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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Reference: Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Friday, 26 May 2006

Members: Senator Payne *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Bartlett, Kirk, Mason and Scullion

Participating members: Senators Abetz, Allison, Barnett, Bartlett, Bernardi, Mark Bishop, Brandis, Bob Brown, George Campbell, Carr, Chapman, Colbeck, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Heffernan, Hogg, Humphries, Hurley, Johnston, Joyce, Lightfoot, Ludwig, Lundy, Ian Macdonald, McGauran, McLucas, Milne, Murray, Nettle, Parry, Patterson, Robert Ray, Sherry, Siewert, Stephens, Stott Despoja, Trood and Watson

Senators in attendance: Senators Bartlett, Kirk, Ludwig, Mason, Nettle, Payne and Trood

Terms of reference for the inquiry:

Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

WITNESSES

Committee met at 9.02 am

DOMZALSKI Mr Henry Michael, Senior Regional Protection Officer, United Nations High Commissioner for Refugees

WRIGHT, Mr David Neill, Regional Representative, United Nations High Commissioner for Refugees Regional Office for Australia, New Zealand, Papua New Guinea and the South Pacific

CHAIR (Senator Payne)—Good morning and welcome to this hearing for the Senate Legal and Constitutional Legislation Committee's inquiry into the provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006. The inquiry was referred to the committee by the Senate on 11 May 2006, for report by 13 June 2006. The bill amends the Migration Act 1958 to expand the offshore processing regime currently applying to offshore entry persons and transitory persons to include all persons arriving at mainland Australia unlawfully by sea on or after 13 April 2006. The committee has received about 120 submissions for the inquiry. Most of those submissions have already been authorised for publication and are available on the committee's website.

Developing the program for the hearing today was complicated by the fact that it has, by necessity, been scheduled between two weeks of estimates hearings. The committee appreciates the attendance of all witnesses at the hearing today, particularly those who have travelled from interstate. I remind all witnesses that in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session.

It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

I welcome representatives of the United Nations High Commissioner for Refugees. The UNHCR has lodged a submission with the committee, which we have numbered 75. Mr Wright, do you need to make any amendments or alterations to that submission?

Mr Wright—No, thank you.

CHAIR—I invite you to make an opening statement, and at the conclusion of that we will go to questions from members of the committee. I exhort those making opening statements to keep them to a maximum of five minutes. We have a number of senators who wish to ask questions, and, the more time we have to do that, the better for the proceedings. We do have the benefit of your submission.

Mr Wright—Thank you. The UNHCR thanks the government for calling this Senate inquiry, thus providing more time to weigh the serious implications of the bill for asylum

seekers, refugees and others in need of international protection, for inviting UNHCR to make a submission and for inviting UNHCR to appear at this public hearing.

UNHCR is charged with monitoring the provision of international protection by states and with ensuring that permanent solutions are found for refugees, asylum seekers and others of concern to UNHCR. It is in this capacity that UNHCR supervises the application by signatory states such as Australia of the provisions of the 1951 convention. Under its charter, UNHCR remains committed to an ongoing dialogue with Australia about how its laws and practices provide such protection and solutions. Article 9 of the convention states that only in grave and exceptional circumstances can a contracting state take provisional measures to suspend determining whether or not a person is a refugee to whom it owes an obligation to provide status under the terms and conditions elaborated throughout the refugee convention.

Under this bill, Australia claims to be undertaking its responsibility to determine whether or not a person falling within the proposed class of 'designated unauthorised arrivals' is a refugee. This would suggest that the process envisaged could be considered extraterritorial processing. However, the history of Australia's offshore processing makes it appear that what has taken place is in fact a transfer of responsibilities to a third country. Given the lack of clarity with regard to which process is actually involved, one of the main concerns in UNHCR's submission is to obtain clarity on this issue. This is required because the legal and practical concerns stemming from extraterritorial processing on the one hand, and a transfer of responsibilities on the other, differ significantly.

UNHCR's submission raises both fundamental and secondary concerns. Among the fundamental concerns is the fact that removing a class of asylum seekers from the territory of a signatory state and providing them with inferior treatment to other classes of asylum seekers, processed on the mainland, is unprecedented. The proposed treatment of 'designated unauthorised arrivals' is considered procedurally inferior, contrary to article 16 of the convention, as asylum seekers and refugees will be denied access to legal advice, denied an independent merits review and denied access to the Australian courts. UNHCR firmly believes that this amounts to a penalty, insofar as some basic rights are adversely affected by the terms of the bill. This penalisation also increases the likelihood of Australia being in breach of article 31 of the refugee convention. This interpretation of the bill as a penalty is, in UNHCR's view, compounded by the bill explicitly stating that it is meant as a deterrent.

UNHCR's submission also makes clear our concerns about the proposed use of the Republic of Nauru for offshore processing. Since Nauru is not a signatory to the refugee convention, there are no guarantees provided by Nauru, that UNHCR is privy to, that it is obliged under international law to provide effective protection, despite the provisions of section 198A of the Australian Migration Act. The bill therefore heightens the risk of refoulement, contrary to article 33 of the refugee convention.

UNHCR also considers the bill to be discriminatory and inferior insofar as persons processed offshore, even recognised refugees, will have no guarantee of freedom of movement—that is, no article 29 travel documents—and no expectation of local integration in Australia, as the bill only proposes their consideration for resettlement. Thus, they will be denied regularisation of their status in accordance with the normal practices of other signatory states for refugees processed in their territory.

Finally, UNHCR sees the bill as undermining efforts to maximise international solidarity with regard to the shouldering of responsibilities for protecting refugees. The message that this bill sends, particularly to states in the Pacific region but also worldwide, is that states can deflect their responsibilities. Thank you.

CHAIR—Thank you very much, Mr Wright. Mr Domzalski, do you wish to add anything at this point?

Mr Domzalski—No, I do not.

CHAIR—Thank you. We will start with questions then. Senator Ludwig?

Senator LUDWIG—I appreciate the fact that you have provided a submission in such a short space of time. It seems the offshore processing will differ from that which is provided here, on shore. Does that concern you? Perhaps you could expand on that, because it seems that there will be no RRT review and there will be a difference between offshore and onshore processing facilities in the position provided for both adults and children. And I am not yet certain whether the UNHCR will in fact undertake the early work in the offshore processing, which of course will present a difference. Do you have a view on any of those matters?

Mr Wright—Let me say that this goes straight to the issue of whether responsibility is being transferred to a third state or country, or whether it is extraterritorial processing by Australia. If the latter were the case then the expectation of UNHCR is that the standards which apply on the mainland would be carried out during the offshore processing in that other location—in this case, the proposed location being the Republic of Nauru. It does concern UNHCR that people are denied legal advice in making their applications and they are denied an independent merits review: the bill only proposes that a second DIMA official would carry out a review, and perhaps even a third review if new information came to light. It also denies access to the courts of Australia. The cumulative effect of these denials is that the decision taken itself could be jeopardised, or the quality of the decision taken could be jeopardised.

We are also concerned about the family reunification and derivative implications of this bill. The experience of offshore processing since 2001 or 2002 demonstrates extended periods of family separation and undermines the speedy solution that refugees require. This was of particular severity for women and children.

Finally, UNHCR has not been formally asked to participate in the practice of the new process, and it has indicated that, given that Australia has a full and effective system of determining the status of refugees and meeting its obligations, it would not be inclined at this time to actually be a party to the process.

Senator LUDWIG—So we do not know yet who might undertake the actual processing?

Mr Wright—No. It is indicated in the bill that it will be carried out by the Australian authorities, by DIMA.

Senator LUDWIG—Prior to bringing forward this piece of legislation to affect the general law for asylum seekers in Australia, did the Australian government consult with the UNHCR about it? It seems clear that they should have, at least from my reading of the convention, and that that would be the usual course of events.

Mr Wright—I am happy to agree with your interpretation of article 35 of the convention. The series of briefings and informal discussions that took place with regard to the intention to put forward a new bill do not, in UNHCR's view, constitute the level of consultation that we have come to expect with other signatory states, and we were not privy to the content of the bill before it was made public.

Senator LUDWIG—Does that disappoint you?

Mr Wright—Yes, it does. It undermines the ability of UNHCR to fulfil its role under its mandate to assist states to put in place good legislation that will provide international protection.

Senator LUDWIG—Are you confident that sufficient work has been done to ensure that the responsibility for the human rights welfare of the asylum seekers who are processed in this way is dealt with according to the convention?

Mr Wright—The recognition of those who are determined to be refugees by this process would not automatically result in them, if they were on Nauru, receiving the level of support and other rights that are laid down in the refugee convention. It also raises concerns under other international treaties that I am not going to comment on this morning since I will limit my comments to the responsibilities of UNHCR and the refugee convention.

Senator BARTLETT—The last time there were a large number of people sent to Nauru and Manus Island, in 2001, the UNHCR, as I understand it, initially assisted with assessing the first group of people off the *Tampa* and the other boat that they arrived in Nauru jointly on, but you did not do any assessing after that. Could you outline the reasons why you decided or chose not to play that role after the initial, fairly unique, *Tampa* circumstances.

Mr Wright—I think one has to look at the situation at that time. We were dealing with secondary movers, as they are labelled—primarily people coming from Afghanistan and Iraq. We were dealing with an environment in which UNHCR was being encouraged to accept that the decisions that were being taken by states were in relation to the prevention of people-smuggling and trafficking. The request to UNHCR to carry out refugee status determination for some of the case load from the *Tampa* and the other boat came from the Republic of Nauru, and our documentary evidence would suggest that the then High Commissioner for Refugees accepted that in order to strengthen the protection afforded it would participate in the determination process for that case load only. When subsequent demands were made upon UNHCR to determine those on subsequent boats that arrived, UNHCR declined because at that time it was clear that the determination was being done and could be done by DIMA officials.

