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Senate Legal and Constitutional Legislation Committee

Consideration of Legislation Referred to the Committee

Provisions of the Migration Legislation Amendment Bill (No.1) 2002

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CHAPTER 1

INTRODUCTION

Background

1.1 The Migration Legislation Amendment Bill (No.1) 2002 ('the Bill') was introduced into the House of Representatives on 13 March 2002. Its second reading was adjourned on the same day.

1.2 On 20 March 2002, the Senate adopted the Selection of Bills Committee's second report for 2002 in so far as it recommended that the provisions of the Bill be referred to the Legal and Constitutional Legislation Committee for inquiry and report by 15 May 2002.

1.3 The report stated that the reasons for referral/principal issues for consideration were that the Bill made a number of changes to the operation of the Migration Act, particularly to certain visa-related matters and that the impact of the proposed changes required full examination.

1.4 The Committee points out that some of the proposed amendments (particularly those dealing with criminal offences) involved technical and complex legal issues. The Committee wishes to thank those who attempted at short notice to assist the Committee to grapple with those issues.

Purpose of the Bill

1.5 According to the Explanatory Memorandum, the Bill is an 'omnibus' Bill, dealing with miscellaneous matters. It amends the *Migration Act 1958* (the Migration Act) for various purposes, including the following:

a) Clarifying certain visa-related matters by:

i) providing that a non-citizen child born in Australia is immigration cleared for the purposes of his or her 'birth entry' if at least one of his or her parents is immigration cleared. This provision is back-dated to 1 September 1994;[1]

ii) ensuring that a special purpose visa ceases to be in effect immediately if the Minister declares that it is undesirable for the non-citizen to travel to and enter Australia or remain in Australia and putting it beyond doubt that the rules of natural justice do not apply to the making of such a declaration;[2]

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1 Items 1 and 2 of Schedule 1 of the Bill. For further explanation, see paragraphs 1.7-1.8 below

2 Items 1 and 2 of Schedule 3 of the Bill. For further explanation, see paragraph 1.9 below

iii) ensuring that a non-citizen who leaves and re-enters Australia on a bridging visa that allows such travel is subject to the section 48 bar on further applications;[3]

b) Ensuring that certain offence provisions operate as they did prior to the application of the Criminal Code;[4]

c) Applying strict liability to one element of an offence against s 241(1) of assisting people to falsely appear to be de facto spouses for the purposes of the regulations so that one of them can get a stay visa.[5]

Explanation of the principal amendments discussed before the Committee

1.6 Submissions and oral evidence given to the Committee expressed concern about the amendments explained hereunder.

Immigration clearance of child born in Australia to non-citizen parents

1.7 Items 1 and 2 of Schedule 1 deal with this matter. Section 172 indicates several ways in which a non-citizen can be immigration cleared and be lawfully free to move about in the Australian community. First, he or she enters Australia with a visa at a port, provides any required information to the clearance officer and, not being in immigration detention, leaves with the permission of that officer. Secondly, he or she enters Australia otherwise than at a port but with a visa, provides any required information to the clearance officer at a prescribed place and, not being in immigration detention, leaves with the permission of that officer. Thirdly, he or she is refused, or bypasses, immigration clearance and is subsequently granted a substantive visa.

1.8 Section 10 provides that a non-citizen child born in the migration zone is taken to have entered Australia when he or she was born. Conceptually this means that the child should have been immigration cleared at birth if he or she is to be left free in the community. The amendments provide that such a child is immigration cleared if a parent was immigration cleared on last entry into Australia.

Cancellation of special purpose visas

1.9 Items 1 and 2 of Schedule 3 deal with this matter. S 33 currently provides that a special purpose visa, in respect of which the Minister declares that it is undesirable for its non-citizen holder to travel to and enter Australia or remain in Australia, ceases to be in effect at the end of the day on which the declaration is made. It is unclear whether the rules of natural justice apply. If they did apply in this situation, they would say that the person with the special purpose visa must be given a fair opportunity to respond to adverse information which the Minister proposed to consider in making the declaration. Item 1 of

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3 Item 1 of Schedule 6 of the Bill. For further information, see paragraph 1.20 below

4 For example, Item 6 of Schedule 5. For explanation of that item, see paragraphs 1.10-1.16 below

5 Item 7 of Schedule 5. For further explanation, see paragraphs 1.17-1.19 below

Schedule 3 proposes to have the declaration by the Minister take effect immediately on its making and Item 2 proposes to clarify that the rules of natural justice do not apply to the making of the declaration.

