT for certain classes of visas	- High Court under s 75(v) of the Constitution. - Federal Court or Federal Magistrates Court as modified by Part 8 of the Act.
4. Applying while at sea in territorial waters, previous contact at excised place (eg: boat not intercepted, lands at remote community, goes back to sea)	For making an application not in migration zone, offshore visas. Protection claims would be assessed (subject to meeting criteria and note practical difficulties of applying) (is an offshore entry person)	- Visa applicant has no right to review. - The Australian sponsor or relative may have review rights to the MRT for certain classes of visas	- High Court under s 75(v) of the Constitution. - Federal Court or Federal Magistrates Court as modified by Part 8 of the Act.

Description of visa applicant	**Classes of available visas**	**Merits review rights**	**Judicial review in Australian Courts**
5. Applying from Christmas island processing centre after being intercepted at sea, previous contact with excised place	None unless s.46A bar is lifted for onshore visa classes (they are an offshore entry person)	N/A	High Court, but not in relation to a visa decision.
6. Applying from Christmas island processing centre after being intercepted at sea, no previous contact with excised place	None unless s.46A bar is lifted for onshore visa classes (they are an offshore entry person)	N/A	High Court, but not in relation to a visa decision.
7. Applying from declared country processing centre after being intercepted at sea, previous contact with excised place	Offshore visa classes, particularly subclass 447 (Secondary Movement Offshore Entry (Temporary) (subject to meeting criteria)	- Visa applicant has no right to review. - The Australian sponsor or relative may have review rights to the MRT for certain classes of visas - If a protection claim, UNHCR-like review process	- If visa applicant - High Court under s 75(v) of the Constitution. - Federal Court or Federal Magistrates Court as modified by Part 8 of the Act. - Otherwise none.
8. Applying from declared country processing centre after being intercepted at sea, no previous contact with excised place	Offshore visa classes, particularly subclass 451 (Secondary Movement Relocation (Temporary) (subject to meeting criteria)	- Visa applicant has no right to review. - The Australian sponsor or relative may have review rights to the MRT for certain classes of visas - If a protection claim, UNHCR-like review process	- If visa applicant - High Court under s 75(v) of the Constitution. - Federal Court or Federal Magistrates Court as modified by Part 8 of the Act. - Otherwise none.