So, again, this comes to the issue of whether or not what was happening under 'Pacific solution 1' was a transfer of responsibilities, which the request coming from the Republic of Nauru would suggest, or whether it was extraterritorial processing, which the fact that DIMA officers were doing determinations would suggest. So even then there was a lack of clarity.

Senator BARTLETT—I noted that in paragraph 5 and 6 of your submission you indicated that you do not consider that experience of taking people across to Nauru an outstanding success in the way that the government is characterising it but rather consider that it resulted in the prolonged detention-like situation of people, including refugees, extended separation of

families and serious mental health problems. Is there anything in this new proposal that you can see would avoid those shortcomings that you assessed from previous practice?

Mr Wright—Could I just hold on that one and take the liberty of reading to you one section of a letter which was written by the then High Commissioner for Refugees with regard to your previous question, on the UNHCR role. It says:

> The facts of this case, although not all clear, would in our preliminary analysis point in the direction of Australia as the country primarily responsible for allowing admission, temporarily or otherwise, and best placed to determine the validity of any claims for refugee status.

I think that was the reason that we subsequently stopped doing the determination.

With regard to paragraphs 5 and 6, the answer is: no, we do not consider it, in retrospect—and I think one has to look at the experience—to have been an outstanding success. There were considerable delays and separation of families. The resettlement opportunities were hard to come by. I think less than four per cent of that case load went to countries other than Australia and New Zealand for resettlement in the end, so the extended period of their stay in conditions that were not as effective and appropriate as those that could have been provided on the mainland of Australia is not considered by UNHCR to be an outstanding success.

Senator BARTLETT—There is a related issue that we are seeing at the moment with this legislation with the potential to encourage people to go to PNG, particularly if they have come through that way. My understanding from an article on Australian Policy Online is that there are about 8,000 West Papuan refugees and asylum seekers already living in camps in PNG. Does that sound right to you? Can you give us an indication of what the refugee situation is like in Papua New Guinea?

Mr Wright—Papua New Guinea does have quite a significant case load of Papuan refugees. Some of them are in the East Awin settlement, and our office in Port Moresby looks after them. There are approximately 5,000 there, and there are almost as many on the border in villages, some of which are probably on the Papua New Guinea side and some are not; this is a very remote region. The government of Papua New Guinea refers to them as border crossers because they transit to and fro regularly. But, in order for them to obtain status in Papua New Guinea, the government urges them to move to the settlement of East Awin, where, if they spend a period of six months, they are subsequently given some documentary security in the form of a permissive residency permit. We see PNG as trying its best to fulfil its obligations as a signatory state to the convention. I should add that the figure of 10,000 is the one that we use for the total number of Papuan refugees, but many of them, having been in a settlement, do go on to live in urban areas or close to the urban areas in Papua New Guinea once they have that documentary security and freedom to travel within Papua New Guinea.

Senator BARTLETT—Papua New Guinea has ratified the refugee convention and protocol, as I understand it, but I believe there are a few articles it has absented itself from. I cannot remember the technical term. Do you know what those are?

Mr Wright—They have seven reservations at the moment, which we have been working with the government of Papua New Guinea to encourage them to withdraw. When they acceded—I think it was 1987—they put those seven reservations in, because they felt that they could not live up to their responsibilities under those articles of the convention. These

were in relation to things like access to housing, education and employment, so they had reservations at that time. They may now, we believe, be in a position to withdraw those reservations and be able to fulfil their responsibilities. In some cases, they have actually fulfilled their responsibilities under the very articles that they have made reservations to, so it would seem appropriate to us that they withdraw at least five of those seven, and they are considering that in government at this time.

Mr Domzalski—Those reservations, I believe, are the same reservations that Australia made when it signed the convention in 1954 but were removed upon the signing of the protocol in 1967. Often, when states sign onto the convention, they are a bit cautious in that way to undertake more responsibilities than they feel they can handle. It was the Australian experience that those reservations were no longer called for, and they were removed, and we hope the same will take place with Papua New Guinea.

Senator BARTLETT—You mentioned five out of seven; what would be the other two?

Mr Wright—I believe that one of them is to do with citizenship, but I would have to take that on notice.

Senator BARTLETT—If you could. I was wondering about what is often said and what I think you reflected in your opening comments with regard to the impact this may have more widely on global efforts to develop a better solution for displaced people, particularly in this case, where the context of it is people coming from a country directly to Australia rather than through other ones. I was just wondering if you could give us an indication of how much of a refugee-producing region ours is—I guess up until now Australians have often thought of refugees as coming from the Middle East or Africa—and also what the level of cooperation is with countries in the region. How many of them are signed up to the convention.

Mr Wright—I can speak to the 15 countries for which I am the regional representative. There are four Pacific states who have acceded but find great difficulty in fulfilling all their responsibilities and, to be frank, they are not challenged because the numbers of asylum seekers that go to those countries are very limited; they are very few indeed. They tend to just pick the phone up and call UNHCR when it happens. Nevertheless, the impact on more developed regimes, such as Fiji and Papua New Guinea, remains to be seen. Certainly in our view it sets a negative precedent and may not encourage them to go ahead and fulfil their full obligations under the refugee convention. So we do have concerns.

In terms of refugee-producing countries in the Asia-Pacific, one of the principal ones at the moment is Myanmar and there is quite a significant flow of people from China as well. So it is quite limited in relation to the African case load. If you look at the asylum statistics for 2005, you will see that less than one per cent of the world's newly registered asylum seekers were registered in Australia and New Zealand. So we do not consider it a huge caseload. Nevertheless, each individual's rights are important and we would like to see the legislation in place to deal with them fairly and efficiently should they seek asylum in this region.

Senator BARTLETT—I have just two more questions. Firstly, are you able to make a broad comment on the general situation in West Papua? Are you allowed in by the Indonesian government to assess the situation there at all?

Mr Wright—I can confirm that, despite repeated requests, UNHCR has not been given permission by the government in Jakarta to have access to West Papua. So we do not have direct information from there. We do of course have information coming from those that cross into Papua New Guinea and are interviewed by us.

Senator BARTLETT—I know you cannot give definitive statements, but is it your general view that the claims that are made about human rights abuses there are sufficient to cause concern?

Mr Wright—Certainly they are of concern. These reports are widespread, and the volume of the reports would suggest that there is reason for concern. But we have not done determination on those individuals. It is up to states to form an opinion on that.

Senator BARTLETT—There is another question I wanted to ask, perhaps just by way of parallel. In material provided by the UNHCR to the joint foreign affairs committee inquiry into South Korea and China, I noted that China is a signatory to the convention. I noted that the way China deals with asylum seekers from North Korea is to assess them as illegal immigrants instead of asylum seekers and, when it feels like it, force them straight back. I guess the parallel is somebody coming direct from a country into another country that is a signatory. Is my understanding correct about that, and is that sort of practice widespread amongst countries that are on the surface signed up to the refugee convention but which nonetheless do send people back directly to the country they are fleeing from?

Mr Wright—In my view, that is the correct understanding. UNHCR has expressed its concern about that practice, but it is not a widespread phenomenon and certainly not one that UNHCR, under its mandate, would be comfortable with.

Senator MASON—Mr Wright, could you help me with a bit of background information. I am trying to take up where Senator Bartlett left off. What percentage of people who arrive by boat in this country are ultimately classified as refugees? Do you know?

Mr Wright—No, I do not know off the top of my head. We do get statistics from the government of Australia that are regularly published by UNHCR in its annual statistics.

Senator MASON—Can you take that on notice.

Mr Wright—I can take that on notice.

Senator MASON—Can you also take on notice what the percentage is of people who arrive by air and claim refugee status and are finally determined to be refugees. I think it might be interesting for the committee as a bit of background.

Mr Wright—I understand you will be taking testimony from DIMA this afternoon. They may well have the statistics with them.

Senator MASON—I do not think I will be here for that. But thank you. Perhaps we can ask the department that. Going back to the issue you raised earlier, both orally and in your submission, that relates to consultation between the government and UNHCR: I noticed that in one of the briefings that we have received, quoting Mr Erik Feller, whom I am sure you are very friendly with—

Mr Wright—It is Erika—she.

Senator MASON—Oh, really? How embarrassing! I am sure she is a very capable lady. In your submission at paragraph 10 you state:

Article 35 of the 1951 Convention obligates States Party to cooperate with UNHCR in its duty of supervising the application of the provisions of the 1951 Convention.

Are you saying that there was not any consultation?

Mr Wright—I think we are into semantics here.

Senator MASON—I am not trying to be—

Mr Wright—I am not talking about the semantics of what is in the convention or the state obligations under article 35. Prior to the bill being made public, UNHCR had not had sight of it. It had been briefed on the overall intent of the bill. But is a briefing a consultation? If one sits and listens, that is hardly a consultation. We raised several concerns at least three weeks before the bill was made public. None of those concerns were addressed in the letter of the bill as it was made public.

Senator MASON—The implication of paragraphs 10 and 11 of your submission is—and I will ask you the question: do you think that is a breach of the convention by Australia?

Mr Wright—Certainly, the practice of other signatory states is to consult UNHCR prior to drafting and putting into the public forum legislation which relates to asylum seekers and refugees. That, in this case, I suggest, was flawed.

Senator MASON—That was a very cautious, very judicious, answer. In another background document we have received, you are quoted as saying that you are concerned that refugees could be left in limbo in offshore camps if Australia refused to accept them for resettlement. What do you mean by that? What is your understanding of the Australian government's position?

Mr Wright—We have had routine meetings with DIMA in the period immediately before the bill was made public—although we did not see it—and since it was made public. We have raised that question with DIMA. DIMA have advised us that it is the preference of the government of Australia that those recognised as refugees would be resettled in a country other than Australia. Nevertheless, if that is not possible, it does not preclude the resettlement of these refugees in Australia. Our concern is that in practice under 'Pacific solution 1'—and we still have two Iraqis on Nauru unable to find a solution at the moment—an extended period in quite isolated conditions has resulted from the practice of offshore processing, and that that extended period is not conducive to the wellbeing of those individuals in terms of family reunification, derivative status, mental health and other forms of support.