Application of strict liability to s 233(1)(a) (people smuggling) offences

1.10 Item 6 of Schedule 5 deals with this matter. S 233(1)(a) of the Migration Act makes it an offence, punishable with imprisonment for 10 years and/or a fine of 1000 penalty units ($110,000), to participate in the bringing or coming to Australia of a non-citizen under circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of the Migration Act. The provision says nothing about the state of mind of the accused in relation to the circumstances under which the non-citizen is brought or comes to Australia. (This is relevant to the question of 'fault element' as to which, see paragraph 1.11 below).

1.11 The Northern Territory Supreme Court ruled in two cases in 1997 and 2000 that strict liability applied to the circumstances under which the non-citizen was brought or came to Australia, i.e., the prosecution only had to prove two points, namely, that

a) the accused had deliberately participated in the bringing or coming of the non-citizen to Australia; and

b) it might reasonably have been inferred from the circumstances under which that non-citizen was brought or came to Australia that he or she intended to enter Australia in contravention of the Migration Act.

1.12 On 19 September 2001 the *Migration Legislation Amendment (Application of Criminal Code) Act 2001* (the Application of Criminal Code Act) came into effect. This Act applied ss 5.6(2) and 5.4(1) of the Criminal Code to all offences against the Migration Act. It is provided in s 5.6(2) that:

> If the law creating the offence does not specify a fault element [intention, knowledge, recklessness or negligence] for a physical element that consists of a circumstance . . . , recklessness is the fault element for that physical element.

1.13 The intention of the non-citizen being brought or coming to Australia would be such a circumstance. S 5.4(1) of the Criminal Code states that:

> A person is reckless with respect to a circumstance if:
>
> a) he or she is aware of a substantial risk that the circumstance in question exists or will exist: and,
>
> b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

1.14 The effect of the Application of Criminal Code Act was to add a third point to the matters that the prosecution has to prove in any prosecution under s 233(1)(a) of the Migration Act. Specifically, the prosecution now has to prove, in addition to the points in paragraph 1.10 above, that :

> the accused was aware of a substantial risk that the non-citizen intended to enter Australia in contravention of the Migration Act and, having regard to the circumstances known to him or her, he or she was not justified in taking that risk.

1.15 The Explanatory Memorandum states that this was contrary to the stated purpose of the Application of Criminal Code Act, which was to ensure that the relevant offences would continue to have the same meaning and apply in the same way as they did prior to the application of the Criminal Code.[6]

1.16 Item 6 of Schedule 5 of the Bill proposes to restore the previous situation by inserting a new subsection in s 233. This new subsection will provide that strict liability applies to the element of the offence against s 233(1)(a) that the bringing or coming to Australia of the non-citizen was under circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of the Act. The prosecution will no longer have to prove the third point.

Application of strict liability to s 241(1) (de facto spouses) offences

1.17 Item 7 of Schedule 5 deals with this matter. S 241(1) makes it an offence for a person, knowing or reasonably believing that two other persons are not de facto spouses for the purposes of the regulations, to make or help to make it look as if they are such de facto spouses so that one of them can qualify for a stay visa. In other words, the offence consists of helping to establish a sham de facto relationship for the purpose of obtaining a visa.

1.18 R 1.15A(2) of the Migration Regulations defines a de facto relationship in terms of the Minister's satisfaction that:

- the persons are committed to a shared life as husband and wife to the exclusion of others;
- their relationship is genuine and continuing;
- they live together or do not live separately and apart on a permanent basis;
- for the purposes of certain visa applications, the relationship existed for 12 months before the relevant time.

1.19 This item would insert a new s 241(3) providing that strict liability applies to the element of an offence against s 241(1) that two persons are not de facto spouses of each other, for the purposes of the regulations, in so far as the regulations require the Minister to be satisfied of any matter in determining whether they are de facto spouses. The Explanatory Memorandum indicates that, because of the complexity of the definition of de facto spouse in the regulations, it could be most difficult for the prosecution to prove that the defendant knew that the people were not de facto spouses for the purposes of the regulations.[7] It also states that the purpose of the amendment was to make it clear that the prosecution was required only to prove that the de facto relationship was not genuine, and that the defendant knew, or reasonably believed, that this was the case.[8]

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6 Explanatory Memorandum to Migration Legislation Amendment Bill (No. 1) 2001, paragraph 87

7 Explanatory Memorandum to Migration Legislation Amendment Bill (No. 1) 2001, paragraph 91

8 Explanatory Memorandum to Migration Legislation Amendment Bill (No. 1) 2001, paragraph 94

Restrictions on bridging visa holders

1.20 Item 1 of Schedule 6 deals with this matter. S 48 currently limits the visas that a non-citizen in the migration zone who does not hold a substantive visa and who was refused a visa after last entering Australia or held a visa that was cancelled can apply for. The Bill proposes by Item 1 of Schedule 6 (headed 'Minor amendments') an amendment to s 48 stating that, for the purposes of the section, a non-citizen who, while holding a bridging visa, leaves and re-enters the migration zone is taken to have been continuously in the migration zone despite that travel.

