CHAPTER 3

CONSIDERATION OF THE BILL

3.1 This chapter considers the main issues and concerns raised in the course of the committee's inquiry.

Key Issues

Section 48(3) - Previous Recommendation

3.2 In its 2002 Report on the Migration Legislation Amendment Bill (No. 1) 2002, the committee recommended that the bill be passed subject to two recommendations, only one of which is relevant to the current Bill. That recommendation related to the proposed amendment to section 48 of the Migration Act, which restricts the types of visas that a person can apply for once they have had a visa refused or cancelled (Schedule 4 of the Bill).

3.3 According to the 2002 Report, the proposed amendments to section 48 'caused more debate (and confusion) than any other in the Bill'. That is:

> Many of the persons and organisations which sent submissions or gave evidence believed that [the amendments to section 48] 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 country to lodge 'offshore' applications.[1]

3.4 The committee noted that a careful reading of section 48 made it clear that the section only operated to restrict the visa applications that a person could make onshore. However, the committee recommended that the new subsection 48(3) be amended to include a form of words that clarified that the restriction in section 48 applied only to onshore applications.

3.5 This recommendation has not been taken up in the current Bill. The Department's submission outlines the reason for this:

> [In its previous report, the committee] noted that there was some confusion around the provision and recommended a clarifying amendment be made. However the Committee also noted that the legal position was in fact correct.
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> The provision remains the same as originally drafted in the Migration Legislation Amendment Bill (No 1) 2002 as we consider that the legal

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1 2002 Report, pp. 12-13.

> effect of the provision is correct. The explanatory memorandum also makes it clear that the provision relates to [a] person seeking to apply for a visa when they are in Australia, not when they are offshore.[2]

Immigration status of the children of non-citizens

3.6 Amnesty International Australia (Amnesty) suggested that there needs to be some form of immigration clearance for children born in Australia to non-citizens who are not immigration cleared. Amnesty argues that the fact that paragraph 172(1)(ba) does not provide for these children to be immigration cleared can be problematic because the child might have great difficulty obtaining a passport/travel documents from their parent's country of origin.

3.7 Amnesty cited the case of Naomi Leong as an example of this issue. Naomi was born while her mother, Virginia, was in immigration detention at Villawood. The Malaysian Government denied Naomi any lawful status to enter Malaysia.[3]

3.8 Australian Lawyers for Human Rights (ALHR) have also noted that the status of children is now also subject to the provisions of the *Migration Amendment (Detention Arrangements) Act 2005*.[4] No further information was provided by ALHR regarding its concern in relation to the interaction between the current Bill and the Migration Amendment (Detention Arrangements) Act.

3.9 In the course of the committee's previous inquiry, the International Commission of Jurists suggested that the Bill should address other situations where children should be immigration cleared:

> … 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.[5]

3.10 During the previous inquiry, in response to this proposal, the Department stated 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, the Department would also have to examine whether or not the child was entitled to a visa at that time. The committee agreed with the Department on this point.[6]

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2 *Submission 3*, p. 6.

3 *Submission 1*, pp 1-2.

4 *Submission 2*, p. 1.

5 2002 Report, p. 7.

6 2002 Report, p. 7.

Strict liability in relation to people smuggling offences

3.11 In the course of the previous inquiry, witnesses expressed concern about strict liability being applied to the people smuggling offence in paragraph 233(1)(a). For example, the Law Institute of Victoria argued that it was inappropriate for strict liability to apply to an element of an offence which carried a penalty of 10 years in prison and/or a fine of 1000 penalty units.[7]

3.12 In its submission to the current inquiry, the Department noted this concern, however, the Department reiterated that the reason for the amendment is to restore the offence to one of strict liability, as had been the case before the introduction of the Criminal Code:

> We advised [the committee in 2002] that the effect of s233(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 reckless as to whether the non-citizen has a lawful right to come to Australia. Advice was given that [the] DPP had advised that because of the Criminal Code, the offence in section 233 had been altered.
>
> The courts had interpreted the offence as being a strict liability offence and this had not been picked up in the harmonisation exercise undertaken [in 2001]. The amendment would ensure that the provision operated in the way it always had. It was being made a strict liability offence again.
>
> [In its 2002 Report the committee] noted the concern in respect of strict liability but stated that the change from recklessness to strict liability was justified in the current context.[8]

3.13 During the current inquiry the committee raised with the Department the fact that paragraph 233(1)(a) did not distinguish between the crew of a vessel who are asylum seekers fleeing persecution, and cases where the crew of a boat is profiting for assisting people to illegally enter Australia (people smuggling). The committee queried whether asylum seekers would be much worse off under the strict liability provision than under the current provision which requires 'recklessness'.

3.14 The Department noted that strict liability would apply to the physical objective element of the offence in paragraph 233(1)(a): the bringing or coming to Australia of a non-citizen under circumstances where it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of the Migration Act. The Department stated that, as strict liability applies to the objective element of the offence, 'it is unlikely that an individual would be more liable to be prosecuted if section 233 is a strict liability offence than if the provision has a recklessness element.[9]

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7 2002 Report, p. 9.

8 *Submission 3*, p. 4.

9 Answers to Questions on Notice, 6 September 2006, *Submission 3A*, p. 1.

3.15 Further, the Department also stated that the provisions do not have a disproportionate impact on asylum seekers:

> The decision to prosecute an individual under these provisions is determined on a case-by-case basis. Depending on the circumstances of a case, a decision may be made that it may be inappropriate to prosecute an asylum seeker under these provisions. Ultimately, a decision on whether to prosecute rests with the Commonwealth Director of Public Prosecutions who will consider whether the public interest requires a prosecution to be pursued.[10]

3.16 The committee also asked the Department whether it was possible for paragraph 233(1)(a) to be amended in a way to maintain strict liability but to distinguish between a skipper of a boat who is an asylum seeker (and carrying other asylum seekers) and cases where there is a clear profit motive for the skipper involved in people smuggling.

3.17 The Department does not believe such an amendment should be made because it would lead to unjustified claims for asylum:

> The existing prosecution provisions form part of Australia's response to people smuggling by providing a mechanism to prosecute people smugglers and crew members who bring people unlawfully into Australia. A proposed exception to these provisions for any person who has made an asylum claim may encourage unmeritorious claims made solely for the purpose of avoiding potential prosecution.[11]

Committee view

3.18 The committee has previously recommended that the provisions of this Bill be passed by the Senate, and will make the same recommendation in this report.

3.19 However, there are two issues that the committee will briefly address.

3.20 Firstly, the committee is disappointed that the Department does not appear to appreciate the need for clarity in legislative drafting. The committee accepts that the amendments proposed to subsection 48(3), as currently drafted, are legally correct. However, the committee does not understand the Department's reluctance to insert a simple clarifying statement into section 48(3) which would alleviate the confusion which seems to have surrounded this provision.

Recommendation 1

3.21 The committee recommends that subsection 48(3) of the Bill be amended to include a statement that section 48 applies only to onshore visa applications.

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10 Answers to Questions on Notice, 6 September 2006, *Submission 3A*, p. 1.

11 Answers to Questions on Notice, 6 September 2006, *Submission 3A*, p. 3.

3.22 The committee has considered the issue of strict liability in the context of the offence in paragraph 233(1)(a). While the committee is still concerned about the impact of the amendments on boat skippers (and crew) who are themselves asylum seekers, the committee accepts the Department's explanation as to why this group cannot be excluded from the offence in paragraph 233(1)(a).

Recommendation 2

3.23 Subject to the above recommendation, the committee recommends that the Senate pass the Bill.

Senator Marise Payne

Committee Chair