Senator MASON—You go on to say, in that context, that the new system could be tantamount to a penalty in breach of the 1951 convention if it failed to match the standards of processing on the mainland. You were quoted by Michael Gordon in the *Age*. Can you expand on that?

Mr Wright—Back to the issue of—

Senator MASON—This is very aggressive questioning, Mr Wright, but you are handling it very well.

Mr Wright—If extraterritorial processing is the real intent—and I have asked for clarity on that issue—then UNHCR would see the responsibility of Australia as being to ensure that the extraterritorial processing mirrors the standards of processing that are afforded on the mainland of Australia. We believe it would be very costly, very expensive, and possibly almost impossible to provide those standards in the very small island country of Nauru in the Pacific. It is certainly logistically difficult to do that and it does deny certain basic rights to those persons who are there for extended periods. So if it is extraterritorial processing then we feel that what is proposed will not live up the same standards as those on the mainland. If it is a transfer of responsibility, we would have even greater concern because of the lack of legal obligations on the part of the Republic of Nauru, which is not a signatory to the convention, and their capacity to fulfil those responsibilities and prevent a breach of the convention under article 33, refoulement, and other articles that they would find it very difficult to take responsibility for.

Senator MASON—Are there any precedents or overseas examples where this sort of process is currently going on? Are there any other signatories to the convention that have taken a similar course?

Mr Wright—None. The discrimination against boat arrivals is one aspect that we find to be unprecedented. There are loose analogies with a thing called the Dublin convention, but, in that case, UNHCR has been assured that the countries that would take the responsibility in a transfer-of-responsibilities arrangement would be more than able to fulfil all their responsibilities.

Senator MASON—Can we get back for a second to Australia taking the refugees. I do not want to put words in your mouth, but I think you said it was the preference of the department, in the briefing they gave to you, that if people were found to be refugees they would go elsewhere. Is that right?

Mr Wright—That is correct. The preference is that they be resettled in another country. Nevertheless, there is a recognition that there would be a default responsibility upon Australia, if that were not possible, to let them to come here. That is what we have been advised by DIMA. May I just point out that resettlement is one of three solutions for those who are unfortunate enough to have become asylum seekers and refugees. One of the concerns that I mentioned in my submission—let me stress it again—is that what you are denying them, if they do not have access to integration in Australia, is one of the potential solutions to their plight by saying, 'You can only be resettled in a third country.' You are denying them that preferred solution. If they cannot go back to their own country, the first solution, and they cannot be integrated in Australia, the second solution—which is what is implied at least in this bill—then the only remaining solution is resettlement.

Senator MASON—Is that preference of the department, or the government, that they not be resettled in Australia a breach or a potential breach of the convention?

Mr Wright—It does go to article 9 of the refugee convention. The difficulty with a new bill is that the bill in its own right is not a breach. What the bill does is create situations in which a breach is more or less likely to occur. What we have expressed concern about in our

formal submission to this inquiry is that there are several articles which are more likely to be breached as a result of this bill.

Senator MASON—Thank you, Mr Wright.

CHAIR—We will go to Senator Nettle and then Senator Trood.

Senator NETTLE—Thank you. Are you aware of concerns that have been expressed by West Papuans living in PNG about whether or not they are safe from Indonesian authorities—whether or not the protection that they are provided with in PNG is adequate to ensure that they do not have an ongoing fear of persecution?

Mr Wright—Yes, we are aware and our office in Port Moresby is in very regular contact with the government of Papua New Guinea. We believe that they are seeking to provide opportunities for any West Papuan that might have entered Papua New Guinea to seek recognition of the status through refugee status determination procedures carried out by the government of Papua New Guinea. They are intent upon making that available despite the difficult political situation they find themselves in, so we have no reason to be concerned. There is, of course, a very porous border and persons other than asylum seekers can easily cross from Indonesia into Papua New Guinea, and that has also been the subject of some controversy—expressed in the media, at least.

Senator NETTLE—Is there currently any domestic refugee law in PNG?

Mr Wright—Having acceded, they have the capacity to carry out refugee status determination and have demonstrated that in the past. We have asked for amendments to their laws and we are working with them on drafting of legislation that would strengthen their national laws in line with their international treaty obligations under the refugee convention. So there is still quite a way to go and these processes are not moving terribly quickly. We will continue to encourage them to strengthen their national legislation.

Senator NETTLE—How many staff do you have working in PNG at the moment?

Mr Wright—Presently, we have two international staff and three national staff.

Senator NETTLE—Has the UNHCR in PNG had any approach from Siti Wainggai in relation to her protection?

Mr Wright—Yes.

Senator NETTLE—Can I ask you where that is at?

Mr Wright—I do not know if it is relevant to the inquiry, Chair, but I am happy to answer it.

CHAIR—If I restricted the questioning in hearings to what was relevant to the inquiry we would get them over quite quickly on occasion, but I am more concerned about the privacy and appropriateness of discussing those sorts of questions in open session. This is on the public record, and I am sensitive to the position of the individuals we may be discussing, so Senator Nettle and Mr Wright, I would encourage you to be particularly mindful of that.

Mr Wright—Let me respond by saying that UNHCR does not globally make a practice of discussing individual cases and, in this case, I would decline to comment in public on that particular individual.

Senator NETTLE—No worries. Are you aware of any restrictions that exist in relation to the permissive residency that West Papuans are able to receive in PNG?

Mr Wright—First of all, they need to demonstrate their intention to stay in Papua New Guinea. That means that they would not normally get the permissive residency permit for a period of six months in East Arwin settlements, so they have demonstrated an intention to stay. Once they have it, they have freedom to travel within Papua New Guinea, the opportunity for their children to get education and the right to obtain employment, although such opportunities are very slim in the Western Province of Papua New Guinea. So there are concerns whether they can access their rights in Papua New Guinea once they have been given a permissive residency permit. Nevertheless, it is important that they are given documentary security and recognition by the government of Papua New Guinea.

Senator NETTLE—Is one of the reservations to the refugee convention that the Papua New Guinea government has about not being prepared to sign onto the clause prohibiting the deportation of refugees?

Mr Domzalski—I do not believe that is the case but I would have to check. Deportation is distinguished from the refoulement, which is the forcible return and there are two provisions in the convention. One of them, the one on refoulement, which is the forced return to a place of danger, is a provision to which there can be no reservation—it is a non-derrogable provision. It would not be possible for the government to take exception to that one, and that is the key provision.

Mr Wright—Let me say, we came, obviously, today prepared to talk about Australian legislation, and I am happy to take that question on notice as well. I do not believe there is any reservation by Papua New Guinea on deportation.

Senator NETTLE—What requests have been made to you by the Australian government about your involvement in facilitating or implementing these new laws?

Mr Wright—We have received no formal request for participation of UNHCR. We have had informal discussions with regard to whether UNHCR would consider participation in determination, review or resettlement. As I said, at this stage we want to wait and see what shape this bill takes and whether it is enacted before we look at the implications of its practice. We have seen that Australia can carry out its responsibilities and has demonstrated that in the past, and we do not see a reason at this time for UNHCR to formally participate in the process of implementing this bill. So we have expressed a disinclination to do so. But the doors are not all closed on this; let us wait and see what happens with the bill.

Senator NETTLE—I wanted to ask you about the requirement in the refugee convention for establishing an effective and durable solution. Do you think this bill sets out the capacity for ensuring that that durable solution in particular is able to be achieved?

Mr Wright—I will just repeat the point that it would appear the bill, as it is currently written, denies one of the solutions—that is, the solution of local integration in Australia of recognised refugees. We feel that the prospect of a solution is undermined by the processing taking place off shore in a country where experience has shown that those being processed have spent extended periods in difficult conditions. There is always a tension between doing it fast and doing it fair. If you do it fast it may not be fair; if you do it fair it may not be fast. In

this case, I think we have to look at experience in order to make a determination of whether offshore processing affords a better or a lesser standard in relation to what happens on the mainland.

Senator NETTLE—This question goes to the circumstances of West Papuans fleeing to Australia from PNG. You described the permissive residency status in which people need to have spent six months in a camp before they are able to get that residency status. How does that impact on Australia's decision making in relation to people who have come through PNG, been there for seven days and so could have been able to get protection there? To me, the requirement of permissive residency to be there for six months creates a problem for people who are there for a shorter period of time. Am I right?

Mr Wright—If an asylum seeker has come to Australia through another country which has the capacity and responsibility to afford it protection, I think that is quite clear. The situations that we have to deal with, however, tend to be the exceptional cases where it is not at all clear. Somebody may have spent several years in Papua New Guinea but never have been recognised as a refugee and then turn up in Australia. Let me just say that it is a matter of public record in previous Senate inquiry submissions that UNHCR has concerns about the seven-day rule, the determination of what is and what is not effective protection and what can be provided by other states in the form of effective protection. There is concern that UNHCR having an office in a country does not necessarily mean that that country can afford effective protection to asylum seekers and refugees. It is quite possible in a very large, widespread country such as Indonesia, which is the one that you are referring to, that an asylum seeker or a refugee may not even be aware that UNHCR has an office in Jakarta let alone go and visit it or seek protection from UNHCR. So we do not consider it appropriate that Australian law recognises the presence of a UNHCR office in a country as affording effective protection.

Senator NETTLE—The last question I will ask is about the issue of West Papuan asylum seekers who have fled directly from West Papua coming to Australia and being turned back as a result of Australian operations along the northern border. What implications does that have under article 31 of the convention about people who are directly fleeing persecution?

Mr Wright—It is article 33, which is the article that covers refoulement. For article 33 to apply, they would have to have entered Australian territory. The question would then become whether or not under some bilateral or regional security arrangement they were being refouled. There is very little in this bill that deals with that issue. It is an issue that has been dealt with separately through the Australian military. So I do not think in relation to our submission to this bill it is therefore relevant. But we are concerned about preventing refoulement.