Conduct of the present inquiry

1.21 The Committee advertised the inquiry in the 'Weekend Australian' newspaper and wrote to a range of organisations and individuals on 25 March 2002 inviting submissions. The Committee received 16 submissions, including supplementaries, which are listed at Appendix 1.

1.22 The Committee was given a private briefing on the Bill and the Migration Legislation Amendment (Procedural Fairness) Bill 2002 by officers of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) on 27 March 2002. A transcript of that briefing was taken by Hansard. With the agreement of the Department, that transcript has been included in the public record. A public hearing on the two Bills was held in Sydney on 9 April 2002.

1.23 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

ISSUES

2.1 In this chapter, the Committee discusses the following significant issues which emerged in written and oral evidence:

- immigration clearance of children born in Australia to non-citizen parents;
- cancellation of special purpose visas;
- application of strict liability to s 233(1)(a) (people smuggling) offences;
- application of strict liability to s 241(1) (de facto spouses) offences; and
- restrictions on bridging visa holders.

Immigration clearance of children born in Australia to non-citizen parents (Items 1 and 2 of Schedule 1)

2.2 The International Commission of Jurists (the ICJ) suggested that, just as the Bill proposes that children born in Australia to parents, at least one of whom is immigration cleared at the time of the child's birth, would be immigration cleared, so children born in Australia to parents who were subsequently given immigration clearance should also be immigration cleared.[1]

2.3 The Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) did not support this proposition. DIMIA said that where a child was born to a person who did not hold a substantive visa and who had not been immigration cleared, if the person applied for and was granted a substantive visa, it would also have to examine whether or not the child was entitled to a visa at that time. On the other hand, where a child was born to a person who had bypassed immigration clearance but been granted a substantive visa, so that the person was immigration cleared under s 172 at the time of the birth, the child would be immigration cleared.[2]

2.4 The Committee agrees with DIMIA's interpretation on this point.

Cancellation of special purpose visas (Items 1 and 2 of Schedule 3)

2.5 There are two circumstances in which a non-citizen's special purpose visa can cease to be in effect:

- members of a class that has a prescribed status, e.g., foreign armed forces dependants, are taken to have special purpose visas. On their ceasing to be members of that class, their special purpose visas automatically cease to be in effect;

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1 *Submission 7*, International Commission of Jurists, p. 3

2 *Transcript of evidence*, Department of Immigration, Multicultural and Indigenous Affairs, Proof Hansard, p. 52

- special purpose visas also cease to be in effect if the Minister makes a declaration under s 33(9) that it is undesirable for a named person or a named class of persons to travel to or enter or remain in Australia.

2.6 The Bill proposes amendments:

a) that state directly that the rules of natural justice do not apply to a declaration by the Minister under s 33(9);

b) that state that the special purpose visa(s) of a named person or named class of persons cease to be in effect as soon as the Minister makes a declaration in relation to that person or class of persons, instead of at the end of that day.

2.7 In relation to the first circumstance, the ICJ suggested that there be provision for giving notice of possible cessation of a person's special purpose visa by reason of his or her losing a prescribed status.[3] DIMIA pointed out that the Bill proposed that the rules of natural justice not apply to the cancellation of a special purpose visa by reason of a declaration of the Minister, but did not address the automatic cessation of a visa by reason of loss of a prescribed status.[4]

2.8 The Committee does not consider that any ground has been established for warning people of the impending loss of their prescribed status and consequent automatic cessation of a special purpose visa.

2.9 With regard to the second circumstance, the NSW Council for Civil Liberties suggested that, rather than abrogate the rules of natural justice, the Minister should not make a declaration until he or she had made reasonable efforts in the circumstances to contact the person who would be affected by the declaration.[5] The Victorian Bar particularly objected to the Minister's use of adverse intelligence reports without first giving the person who would be affected an opportunity to answer them. It pointed out that adverse intelligence reports (mentioned in the Explanatory Memorandum) could come from countries governed by undemocratic regimes that regularly commit human rights violations and could hardly be regarded as reliable.[6]

2.10 The Explanatory Memorandum states that the purpose of the new provision is to ensure that, as originally intended, quick action can be taken to prevent the use of a special purpose visa by a person whose entry or stay in Australia is not in Australia's interest. The Explanatory Memorandum also states that the exclusion of the rules of natural justice also avoids the operational difficulties associated with an obligation to afford natural justice in particular circumstances, e.g, the difficulty or impossibility of contacting a seafarer who has deserted his vessel. Adverse intelligence reports or time constraints might also prevent the declaration being put to the person.[7]

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3 *Submission 7*, International Commission of Jurists, p. 4

4 *Transcript of evidence*, Department of Immigration and Multicultural and Indigenous Affairs, Proof Hansard, p. 58

5 *Submission 2*, NSW Council for Civil Liberties, p. 3

6 *Submission 10*, The Victorian Bar, p. 5

7 Explanatory Memorandum to the Migration Legislation Amendment Bill (No. 1) 2002, paragraphs 41 and 43

2.11 DIMIA points out that as a matter of policy, the Minister may revoke a declaration made under s 33(9) in order to allow a person to be the holder of a special purpose visa again and that this could occur where it was found that the adverse information provided by a country was incorrect.[8]

2.12 The Committee considers that the argument about the need for quick action is confirmed by Item 1 which, as stated in paragraph 2.6(b) above, changes the time for operation of the Minister's declaration from the end of the day to immediate. Even the current time for operation of the Minister's declaration, namely, the end of the day, is inconsistent with the operation of the rules of natural justice. The Committee is not convinced that there should be room for the application of the rules of natural justice to a declaration by the Minister under s 33(9). However, it is not sure that DIMIA has adequately answered the objection by the Law Institute of Victoria and suggests that the matter be examined more closely.

Application of strict liability to s 233(1)(a) (people smuggling) offences (Item 6 of Schedule 5)

2.13 The ICJ suggested that if strict liability is to apply to the element of an offence against s 233(1)(a) that the bringing or coming of a non-citizen to Australia was under circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of the Act, there should be a requirement of criminal intent on the part of both smuggler and illegal entrant, instead of only the latter needing to intend to enter Australia illegally.[9] The Committee is unable to reconcile the presence of both strict liability and a requirement for criminal intent on the part of the smuggler.

2.14 The ICJ said in evidence that many of the people involved, particularly Indonesian fishermen, were quite uneducated and would have no knowledge of Australian migration law and have no intention of breaking that law. It distinguished between the organisers and the crews.[10] However, it acknowledged that fishermen knew that other fishermen were detained in gaols in the Northern Territory and Western Australia but suggested that there was a financial impetus for them to participate in the smuggling process notwithstanding the penalties. They realised that they would end up in gaol but they did not particularly know why.[11]

2.15 The Law Institute of Victoria argued that it was inappropriate for strict liability to apply to any element of an offence which carried a penalty of 10 years in prison and/or a fine of 1000 penalty units ($110, 000).[12]

2.16 DIMIA responded that the effect of s 233(1)(a) currently was to make it an offence for someone to participate in the bringing or coming of a non-citizen into Australia being

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8 *Submission 11A*, Department of Immigration and Multicultural and Indigenous Affairs, p. 3

9 *Submission 7*, International Commission of Jurists, p. 4

10 *Transcript of evidence*, International Commission of Jurists, Proof Hansard, p. 27

11 *Transcript of evidence*, International Commission of Jurists, Proof Hansard, pp. 29-30

12 *Transcript of evidence*, Law Institute of Victoria and Law Council of Australia, Proof Hansard, p. 38

reckless as to whether the non-citizen has a lawful right to come to Australia.[13] It said that the Director of Public Prosecutions wrote to it in September 2001 saying that, because of the application of the Criminal Code, the offence in section 233 had been altered. The courts had interpreted the offence in s 233 as being a strict liability offence, and this had not been picked up in the harmonisation exercise that was undertaken the previous year. The amendment would ensure that the provision operated in the way it always had. It was being made a strict liability offence again. DIMIA pointed out:

> There is actually an objective element to this offence, namely,
>
> . . . the bringing or coming to Australia of the relevant non-citizen was under circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of this Act.[14]

2.17 DIMIA also referred to a number of provisions in Commonwealth Acts which provided for elements of offences punishable with imprisonment for 10 years or more to be subject to strict (or absolute) liability.[15] However, most of these related to elements which might be seen as subsidiary. For example, it is an offence against Item 71.2 of the Criminal Code to intentionally or recklessly cause the death of a UN or associated person engaged in a UN operation and strict liability applies to the elements that the person is a UN or associated person engaged in a UN operation. Similarly strict liability applies to the element of offences under the Crimes (Aviation) Act that the aircraft against which the offences are committed is a Division 3 aircraft.