Senator TROOD—Mr Wright, I want to ask about the Papua New Guinea situation and the several thousand West Papuans that are there. Is the Papua New Guinea government attempting to resettle those people or are they essentially being permitted to remain permanently in Papua New Guinea?

Mr Wright—Most of those that you are referring to are certainly trying to settle, integrate, into society in Papua New Guinea. Although there are some resettlement cases from Papua New Guinea, they tend to be those who have arrived from further afield, who would find it more difficult to integrate effectively in Papua New Guinea—it would be culturally difficult for them to do so. On those grounds, resettlement places are sought for them. But the West Papuans tend to integrate there.

Senator TROOD—So is UNHCR having a role to play in that resettlement activity, that attempt to resettle those few people?

Mr Wright—Absolutely.

Senator TROOD—What sort of success are you having?

Mr Wright—We have a moderate rate of success. Although we are finding solutions, in some cases it takes time to find a resettlement country willing to take them. But resettlement is a solution that is only available to less than half a per cent of the world's refugees each year. The maximum number of places would be half a per cent of the world's refugees currently, and there are about 9.2 million recognised refugees in the world.

Senator TROOD—How many people are we talking about in Papua New Guinea that are seeking or need resettlement?

Mr Wright—You can count them on one hand at any one time. It is a very small number.

Senator TROOD—In relation to the situation on Nauru with regard to 'Pacific solution 1', if I may call it that: there were people from that group of people resettled overseas in third countries. That is correct, isn't it?

Mr Wright—That is correct. I have the statistics with me. With 'Pacific solution 1', if I may also use that expression, 1,062 people were resettled to third countries, including 615—58 per cent—to Australia, 401—38 per cent—to New Zealand, 20 to Sweden, four to Norway, six to Denmark and 16 to Canada. So about four per cent of them went to countries other than Australia and New Zealand.

Senator TROOD—Obviously most of them came to Australia, and the others went to various places, most notably to New Zealand. If this arrangement were to be put in place and if there were to be refugees placed on Nauru and if they were determined to be entitled to the protection of the convention, then they would need resettlement. If the position of the Australian government is, as it has been explained to you, that they indeed have a preference for resettlement elsewhere, what is your assessment of how easy or straightforward that is likely to be, given the fact that we did do that on the last occasion?

Mr Wright—I think it would be extremely difficult to find places for them in other resettlement countries if those resettlement countries saw this Australian practice as being a deflection of Australia's own responsibilities. It is difficult in any event to find resettlement places, given that there is a huge need, in protracted case loads of refugees around the world, for resettlement as a solution. We have these sorts of competing demands and it would be appropriate to assess people's priority for resettlement based on their protection needs—the conditions that they are living in that require them to gain resettlement. So this whole question of, first of all, it being difficult to find resettlement and, secondly, a negative perception by

other countries that Australia is not accepting refugees anymore and is just trying to get other countries to accept them, might undermine the prospects for resettlement and create extended periods without a solution.

Senator TROOD—New Zealand helped on the last occasion, as did the Canadians and the Swedes. Why could we not expect that they might do similarly were this situation to arise again?

Mr Wright—They do not ask Australia to resettle the case load of asylum seekers who arrive on their mainland, so they may not—and obviously I am having to be conjectural here—wish to accept the resettlement case load that Australia has refused to allow on its mainland. I am just saying that that would be an added complication in affording priority for resettlement of these potential refugees.

Senator TROOD—Are there other countries other than those three that I have mentioned who are perhaps likely candidates who would be accommodating?

Mr Wright—I do not see any likely candidates. I think the countries who do accept resettlement of refugees—and Australia has an excellent track record of its own on this front, being the third most receptive to resettlement of refugees in the world—would see this legislation in its current form as being a deflection of Australia's responsibilities to provide solutions on its mainland, therefore adding to the resettlement burden of the other countries in the world. So I think that has to be borne in mind.

Senator BARTLETT—Excuse me, but I think this is relevant: leaving aside New Zealand, the ones that were accepted by Sweden, Denmark or Canada were people who had relatives or immediate family already there—is that right?

Mr Wright—That is correct. This is quite often a reason for resettlement in a country—because they have some connection with it. In fact, in terms of extraterritorial processing, it would be more appropriate if there were some logic, some connection, between those seeking asylum on mainland Australia and the country where that extraterritorial processing was happening. But we do not see any in this case. What we see is legislation that is based upon deterrence, not concerns about smuggling and other issues, as was the case in 'Pacific solution 1'.

Senator TROOD—In your submission, you make some observations about the potential of this legislation to be inconsistent with article 16 of the convention. That is the article which relates to the ability of people whose claims are rejected to appeal through a system of courts—is that right? Could you outline your concerns with respect to that matter?

Mr Wright—There are various elements to this. Article 16 relates primarily to the requirement of signatory states to provide an independent merits review of the initial determination. There are other ExCom conclusions—Australia is a member of the executive committee, or ExCom, of UNHCR—which relate to the provision of legal advice and access to the courts. I think all in all there is a very difficult balance to be struck here. Whilst UNHCR must, under its charter and its mandate, try to pursue the best possible opportunity for an effective initial determination and an effective review and appeal process for refugees, clearly that is going to be very difficult if there is a transfer of responsibilities and perhaps the courts of Nauru were to take on the responsibility for the access to the courts. Also, the bill in

its current format talks about the review mechanism not being independent but being carried out by a second DIMA official. That brings into question whether or not it is truly independent and whether it strengthens the likelihood of the system being effective not only in doing the initial determination but in doing a review that is required under international law or any appeals to the initial determination or review. So we feel it just weakens the whole mechanism for determination and for review and appeal.

Senator TROOD—The convention does not prescribe a requirement that there be a system of appeal of some kind if an asylum request is rejected, does it?

Mr Wright—That is correct, but the Executive Committee Conclusions, which Australia is party to, do try to put in place best practices around the world and they do include access to the courts and they do include legal advice for these persons. And those would obviously be denied in the bill as it currently stands.

Senator TROOD—So is it your position that you would expect a person or persons arriving in Australia to seek asylum to have access to the Australian justice system, with all its possible magisterial appeals?

Mr Wright—Yes. That is a general right that they should enjoy. Nevertheless, the bill appears to deny them that right, which is why we have raised our concerns repeatedly about article 16.

Senator MASON—It is a very expensive right, Mr Wright.

Mr Wright—It is a very expensive right, it is a very slow right, it puts a huge burden on courts in terms of time and it delays the finding of solutions in many cases. Nevertheless, if one is required under one's mandate and charter to pursue a person's enjoyment of that right then we will encourage states to do so, and we will obviously point out where they are not doing so.

Senator MASON—Because we are politicians and not international lawyers, Mr Wright.

Mr Wright—I understand that!

Senator TROOD—Is there a minimum expectation? In your view, should a person, for example, have one right of appeal or two? Do you have a view about that?

Mr Wright—There is certainly no question that the minimum expectation is a review of the initial determination.

Senator TROOD—A judicial review?

Mr Wright—An independent, merits based review of the initial determination.

Senator TROOD—Thanks, Madam Chair.

CHAIR—Mr Domzalski, did you want to say something?

Mr Domzalski—If I may, on the question of the article 16 obligations, it is another one of the few provisions of the convention which are non-derogable; it is a provision to which no exception is permitted. So it is considered one of the core elements of the framework.

CHAIR—Thank you. Mr Wright and Mr Domzalski, on behalf of the committee, thank you very much for appearing before the committee today. I think you have taken a couple of

questions on notice for the committee. We have a reporting date, as I think I indicated, of 13 June, but the report will be in preparation long before that, so assistance in returning those answers would be helpful. Thank you for your time today and for your submission.

Mr Wright—Thank you, Chair.

[10.03 am]

WALTERS, Mr Brian, SC, President, Liberty Victoria (Victorian Council of Civil Liberties Inc.)

CHAIR—I now welcome Mr Brian Walters SC from Liberty Victoria. Liberty Victoria has lodged a submission with the committee which we have numbered 31. Mr Walters, do you need to make any amendments or alterations to that submission?

Mr Walters—No.

CHAIR—I invite you to make an opening statement—a brief one, if I may request that—and we will go to questions from members of the committee at the conclusion of that.

Mr Walters—Thank you, and thank you for the opportunity to be part of the deliberations of the committee. Following the conflagration of the Second World War, the nations of the world came together in a determination to ensure that this would never happen again and that the human rights violations that accompanied the Second World War would never happen again. In 1948, under the presidency of Australia, the United Nations passed the Universal Declaration of Human Rights, and then specific international human rights instruments followed. The first was the genocide convention and the second was the Convention Relating to the Status of Refugees, in 1951. In our view, and you have heard already from others in relation to this, the current bill places Australia at grave risk of a serious breach of its obligations under the refugee convention of 1951.

There is another aspect that does not just depend on breach of the convention, though, and that relates to the rule of law. We as a community have a choice as to the type of society we have. We can have power exercised without restraint or we can have precise written laws with precise protections which are able to be reviewed in courts of law. It is the choice between tyranny and democracy. When we speak of the rule of law we are speaking of appropriate balances and sharing in the exercise of power. That is fundamental to the Westminster system.

Under this bill the rule of law both in Australia and in Nauru will be corrupted. Under this bill in Australia we have a situation where Australian officials will be exercising executive power on behalf of the Australian government and the Australian people but their conduct will not be reviewable in any court of law. Take, for example, a situation where someone is sitting for years in Nauru. There will be no writ of mandamus available to ensure the fulfilment of any obligations. Indeed, under this bill there are no clear processes and procedures set out for the determination of refugee claims. If an official were to exercise power capriciously or on the basis of some improper motive, there would be no way of correcting that in an Australian court. That is fundamental to the rule of law. It is not just a question of article 16 of the convention, though that is in our view being breached, but a question of whether we want to retain the rule of law in Australia.