2.18 On the other hand, there are some offences where (as is the case with s 233(1)(a)) the element to which strict or absolute liability applies appears to be fundamental to the criminality. For example, strict liability applies to the offence of being owner or master of a vessel which enters or remains in a safety zone contrary to s 119 of the *Petroleum (Submerged Lands) Act 1967*. Again, in relation to the offence of engaging in sexual intercourse outside Australia with a person under 16, absolute liability applies to the elements of where the offence occurs and the age of the other person.

2.19 It appears that there are very few Commonwealth offences where strict liability applies to a fundamental element. However, as DIMIA pointed out, there is an objective element to the offence, namely, the presence of circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of the Migration Act. There is no such objective element in the strict/absolute liability offences mentioned in paragraphs 2.17-2.18 above. The presence of this objective element in an offence against s 233(1)(a) means that substituting strict liability for recklessness will not greatly reduce the burden on the prosecution. In fact, it seems likely that the fishermen to whom the ICJ referred would have been reckless if they had participated in the bringing or coming of non-citizens to Australia, knowing that other fishermen who had done the same had ended up in prison.

2.20 The Committee notes concerns in respect of strict liability raised in other reports of this Committee and of the Scrutiny of Bills Committee. However, in this instance, the

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13 *Transcript of evidence*, Department of Immigration and Multicultural and Indigenous Affairs, p. 57

14 *Transcript of evidence*, Department of Immigration and Multicultural and Indigenous Affairs, p. 8

15 Strict liability and absolute liability are defined in Items 6.1 and 6.2 respectively of the Criminal Code. The defence of mistake of fact is available in the first case but not in the second.

change from recklessness to strict liability is justified in the current context. Having regard to the above considerations and to the fact that the maximum penalty had already been set at its current level by the *Migration Legislation Amendment Act (No. 1) 1999* on 22 July 1999 (i.e. before the Application of Criminal Code Act took effect in 2001), the Committee is satisfied that the maximum penalty for the offence is not unacceptably harsh.

Application of strict liability to s 241(1) (de facto spouses) offences (Item 7 of Schedule 5)

2.21 The ICJ opposed the amendment to apply strict liability to the element of an offence against s 241(3) that two persons are not de facto spouses for the purposes of the regulations. It pointed out that for some purposes, a de facto relationship was not recognised by the regulations until it had existed for 12 months. It said that this amendment could catch lawyers who were assisting people to establish that there was a relationship which, after 12 months, might be seen as a de facto relationship for the purposes of the regulations. The Committee notes that it is difficult to envisage how an individual could be liable so long as he or she was helping to provide evidence of what was true. The ICJ also suggested that strict liability only apply when the person was acting with intent to create a false de facto relationship.[16]

2.22 The Law Institute of Victoria and Law Council of Australia argued that the maximum penalty for the offence ($110,000 and/or imprisonment for 10 years) was excessive for an offence involving strict liability but that, in any case, it was self-contradictory for strict liability to apply to a provision involving knowledge or belief on reasonable grounds.[17] The Committee does not consider that the maximum penalty for the offence is unacceptably harsh, particularly given the subsidiary nature of the element to which strict liability will apply - see paragraph 2.17 above. The Committee does not consider that there is any self-contradiction where strict liability applies to one element of an offence but knowledge or reasonable belief applies to another. However, the Committee considers that there are difficulties with the amendment, as to which, see paragraphs 2.25-2.27 below.

2.23 DIMIA said that without the amendment the prosecution would have to prove that the accused knew or reasonably believed that the relationship was not a de facto relationship as defined by the regulations. It said:

> The regulations use the term 'to the minister's satisfaction', and the issue with these amendments is really that the prosecution would have to demonstrate that the individual knew what the 'minister's satisfaction' was. The amendments will have the effect that the prosecution will still have to prove that the person knew that it was not a de facto relationship, and that the arrangements were being made in an attempt to make that relationship appear to be a de facto relationship for the purposes of a visa application.[18]

2.24 The Department stated further:

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16 *Submission 7*, International Commission of Jurists, p. 4

17 *Transcript of evidenc*e, Law Institute of Victoria & Law Council of Australia, Proof Hansard, pp. 38-39

18 *Transcript of evidence*, Department of Immigration and Multicultural and Indigenous Affairs, Proof Hansard, p. 57

> The prosecution is required to establish that the two other persons are not de facto spouses of each other for the purposes of the regulations. No fault element will need to be established in relation to this physical element in so far as knowing or believing that the Minister was satisfied. This is a separate matter from knowing or believing on reasonable grounds that two other persons are not de facto spouses.[19]