Nauru is not a signatory to the convention but it does have a constitution, and section 5 of the constitution of Nauru contains a guarantee of the protection of personal liberty. Section 5(1) provides:

No person shall be deprived of his personal liberty, except as authorised by law in any of the following cases:

And there are a series of particular examples set out. They include a sentence of imprisonment for a crime, being suspected of a crime and being held, protection for disease and various other particular things. The closest it gets in section 5 to the present kind of situation is:

(h) for the purpose of preventing his unlawful entry into Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru.

That is the closest it gets, and that does not cover a situation where Nauru is holding people on behalf of a foreign government, namely Australia, for the purpose of Australia assessing a claim for asylum. It is in our view a clear breach of the constitution of Nauru to have this kind of arrangement. Subsection (2) of section 5 of the constitution of Nauru provides:

A person who is arrested or detained shall be informed promptly of the reasons for the arrest or detention and shall be permitted to consult in the place in which he is detained a legal representative of his own choice.

In practice, under the Pacific solution mark 1, that right has been violated. We can say that is a matter for Nauru, and it is. But it is also a matter for us. We are procuring a breach of the Nauru constitution by these kinds of arrangements. We are doing it for payment of money. Nauru needs that money. We are doing it in our region to undermine the rule of law. It is the loss of the rule of law which so often has caused a flow of refugees in the first place. Liberty Victoria's concern is not only with the breach of the convention but with the more fundamental, and we say underlying, problems with Australia, as it were, taking its legal obligations off shore in a way that is no longer reviewable under Australian courts.

CHAIR—Thank you very much, Mr Walters. I thank Liberty Victoria for their submission. I am not sure whether you were in the room at the beginning of the proceedings, but I indicated that by necessity this hearing is being held between estimates weeks for the Senate. I know that it is not the most convenient timing, and I particularly want to thank witnesses who have come from interstate, so thank you for that.

Senator KIRK—Thank you for your submission. I want to begin with the comments that you made about the absence of review mechanisms. As you say, there is no merits review available under the RRT. In your reading of the legislation, you seem to indicate that there would also be no access to judicial review. Do you say that because there is an express provision to that effect, or is it simply because Nauru is Nauru and not Australia?

Mr Walters—As we understand it, there is no provision for it and it is outside the jurisdiction of Australia. It might be that one could fashion an appropriate claim. There has been the practical difficulty in the past that lawyers have not been allowed into Nauru to get instructions to take any proceedings. It is one thing to say that there might be a theoretical right, but if you cannot exercise it in practice the rule of law is gone right there.

Senator KIRK—Have your members tried to access clients in Nauru and been refused?

Mr Walters—Yes. Julian Burnside QC is on my committee and has tried to do that on a number of occasions without success. He has also tried to take proceedings in the High Court because Nauru has arrangements provided for in its constitution which allow for an appeal, ultimately, to the High Court of Australia. However, the exercise of that right depends on

exercise of discretionary decisions by those in authority in Nauru, and that has not been forthcoming.

Senator KIRK—Was it the case that Mr Burnside was simply refused a visa to enter the country?

Mr Walters—Yes.

Senator KIRK—Going back to the legal issue, it is the case that Australian immigration officials are going to be exercising the power, as I understand it, to make the determination.

Mr Walters—That is what the explanatory memorandum sets out, yes.

Senator KIRK—You say that it is outside of the jurisdiction of Australia, but would not those officers be subject to section 75(5)? You mention that you did not think any writ of mandamus could be issued.

Mr Walters—They would be officers of the Commonwealth, so that limb of it would be satisfied, and therefore there might well be a possibility of proceeding. No-one will rule out someone being able to do it, but you have to get instructions from someone. We now know that people did want to approach courts when they were on the *Tampa*, but they were prevented at gunpoint from doing so. We now know that happened; we did not know while we were running the case. In the practical, real world, unless you can get instructions from people, you cannot vindicate their rights.

Senator KIRK—I also want to ask about possible detention of children. I understand the Migration Act requires detention of children to be as a last resort. These amendments, it seems to me, would lead to the automatic detention of children. I wonder whether you have a view—you have not mentioned it in your submission—about how these amendments sit against the Convention on the Rights of the Child.

Mr Walters—In our view, it is not consistent with the Convention on the Rights of the Child. It appears to us that there is an automatic detention in this. In relation to the question of detention, since last year Nauru has taken the view that people on the island who are subject to this process have visas which allow them to leave the place of detention during daylight hours from Monday to Saturday. That is still detention in any view.

When Captain Dreyfus was held at Devils Island for years he was able to roam anywhere on that island, which is about the same size. If you had asked anyone in the world whether he was in detention, they would have all said yes. The fact that you can leave your place of detention for short periods does not mean it is not detention. We have weekend detention, which is detention even though it is only for a weekend. But, yes, the rights of the child in our view are violated and it is inconsistent with the provisions of the Migration Act, which have made it a last resort to what appears to us to be the first resort in these cases.

Senator KIRK—So the Migration Act is currently reflecting the Convention on the Rights of the Child, but these amendments will have the effect of undermining if not entirely removing that?

Mr Walters—That is our view, our submission.

Senator MASON—Let me get this right: following from Senator Kirk, you are not so much saying that officials would not be subject to the law in theory but in practice that would be the case—is that it?

Mr Walters—In practice, there is no refugee review tribunal, so there is not a merits review. The prerogative writs are only concerned with the extent of power; they are not concerned with merit, so in law there is no merits review at all. In practice, the judicial review that is available is necessarily limited given that there is no merits review but it is practically impossible given that you cannot get instructions.

Senator MASON—Do you think Nauru is Australia's Guantanamo Bay?

Mr Walters—I think there is a real link to that kind of placing people offshore beyond the jurisdiction of the courts. Morally and in terms of the democratic government of this country, there is clearly a parallel. This Senate will have a grave responsibility to ensure that that kind of precedent is not allowed to gain a foothold and thus undermine the rule of law in our democratic system.

Senator MASON—In your second last paragraph, you say:

... the motivation for this legislation appears to be subservience to overt pressure from the Indonesian government.

Is your argument, in a sense, that not only is this bad law but it is bad foreign policy?

Mr Walters—Yes. Once we allow our response to our fundamental system of government, our rule of law and our protection of human rights to be determined by any foreign pressure, we are then losing any moral credibility in the future. We have freely signed up to the refugee convention and we have done that and adhered to that for years. We have encouraged other countries to do the same. We have taken a moral stance that is important. Once we say, 'We won't do that because it has caused friction locally' for some reason, it is encouraging the kind of treatment that gives rise to refugees in the first place.

Senator MASON—One of the big issues for us that is not really within the province of Liberty Victoria or perhaps this committee is where you have determination of the legal objections, legal arguments and arguments relating to the rule of law. As a politician, one of the big issues for us is not only domestic political concerns but also broader foreign policy interests. I suspect that that is the elephant in the room that we have not discussed and perhaps it is not an issue that is easy for discussion.

Senator TROOD—Are you arguing that the consequences that you see from this act, if it were to be legislated, are the consequence of the activities of the Australian government or as a matter of law in terms of access et cetera or that it is the consequence of the fact that it would be an application of Nauru law, or a conspiracy between the two?

Mr Walters—Australia bears the responsibility in relation to this. We are paying money to Nauru for this kind of arrangement. We cannot do that without taking responsibility. We have initiated this from start to finish. It is an Australian responsibility. The fact is that in our region we should be upholding the rule of law. If ever there is a region where we ought to be doing that, it is here. It is in the Pacific. If we want stability in our region, that is what we have to do. It is Australia's responsibility as a powerful country, and a country which has these people

seeking asylum on its shores and within its jurisdiction, to act in accordance with its legal, democratic and convention obligations.

Senator NETTLE—I want to ask you about the importance of the merit and judicial review system and what you think the impact will be in refugee processing for people not having access to that review.

Mr Walters—Merits review has been particularly important in relation to asylum claims in Australia. I have forgotten the exact figures, but something in the order of 80 per cent of claims that have come before the Refugee Review Tribunal have been successful. That means that it is critically important for the proper vindication of people's rights. Without that merits review, there will be no check on particular decision makers and there will be no way for someone who has brought a claim which is in fact valid but has been misunderstood in some way to have that independently checked.

Senator NETTLE—I would like your comments about external pressure. What do you think are the consequences for Australia of either bowing to or being seen to be bowing to external pressure from Indonesia?

Mr Walters—On an issue like this, if we show that kind of weakness, we are just allowing that pressure to be brought to bear by other countries for their own reasons at other times. We have a region which, as we have heard from an expert, generates some refugees—we have heard about Myanmar, and there are other places—and it cannot be thought that in the future there will not be more. I think everyone here would remember the seventies, when we had the Vietnamese boat people. If we allow a country, because it feels embarrassed by us adhering to our international human rights obligations, to feel free to place pressure on this country and to see that that pressure will produce results, we will just get more of that pressure and our position will become increasingly inconsistent and difficult to justify. In the end, we will lose both independence as a sovereign nation and our human rights credibility—and where we want to encourage other states to recognise the human rights of Australians, we will not get a sympathetic voice.

Senator NETTLE—I have a question about the impact of the policy on Nauru. You mentioned earlier Australian aid money going to Nauru. How do you think this policy and the aid money provided in order for this policy to be carried out impact on the standing of Nauru in the region and their capacity to operate as they see fit?

Mr Walters—It means that Nauru, in order to receive the money that has been on offer for these services, has to effectively put its own legal system on hold. It has to take a burden in terms of people on the island that it is not really set up to do and it is left seen as a country which is prepared to do for money what is, on any view of its constitution, not lawful.

Senator NETTLE—The last question was about the circumstances of individuals currently on Nauru who have been assessed to be refugees but who have an adverse security assessment against them. They indicate that they have not been told the reasons for their adverse security assessment. I am wondering whether Liberty Victoria has any concerns about transparency issues with respect to such security assessments being made and how they impact on our capacity to find a durable solution for ongoing effective protection for individuals such as these in offshore processing centres.

Mr Walters—Security is, and has been in history, too frequently the excuse for overriding human rights. It was the excuse for the emergency decree and the enabling act in 1933 in Germany. It was security: it was the burning of the Reichstag, a terrorist act. Too often security questions are raised and they say, 'You can't question that.' That was the reason Dreyfus was tried in secret—so no-one could see that in fact a crime was being committed against him by the security authorities. History is replete with examples. We need to be very suspicious of claims of security, and we must have them independently assessed. Where someone has their rights interfered with on security grounds, they are entitled to know why and to have that independently checked. One of the fundamental principles of the rule of law is the principle that, if someone's liberty is violated, they are entitled to know the reason and they are entitled to have that independently assessed. That has been recognised in our system of law for over 300 years. It is a serious concern. One of the problems that we have is that all of this is happening off shore, at arms length, a long way away from our system, and people are able to say we do not have responsibility for what we have in fact caused.

Senator LUDWIG—Let us talk about the elephant in the room. The granting of asylum is, I thought, a humanitarian act which is meant to be a non-political decision-making process. In fact, as you indicated, Australia has had what I have thought to be a pretty good history of it up until now, although it has been shaken by this government substantially. But I am wondering if you have a view about the message it sends to the international community about this elephant in the room and about the way we are now going to seek to use Nauru or other offshore processing facilities.

Mr Walters—Yes. The view we have is that the international message is that we will not get up and say openly that we repudiate our obligations under the refugee convention but we will indicate that we will do everything we can to ensure that we place our obligations offshore, transfer them to others who, as in the case of Nauru, do not have those obligations, and give them money, if necessary, to subvert their constitution to make sure that they take on our responsibilities and we will say, 'We've done what we're obliged to do.' The message is that we are being disingenuous as to our obligations. The message is that we do not care about our international obligations and we are not to be trusted on our international obligations. That is a very serious position for Australia to place itself in internationally.

Senator LUDWIG—In terms of the money, it seems to be that, when you look at the process—and we will have an opportunity to talk to DIMA this afternoon—it will be Australian officials who will be doing the process. They will be paid by Australia. If you look at the requirement to accommodate, house, feed and secure, although it will be in Nauru, ultimately it will be Australian money that will underpin all of those arrangements, either directly or indirectly. It will be Australian money that then transfers them. It will be Australian money that will then ultimately find a solution—maybe not even a durable solution—and transfer them there or it might be Australian money that then maintains them in Nauru. In some cases it has been four years. And it will be Australian money that ultimately then sees that other countries might take them and we will transfer them there. It is very hard to disconnect Australia's obligation and then separate it to Nauru when it seems to all be underpinned by Australian money. Do you have a view about that?

Mr Walters—Yes. Our view is that this is a device to say that it is not Australian action when it is. All of these things are set out; you have listed them all. One of the things that are not in the legislation is the actual process under which people will be assessed. What are the criteria? They are not actually in the legislation at all. So we have a legal black hole and Australian money running this process, but with the puppet controlled by Australian strings we say, 'Well, we're not working that.' And yet we have not even set out what it is that the Australian officials will be required to do and have regard to when they are going through their process. All that has been said in the explanatory memorandum is that they will be following a process that has been worked out with the UNHCR. Are not just asylum seekers but also we as Australians entitled to know how our law is being operated and that there are not people who have got some secret agenda operating and acting on whims? Our view is that it is Australian action and it is a device to look as though it is not.

Senator LUDWIG—Having put the dead cat on the table, it is my intention to ask the immigration department this afternoon—and I am sure they are expecting me to ask them—what processes they are going to use and how they are going to derogate from their current MSIs. How are they going to write up a new code? How are they going to train their officers to deal with what would presumably be a new code? How are they going to deal with the 90-day processing? In other words, are a lot of the reforms that the minister has brought forward in an Australian context going to be suspended while they write a new book? It seems to me that that is the only course that they have open to them, because very few of the current MSIs seem to have much application.

Mr Walters—Yes. We have searched through the material that we can, and we cannot see how it is going to be done in practice. That is not set out anywhere for us. I would have thought that would be a starting point, before we had this kind of legislation.

Senator LUDWIG—Presumably they are busy writing new MSIs.

Mr Walters—Yes, one would be interested to see what is in it.

Senator MASON—I just have a follow-up question that Senator Ludwig has inspired me to ask.

CHAIR—He is a fund of inspiration.

Senator MASON—Always. I understand your points about merits review and people being extracted from the Australian legal process, but are you suggesting that the assessment of refugee status by Australian officials—as opposed to, say, UNHCR officials—would be anything other than bona fide and in accordance with international law? I ask that question because—to adopt Senator Trood's language—in the 'Pacific solution 1' the numbers of people assessed as refugees by UNHCR and by Australian officials were quite similar in the end, in terms of percentages.

Mr Walters—I make no specific allegations, but—

Senator MASON—You understand my point, though, don't you? The question I am raising is about the assessment of refugee status by Australian officials. I think you are not suggesting that it is not being undertaken in accordance with international law. Or are you?

Senator LUDWIG—We do not know.

Mr Walters—Where power is being exercised, I do not think we should ever assume that it is always being exercised in good faith. That is why we have the rule of law, because experience has shown that when people have power they will abuse it. Of course we make no specific allegations against anybody, but that principle applies. That principle is critical in assessing appropriate legislation because by having checks and balances we ensure that power is exercised according to the principles that—in this case—parliament wants it to be. In relation to the *Tampa* incident, we think there were abuses of power.

Senator MASON—But not in the assessment of refugee status?

Mr Walters—Not in relation to that; we make no specific allegations. What we say is this: where the Refugee Review Tribunal was able to deal with claims, in a very large number of cases it found those claims had been incorrectly assessed the first time around. We do not say that through any malice; that is not our position.

Senator MASON—Or conspiracy.

Mr Walters—Or conspiracy or anything of that nature. We say that we operate under the Westminster system, and that is all about having checks and balances in the exercise of power and clearly set-out guidelines for the exercise of that power, whether they be laws, regulations or whatever.

Senator MASON—Mr Walters, you have spoken about Nauru; I think you used the word 'puppet'. Are you suggesting that Australia is in some sort of a quid pro quo way paying for certain outcomes? Or are you simply suggesting that as part of the general bilateral aid relationship that is occurring?

Mr Walters—I am making a pretty robust suggestion about what is happening to Nauru. I am suggesting that we are paying them money to not act in accordance with their constitution. That is what I am suggesting—it is as serious as that. Show me where I am wrong.

Senator MASON—You have made your point clearly, Mr Walters. Thank you.

CHAIR—Now I am interested in this argument, which is always a bad thing. It is an interesting proposition that you put, Mr Walters, because you put it as a fact, essentially. But you do not really provide the committee with any proof for the statement you made to Senator Mason that we are paying Nauru money to subvert their constitution and that that is the purpose for which we are paying them money. Putting aside what I might or might not think about this, what evidence do you bring to the committee to support that assertion?

Mr Walters—The effect of what we are doing is just that.

CHAIR—You tell me that is the effect—I understand that—but what evidence do you bring to the committee to support the assertion that that is the purpose for which the payments are made?

Mr Walters—Effect and purpose are two different things. They are often related; and often from the effect you can discern a purpose. But I am saying that that is the effect.

CHAIR—That is different from some of the statements that you made before.

Mr Walters—The first thing is that these people are being held in detention on Nauru. That is the first point. The second thing is that we are paying Nauru money to achieve that

end. The third thing is that that is contrary to the constitution of Nauru. Fourthly, all attempts to have that assessed in a court of law have failed for practical reasons; we have not been able to get it in front of a court.

CHAIR—We will be discussing this further, I am sure.

Senator MASON—Is there a possibility that an action could be launched in Nauru?

Mr Walters—We have tried to do that. Lawyers cannot get visas.

Senator MASON—There must be someone in Nauru that does not need a visa that can launch an action, surely.

Mr Walters—We would be happy to take advice. We have tried and we have tried hard. We have competent people trying and we have not been able to do it. And we have had instructions to do it, I might add, in one case.

Senator MASON—What is the highest court in Nauru?

Mr Walters—The Supreme Court of Nauru.

Senator MASON—Are they subject to appeal to the Privy Council?

Mr Walters—No, there is appeal to the High Court of Australia.

Senator MASON—Well, there you go.

Mr Walters—But you have to have permission from the authorities in Nauru.

Senator MASON—At every turn you are thwarted, Mr Walters.

Mr Walters—That is right.

CHAIR—Mr Walters, that concludes our questions—thank you. Thank you very much for your submission, as I said, and for making the journey to Canberra today.

Mr Walters—Thank you.

[10.41 am]

HUNYOR, Mr Jonathon, Acting Director of Legal Services, Human Rights and Equal Opportunity Commission

INNES, Mr Graeme, AM, Human Rights Commissioner and Commissioner Responsible for Disability Discrimination, Human Rights and Equal Opportunity Commission

SIMMONS, Ms Frances, Associate to President von Doussa, Human Rights and Equal Opportunity Commission

CHAIR—Good morning, ladies and gentlemen. I now welcome Commissioner Graeme Innes, Mr Jonathon Hunyor and Ms Frances Simmons of the Human Rights and Equal Opportunity Commission. HREOC has lodged a submission with the committee, which we have numbered 112. Do you need to make any amendments or alterations to that submission?

Mr Innes—No.

CHAIR—I invite you to make an opening statement, and then we will go to questions.

Mr Innes—We thank the committee for inviting us to appear before this inquiry. This bill represents a backward step in Australia's treatment of asylum seekers. The commission acknowledges that important improvements have been made in relation to Australia's treatment of asylum seekers. We have witnessed the removal of children from detention centres, the implementation of time limits on processing protection claims, the introduction of independent review of long-term detention and, in October last year, the removal of almost all of the remaining asylum seekers detained on Nauru after concerns about their deteriorating mental health.