2.25 It appears to the Committee that the Department is saying that without the amendment, the prosecution has to prove that the defendant knows or reasonably believes that the Minister has turned his or her mind to the issue as to whether the couple in question have a de facto relationship as envisaged by the regulations and has determined that they do not. The Committee does not believe that this is possible. Moreover, the amendment would not improve DIMIA's interpretation because the prosecution would still have to prove that at the time the accused acted, the Minister was satisfied that the parties were in the relevant de facto relationship. The current provision would only make sense if it were interpreted as requiring the prosecution to prove that the accused knew or reasonably believed that the Minister would not be satisfied that there was a de facto relationship as defined by the regulations for the particular purpose.

2.26 Be that as it may, it appears to the Committee that the proposed amendment only adds to the complexity of the existing provision. The amendment is not clear as to meaning or intent. An illustration of the difficulty of understanding it is given by the statement at paragraph 94 of the Explanatory Memorandum:

> The purpose of this amendment is to make it clear that the prosecution is required only to prove that the de facto relationship was not genuine, and that the defendant knew, or reasonably believed, that this was the case (emphasis added).

2.27 The Committee considers that further thought is needed and supports the ICJ's proposal to rephrase s 241 along the lines mentioned at paragraph 2.21 above.

Recommendation 1

The Committee **recommends** that, instead of the proposed new subsection being inserted, s 241(1) be amended to provide in effect that it is an offence to make arrangements that would falsely make, or help to make, it appear that two other persons are de facto spouses for the purposes of the regulations with the intention of assisting one of them to get a stay visa by appearing to satisfy a criterion for the visa.

Restrictions on bridging visa holders (Item 1 of Schedule 6)

2.28 This provision probably caused more debate (and confusion) than any other in the Bill. Many of the persons and organisations which sent submissions or gave evidence believed that it meant that persons who held a bridging visa but whose application for a substantive visa had been rejected could no longer travel overseas to lodge an 'offshore' application, then return to Australia. They referred to what they saw as the long-standing and necessary practice known as the 'Buffalo shuffle' in the United States of America and the 'Auckland shuffle' in Australia by which people travel to the nearest point outside the

19 *Submission 11*, Department of Immigration and Multicultural and Indigenous Affairs, p. 10

country to lodge 'offshore' applications. People and organisations who shared this belief were the Law Institute of Victoria,[20] Mr Michael Clothier[21] and the Refugee and Immigration Legal Centre (the RILC)[22] although the RILC recognised that the provisions related to onshore applications as well.[23]

2.29 The Law Institute of Victoria suggested that it was inappropriate to include such an amendment in a Schedule dealing with 'Minor amendments'.[24] The ICJ also thought that the proposed amendment was fairly substantial and should not have been included in that Schedule, although it correctly understood that it did not relate to offshore applications.[25] On the other hand, the RILC said that the number of persons who successfully made use of the 'loop hole' in s 48 was small because of the specific Schedule 3 criteria (if any) prescribed in each onshore visa subclass.[26]

2.30 DIMIA explained how the amendment to s 48 was intended to operate and what defect it was meant to cure. It said:

> Section 48 basically covers a situation where a person who is in Australia, who has made an application for a visa and who has been rejected, cannot make an application for other visas unless permitted by section 48 . . . You cannot have the broader number of visas open to you unless you leave the country and then subsequently come back in. A person with a bridging visa B . . . has the right to leave the country and travel back to Australia. The bridging visa B is available to a person who lodges an application for a substantive visa while lawfully in the country on another substantive visa. We have had a few situations – about 120 over the last year – where people have actually used this capacity to travel on a bridging visa and come back, and thereby open up the range of classes of visas for which they can apply. That was never the intention.
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> . . .
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> The way section 48 operates at the moment is that if you have been in the country, you have made an application for a visa and you have been unsuccessful, then you can only apply for a limited number of types of visa that are actually specified at section 48. The way in which section 48 no longer applies to you is where, if you leave Australia and subsequently come back, effectively your slate is clean
>
> . . .
>
> I think there were situations where people would lodge serial applications solely to remain in Australia.[27]

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20 *Submission 6*, Law Institute of Victoria, p. 1

21 *Submission 1*, Mr Michael Clothier, p. 1

22 *Submission 9*, Refugee and Immigration Legal Centre, pp. 7-9

23 *Submission 9*, Refugee and Immigration Legal Centre, p. 7

24 *Submission 6*, Law Institute of Victoria, p. 1

25 *Transcript of evidence*, International Commission of Jurists, Proof Hansard, p. 42

26 *Submission 9A*, Refugee and Immigration Legal Centre, p. 3.

27 *Transcript of evidence*, Department of Immigration and Multicultural and Indigenous Affairs, pp. 15-16

2.31 The Department also dealt specifically with the impact of the amendment on the 'Auckland shuffle'. It said of the amendment:

> Basically, it is intended to cover circumstances where the person leaves the country, then comes back and, on their return, attempts to make an application, and they use their departure and return to Australia to get around the making of an onshore application.
>
> In effect the situation is while they are offshore they would be entitled to make an application for a new visa that is offshore. There is nothing in this provision . . . that says that the making of that application is invalid and is to be ignored.[28]

2.32 The Committee agrees that if one reads existing s 48(1) very carefully, it is clear that it refers only to onshore applications, in so far as it refers to a person in the migration zone applying for a visa. Proposed s 48(3), which is along the same lines as existing s 48(2), applies only for the purposes of the section. The narrow application of the section is confirmed by paragraph 121 of the Explanatory Memorandum:

> The effect of subsection 48(1) is that it prevents non-citizens refused a visa from applying for another visa <u>in</u> Australia other than certain prescribed visas (emphasis added)

Recommendation 2

Although the Committee is satisfied that the criticisms of proposed s 48(3) are unfounded, it notes the great amount of confusion caused by its terms. It therefore **recommends** that it be amended by inclusion of a description of the operation of the section along the following lines:

> For the purposes of this section (which deals only with onshore applications for visas) . . .

Additional issues

2.33 The RILC raised two related issues which did not arise from the terms of the Bill. These issues (or 'glitches', as the RILC called them) had arisen as a result of the border protection legislation of last year and related to excised offshore places and new or amended humanitarian visas. The RILC said that it would have expected the Bill to deal with them.[29]

2.34 In response, DIMIA advised the Committee that:

> They are not the subject matter of the bill in question. My understanding . . . is that the issues that [the RILC] raised relat[ing] to what [it] described as 'glitches' are in the regulations. If the government is going to make any change the changes would be in the regulations.[30]

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28 *Transcript of evidence*, Department of Immigration and Multicultural and Indigenous Affairs, p. 52

29 *Transcript of evidence*, Refugee and Immigration Legal Centre, Proof Hansard, p. 50

30 *Transcript of evidence*, Department of Immigration and Multicultural and Indigenous Affairs, Proof Hansard , p. 55

2.35 The Committee does not consider that this response adequately addresses the issue raised. The issues raised by the RILC arise out of the fact that the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* inserted a new visa subclass and amended the criteria for other visa subclasses in the regulations.

2.36 The first matter was in relation to the new s 447 'Secondary Movement Offshore Entry (Temporary)' visa subclass which can not be issued to people who have come directly from, say, Sri Lanka, to the places which have been excised from the migration zone, but only to people who have come by way of a third country. The RILC submitted that the unavailability of this visa subclass to the people who had come direct from their home country was a serious oversight.

2.37 The second matter related to the insertion of safe third country clauses in the offshore humanitarian visa categories so that people in a third country are not eligible for these visas if they could have sought and obtained effective protection from the country they are in or from United Nations officers in that country. The RILC submitted:

> . . . these amendments require either further amendment, or better, repeal, given that the bars which they seek to impose on the grant of the visa subclass operate to effectively exclude the very situations in which applicants avail themselves of these visas. In other words, the grant of these visa subclasses is usually the result of an applicant who has been in a third country for some time being identified (or mandated) and referred to Australia by the offices of the United Nations High Commissioner for Refugees in the said country.[31]

2.38 The Committee notes that in his Second Reading Speech for the Bill, the Honourable Philip Ruddock, Minister for Immigration and Multicultural Affairs, said:

> . . . the Bill amends the migration regulations to implement a visa regime aimed at deterring further movement from, or the bypassing of, other safe countries.[32]

2.39 The Committee suggests that, given the importance of these matters, DIMIA confer directly with the RILC as a matter of priority.

Conclusion

2.40 At the conclusion of this inquiry, the Committee finds itself in agreement with the salutary warning in the Australian Council of Social Service submission:

> In the current political climate surrounding migration and refugee issues, it is imperative that any proposed legislative amendments are transparent and well understood.[33]

The Committee does not consider that all aspects of the Bill satisfy these criteria. As has been indicated in the report, some of the provisions in the Bill are quite obscure.