The commission recognises that it is necessary and proper to facilitate the detection of unauthorised boat arrivals in Australian territorial waters. However, the commission believes that once unauthorised boat arrivals have been detected they should be processed onshore in a manner which is consistent with Australia's human rights obligations. The commission believes the proposal to process all unauthorised arrivals offshore will undermine Australia's compliance with its human rights obligations under the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.

Australia has an obligation under the Convention on the Rights of the Child to act in the best interests of the child and to respect the principle that children should only be detained as a measure of last resort. Under the proposed changes, children will be detained as a measure of first resort, not last resort. The commission's concerns are heightened by the lack of statutory safeguards in the bill to protect against wrong decisions, excessive periods of detention and human rights abuses. The bill does not address the possibility of excessive or indefinite detention. There are no set time limits for processing asylum claims or resettling refugees. This potential for asylum seekers to be detained for an excessive period of time raises serious concerns about arbitrary detention in breach of article 9.1 of the International Covenant on Civil and Political Rights.

By denying asylum seekers processed offshore access to independent merits review, the bill will increase the risk of wrong decisions and increase the risk of a person genuinely in need of

Australia's protection being returned to a place of persecution. The most effective safeguard to protect against the risk of human rights violations is in independent scrutiny. It is of great concern that this bill does not provide for independent scrutiny of offshore processing centres or independent review of departmental decisions about the refugee status of designated unauthorised arrivals.

The commission has serious concerns that the bill will result in Australia undermining its compliance with human rights obligations owed to some of the world's most vulnerable people. By failing to provide explicit statutory safeguards to ensure that offshore processing arrangements are subject to independent scrutiny, the bill does nothing to alleviate these concerns. The commission's submission recommends that this bill should not be passed. In the event that the bill is passed, the commission recommends that explicit statutory safeguards are introduced to guard against the risk of human rights violations, as outlined in this statement and in our submission.

CHAIR—Thank you very much. Are there any other contributions at this point?

Mr Hunyor—No, thank you.

CHAIR—The committee thanks HREOC very much for the submission.

Senator BARTLETT—For the record, could you outline a little bit further the responsibility the commission has under legislation to oversee human rights issues in Australia?

Mr Innes—I think that is detailed in section 2 of our submission.

Senator BARTLETT—That was fairly brief, I guess, on promoting an understanding and acceptance in the discussion of human rights. Do you have a monitoring role on performance and whether human rights are being breached?

Mr Innes—Yes. I will let Mr Hunyor expand on that a little.

Mr Hunyor—We have a range of functions set out in section 11(1) of the HREOC Act relating to human rights that include conducting inquiries into complaints made about acts or practices of the Commonwealth that are alleged to be inconsistent with or contrary to human rights. We have received complaints from people held in Australian immigration detention centres over a number of years that we have investigated under that function, under section 11(1)(f). Similarly, the commissioner conducted the national inquiry into children in immigration detention which resulted in the report *A last resort?*, which was conducted by Commissioner Sev Ozdowski, the former Human Rights Commissioner. Prior to Dr Ozdowski, the Human Rights Commissioner, Chris Sidoti, conducted the inquiry and produced the report *Those who have come across the seas*, which was also a report into human rights in detention centres. The Human Rights Commissioner has historically had, and continues to have, a role in monitoring conditions in and visiting Australian detention centres.

Senator BARTLETT—Is it the case under 'Pacific solution 1', for want of a better term, that the commission was not permitted to visit the facilities at Nauru?

Mr Innes—The commission asserted at that time its authority to visit those facilities, particularly as part of the *A last resort?* inquiry conducted by my predecessor. That assertion was challenged by the department of immigration. The decision was taken that it would be

difficult, in practical terms, for the commission to carry out its function without the support of the department in that regard, so the issue was not proceeded with. But the commission continues to assert that it does have authority in that regard.

Senator BARTLETT—So wasn't the practical outcome specifically that, when the comprehensive inquiry investigation was being done into children in detention, the Australian government did not provide support and that, in practical terms, the government made it impossible or inappropriate for the commission to investigate children in detention on Nauru at the time?

Mr Innes—The commission took a decision that it would not be practical for it to investigate the situation on Nauru at that time without the support of the department to do so.

Senator BARTLETT—So it was as a result of the department's view?

Mr Innes—Yes.

Senator BARTLETT—Have you received any complaints or requests for investigation from people who were at Nauru or Manus Island over the last few years?

Mr Hunyor—The commission generally does not make public the fact of whether it has received complaints under its complaints process. We are not in a position to answer that question.

Senator BARTLETT—You did not conduct any investigations of the sort that you have into individual complaints in Australian detention centres?

Mr Hunyor—Again, that would be to reveal whether we have received those complaints. I can indicate that we have not reported to the Attorney-General, as we are required to do under our act in the event that a breach of human rights is found. There have been no reports to the Attorney-General in that regard.

Senator BARTLETT—But there have been some into Australian detention centres?

Mr Hunyor—There have, and they are on the public record. The issue that Commissioner Innes has indicated in relation to attempts by the commission to visit Nauru in the context of the *A last resort?* inquiry are detailed in that report.

Senator BARTLETT—Are you able to pass a view—even a more general one rather than a formal one—about whether any of the obligations under the various human rights conventions were in practice breached by the operation of 'Pacific solution 1'? You raise a lot of concerns in your submission that this legislation will lead to the potential for breaches of various conventions. Are you able to state whether it has led to a breach in its first incarnation?

Mr Innes—We did express a number of concerns at the time that the initial Pacific solution was proposed, and some of those concerns are detailed in the report on the children in detention inquiry. They are similar to the concerns which we have set out in the submission.

Senator BARTLETT—There are a lot of people expressing concerns about potential breaches. I wondered whether there was the ability to go one step further and say that there have been breaches based on what has happened.

Mr Innes—We did not visit the offshore processing centre in Nauru so it is difficult to be more specific than we were in the report without that information. Our predecessors have visited detention centres in Australia and reports of those visits are on the record. We did not visit the centre in Nauru so it is difficult to be more specific. I am not trying to avoid answering your question but it is hard for us to report on particular breaches when we did not have that opportunity.

Senator BARTLETT—In your role as a human rights watchdog, to use a colloquial phrase, are you aware that the situation will be different this time—that you will have the cooperation of the immigration department in being able to investigate conditions or situations in Nauru should you wish to?

Mr Innes—We have not had discussions with the department in that regard. I felt that it was premature to do so when the proposal had not yet been implemented by the passage of this law. I would certainly initiate those discussions if the bill was passed, dependent on the content of the bill. I can indicate that in general terms the relationship which I have had with the department since my appointment has been more positive, so I am hopeful that opportunities may be made available. I think it would be premature to have had those discussions until we knew exactly the basis on which the process was going to go ahead.

Senator BARTLETT—The commission has not made any requests to visit Nauru in relation to the two people who are still there?

Mr Innes—Not apart from the interactions I discussed in answer to your earlier questions.

Mr Hunyor—I can indicate that, at paragraph 8.5 of the commission's submission, the commission makes the submission that 'if the bill is passed it is crucial that explicit statutory safeguards are introduced'. Those explicit statutory safeguards relate to scrutiny by either the Human Rights and Equal Opportunity Commission or the Ombudsman. So, to the extent that the position is unclear, it is another of the concerns of the commission that that should be made explicit in the bill.

Senator BARTLETT—The commissioner and the Ombudsman, to be precise.

Mr Hunyor—That is right.

Mr Innes—That is on the basis that that sort of monitoring is available in processing centres within Australia.

Senator TROOD—In paragraph 3.2(b), on page 2 of your submission, you make reference to a concern you have about discrimination. That seems to be a reference to a failure to meet our obligation under the international covenant. Could you elaborate on that position, please?

Mr Hunyor—The discrimination that the commission is concerned about is on the basis of immigration status—namely, that some people who have arrived here and are not subject to this regime are dealt with under a different scheme that includes a greater range of protections in terms of the availability of merits review and judicial review. So there is a distinction and, we say, a discrimination between the treatment that is received by those two groups of people. We say that that raises those concerns under the ICCPR. It is discrimination on the basis of immigration status.

Senator TROOD—The department's and the government's position is that one of the virtues of this legislation is that it is trying to make circumstances which are currently discriminatory more equal in relation to all people. At the moment, for example, if you land on an excised island then of course you are treated differently from the way in which you would be treated if you were to land on the Australian mainland. Equalising those regimes is a virtue. But that is not your concern. Is that the situation?

Mr Innes—That is not the concern. I think the words that the government has used are 'incongruity' or 'incongruous situation'. It depends on where you place the incongruity. This proposal differentiates people who arrive by boat, whether they arrive on an excised piece of territory or on mainland Australia, from those who arrive by other means. The commission's recommendation is that asylum seekers should always be treated in the same way, whether they arrive by boat or by other means, and that they should be processed on the Australian mainland.

Senator TROOD—Should you not treat people who arrive in equal circumstances equally? I agree with that proposition, but people who arrive by air, for example, are a different class of people from people who arrive by boats. Therefore, perhaps they need to be treated differently.

Senator LUDWIG—If they are in boats or planes, yes.

Mr Innes—They have arrived by different means.

Senator TROOD—My proposition is that they are not in the same category of people. They are in a different class of people. They arrive by different means and therefore it is possible that there could be a different set of arrangements that apply to people arriving by different means.

Mr Innes—It is possible. What the commission is asserting in its submission is that people should not be treated differently depending on their means of arrival. That is what this proposal does. The commission's argument is that it extends the incongruity.

Senator TROOD—Your concern relates specifically to the circumstances of people arriving, whether by air or by sea?

Mr Innes—No. Our concern arises from the different treatment.