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31 *Submission 9A*, Refugee and Immigration Legal Centre, p. 2. The effect of the change sought by RILC seems to be that people in a third country would not be eligible for these visas if they could have sought and obtained effective protection from the country they were in

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

33 *Submission 3*, Australian Council of Social Service, p. 1

Recommendation 3

The Committee **recommends** that the Bill be passed with the amendments listed in Recommendations 1 and 2.

Senator Marise Payne

Chair

COMMENTS OF SENATOR COONEY

THE BILL DEALS WITH A NUMBER OF MATTERS

The Migration Legislation Amendment Bill (No 1) 2002 deals with a number of matters.

CITIZENSHIP : A FUNDAMENTAL AND SACRED QUALITY

One of these is the status to be given to a child born in Australia but not as one of its citizens.

The power to declare who will and who will not qualify to be an Australian resides with the Federal Parliament. Citizenship is a fundamental and sacred quality underpinning the identity and character of Australia. The Constitution and not the Parliament should declare who is to possess it.

SERIOUS CRIME AND STRICT LIABILITY : THE COMMONWEALTH TREND UNACCEPTABLE

This legislation attaches strict liability to elements of offences set out in sections 233 and 241 of the Migration Act 1958. These crimes carry a maximum penalty of 10 years. It is exceptional for strict liability to be assigned to elements of offences as serious as these. However there is now a trend for this to happen with Commonwealth legislation. This is unacceptable and should be rejected. Most serious crime is dealt with by State and Territory Parliaments and Governments and they appear to be able to cope with it without resorting to strict liability. The Federal Bodies seem to lack the same ability.

THE SHRINKING OF THE RULE OF LAW AT COMMONWEALTH LEVEL

In recent times Australia has experienced, at the Federal level, the shrinking of the rule of law. The asylum seekers Acts guillotined through the Senate at the end of September 2001, the anti-terrorist Legislation, and the Bill dealing with the proceeds of crime, now before Parliament contain provisions which reduce the safeguards traditionally available to those facing the accusations of others. The Migration Legislation Amendment Bill (No 1) 2002 continues the current process whereby the Commonwealth is stripping from people more and more of the rights they have traditionally enjoyed. Recent legislation dealing with asylum seekers and terrorists are other examples of the same penchant.

THE TREND MUST BE REVERSED

There is an unhappy development in Commonwealth activity which prejudices the quality of civil rights in Australia. It is time this trend was reversed.

Senator Barney Cooney

ADDITIONAL COMMENTS AUSTRALIAN DEMOCRATS

I am supportive of the conclusions and recommendations contained in the main report of the Committee.

However, I do retain some concerns regarding the implications and potential application of the amendments that introduce strict liability for people smuggling and de facto spouse offences. My concern is that the penalty for such offences may in some circumstances far outweigh what may be just and reasonable in the circumstances.

I will be giving further examination to this matter prior to the legislation being debated in the Senate.

Senator Andrew Bartlett

Australian Democrats, Queensland

APPENDIX 1

INDIVIDUALS AND ORGANISATIONS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

1. Mr Michael Clothier
2. New South Wales Council for Civil Liberties Inc.
3. Australian Council of Social Service
4. Ms Josephine Orya
5. Amnesty International Australia
6. Law Institute of Victoria

6A. Law Institute of Victoria

7. International Commission of Jurists – Australian Section
8. Attorney-General's Department
9. Refugee & Immigration Legal Centre Inc.

9A. Refugee & Immigration Legal Centre Inc.

9B. Refugee & Immigration Legal Centre Inc.

10. The Victorian Bar
11. Department of Immigration and Multicultural and Indigenous Affairs
12. Australian Lawyers for Human Rights

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Public Hearing, Wednesday 27 March 2002 (Sydney)

Mrs Elizabeth Duke, Director, Legal Policy Section, Department of Immigration and Multicultural and Indigenous Affairs

Mr Des Storer, First Assistant Secretary, Parliamentary and Legal Division, Department of Immigration and Multicultural and Indigenous Affairs

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

Public Hearing, Tuesday 9 April 2002 (Sydney)

Ms Elizabeth Biok, Council Member, International Commission of Jurists

Mr Davie Bitel, Secretary-General, Australian Section of International Commission of Jurists

Ms Isabella Cosenza, Refugee Caseworker, Amnesty International Australia

Dr Mary Crock, Member, Law Institute of Victoria, and Chair, Nationality and Residence Committee, International Law Section, Law Council of Australia

Mr David Manne, Coordinator, Refugee and Immigration Legal Centre

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

Dr Graham Thom, Refugee Coordinator, Amnesty International Australia

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

Ms Catherine Wood, Refugee Caseworker, Amnesty International Australia