Senator TROOD—You also raise a concern about independent merits review. This is on page 2 of your submission, in paragraph 3.2(c). What would be an adequate merits review? Is it your position that the people arriving should be given access to the whole of the Australian court system, or would it be satisfactory, for example, if a person whose application was rejected was given access to the Refugee Review Tribunal? Would that be an adequate merits review?

Mr Innes—Fundamentally, the commission's position is that people should be treated in the same way. However, as you can see from the submission, the commission has alternate positions. If that were not to occur then the commission's alternate position would be that there should be some form of independent merits review. In 2004-05, I think the Refugee Review Tribunal overturned one in three departmental decisions. That indicates to the commission that, without any criticism of the good faith in which DIMA officers acted in that

decision making, there is a need—as was set out by the UNHCR representatives earlier this morning—for an independent merits review. Ideally, that would be constituted by the same review as is available to referees in onshore processing centres. Alternatively, though, some form of independent merits review is sought in our submission.

Senator TROOD—So the tribunal would be an adequate means of meeting that need.

Mr Innes—I suppose the important issue here is the availability of an independent review and a merits review. I do not think we have expressed a specific view as to whether that should be the tribunal or a system that is available to refugees in Australia.

Senator TROOD—I was trying to clarify what would be acceptable in the mind of the commission.

Mr Innes—The Refugee Review Tribunal constitutes an independent merits review, so in that sense that would meet the commission's concerns.

Senator TROOD—I have one other question, and it relates to the matter of return, or refoulement. I want to clarify your position on this. I assume that you are not asserting that either the government or the department would return people who had demonstrated a justifiable fear of persecution. That is not your position, is it?

Mr Innes—This bill does not relate to the return of people. This issue arises from the uncertainty about how that processing will take place in offshore processing centres. I think this is again an issue that the UNHCR touched on earlier this morning. If the processing is to be carried out by Australia in Nauru then it is not as problematic, but if the processing is to be carried out by third countries, particularly countries which are not signatories to the refugee convention, then that is a much greater concern.

Senator TROOD—Is it your concern that, were this processing to be carried out in Nauru under a Nauru based system, that would be tantamount to putting these people in jeopardy again?

Mr Innes—No. The concern is that there would be greater risk—not that it would be tantamount to breaching the refoulement principle.

Senator TROOD—Where does the greater risk arise?

Mr Hunyor—The greater risk comes because of the concerns that the commission and others have raised about the uncertain nature, but also certain of the inadequacies, that are seen in the nature of the process, such as we understand it, particularly the absence of merits review. The commission has made submissions in a number of contexts to the effect that laws which have the effect of removing layers of scrutiny and protection of people's rights heighten the risk of refoulement. Refoulement will only occur if a person who is a refugee is returned, and if the system is an inadequate one that in reality means by good fortune that no-one is returned in those circumstances then luckily enough Australia will not have breached that obligation. But the concern that the commission raises is that a process is being set up that has significant shortcomings, namely, the uncertainty as to the actual process that is going to be followed but particularly the absence of merits review. That heightens the risk in reality of decisions being made that are wrong, resulting in refugees being returned—or refoulement.

Senator TROOD—An erroneous decision may be made about an individual's position, and the consequence of that erroneous position may be that they will be sent back from whence they came and that will put them in jeopardy again?

Mr Hunyor—That is right.

Senator KIRK—Thank you very much for your submission. I want to go back over something that you talked about at the outset and that is the role of the Human Rights and Equal Opportunity Commission to oversight human rights breaches in Australia generally and also in circumstances such as what this bill is proposing where there are going to be individuals on Nauru. You said to us that commission officials were not able to visit Nauru under the so-called Pacific solution No. 1. Have you had any discussions or consultations with the Attorney-General in relation to this bill about what the role of HREOC will be under this new legislation?

Mr Innes—No, we have not. Our submission raises these issues or concerns about independent monitoring and that is the basis of the matters that you raise. It remains the commission's view that we have the authority to monitor offshore processing centres and we would seek to do so once any legislation in this area was passed. But we have not initiated those discussions because I felt that it was difficult to do so in the context of not knowing at this point the exact content of the law which parliament had passed in this regard. We have raised concerns in our submission and in that sense we have flagged them to the government and we would seek to have that dialogue once any law was passed.

Mr Hunyor—The commission's view that the Human Rights Commissioner has expressed is based on the function in our act, the Human Rights and Equal Opportunity Commission Act, in that it relates to acts and practices done by or on behalf of the Commonwealth. To the extent that acts or practices are done by or on behalf of the Commonwealth, it is the commission's view that that is not limited to acts or practices done in the physical geographical area of Australia. It may be a question of fact as to the extent to which certain things that take place in offshore processing centres are done by or behalf of the Commonwealth and that needs to be assessed when we know the arrangements that are being made. But it is focused on those matters. We do not claim a broad remit in relation to anything that goes on in those centres but it relates to acts and practices of the Commonwealth and its agents.

Senator KIRK—So perhaps insofar as it appears that it will be DIMA officials who are doing the processing, then I imagine that you would say that your jurisdiction—if I can call it that—would extend to the activities of those officers?

Mr Innes—Yes, we would say that. That is correct. But there may be the issue—and the arrangements are not clear—as to the day-to-day running of the centres themselves which is not carried out by DIMA officials, and in that respect there may be some more difficulty.

Mr Hunyor—In a sense, Senator, that is the lack of clarity that moves the commission to make the submission that it has done, that it should be made explicit as to what arrangements there are for independent scrutiny.

Senator KIRK—Absolutely.

Mr Innes—And I would reinforce: not just by the commission, but by the Ombudsman as well.

Senator KIRK—Going back to when you made approaches to visit Nauru last time—and I am aware of the fact, Mr Innes, that you were not the commissioner then—you indicated that the Attorney-General did not agree, if I am paraphrasing you correctly, that you had this independent monitoring role in relation to Nauru. Is it correct that there was a dispute as to whether or not that responsibility existed?

Mr Innes—The difference of opinion was between the commission and the department of immigration. The commission asserted its jurisdiction in the way that Mr Hunyor has explained, and the department disagreed with that. That was in the context of the conduct of the children in detention inquiry. The commission formed the view that, in the circumstances of that jurisdiction being challenged by the department, it would not be practical for the commission to pursue that part of the investigation. So the issue was never tested any further than that. But the commission continues to assert its jurisdiction in that respect.

Senator KIRK—How could you test your jurisdiction, if it were to come to that?

Mr Innes—I think we want to see what form any legislation may take in this respect and make our judgments then.

Senator KIRK—And is it the case that you would require the cooperation of DIMA if you were to carry out any sort of oversight or monitoring role in Nauru?

Mr Innes—The cooperation of the department would certainly make the process much more productive.

Senator KIRK—But it is not essential, in your view?

Mr Innes—That is really a judgment I would like to make in the circumstances of any new legislation. The opportunity, for the purposes of the children in detention inquiry, has passed, and I am not sure that hypothesising now is very productive.

Senator KIRK—Okay. Thank you, Madam Chair.

CHAIR—Thanks very much. Senator Nettle?

Senator NETTLE—Thank you for your submission. Under this regime, if somebody is found to require protection but a third country cannot be found for them, is it HREOC's view that continuing detention on Nauru, for example, would amount to the arbitrary detention that you mentioned in your submission?

Mr Innes—That is certainly one of the concerns that we expressed in our submission. If that were to occur, particularly if the detention became lengthy, then yes, that would be a basis for concern.

Senator NETTLE—I also wanted to ask you about the capacity for people to receive health and welfare services whilst in an offshore detention centre. I note the comment you made before that you were not sure whether that would fall under your jurisdiction. Certainly, with the two detainees who remain on Nauru and who have been there for a while, concerns about their mental health have been raised. Do you have any general comments on the

capacity for people in such offshore detention centres to get their health and welfare needs met?

Mr Innes—It is difficult for us to comment on that, in the sense that we have not visited that processing centre, other than to note the general impact that lengthy periods of detention clearly have on people. As I said in my opening statement, we congratulated the government in October last year on the removal of almost all of the remaining asylum seekers detained on Nauru after concerns about their deteriorating mental health.

Senator NETTLE—I also wanted to ask you about the Australian government's interpretation of the refugee convention. You mentioned you had concerns that there is an increased risk of Australia breaching the convention. Are your concerns about the way in which the government is interpreting the refugee convention or that the convention may be breached?

Mr Innes—I am not sure which interpretation of the convention you are referring to.

Senator NETTLE—Some people have made claims that the government is seeking to shirk its responsibilities with regard to the refugee convention by seeking to interpret it in bad faith and not to carry out the full extent of the refugee convention. That is one claim that people are making, that the government is not interpreting the refugee convention in the spirit in which it was written. Then there is what I would consider to be a separate view—but maybe you do not—that it is not the interpretation of the convention that is a concern; it is simply that the legislation increases the likelihood of there being breaches of the convention.

Mr Innes—I do not think that is an issue that we have considered in any detail. We do not really think we are in a position to comment on that distinction, other than in the comments which we have made in our submission and in our statements today.

Senator NETTLE—That is fine; thank you. Is discriminating against one group of refugees to serve as a deterrent for other people considered to be acceptable by HREOC?

Mr Innes—I think it is a matter for government to determine its policy with respect to border protection. What the commission is saying in its submissions is that it recognises government's right and the appropriateness of government doing that; however, such approach needs to take into account the human rights of the people in question. And it is those human rights which this commission has sought to address in the submissions that it has made to this inquiry.

Mr Hunyor—To add to that answer: in paragraphs 5.34 to 5.41 the commission sets out its concerns in relation to article 31 of the refugee convention, which recognises that people should not be subject to penalties for the manner in which they enter another country and their illegal entry or presence in that other country. There are a number of concerns that we raise in our submission as to features of the regime set up by this bill that we say raise our concerns that that obligation is not being met.

Senator NETTLE—So do you consider the provisions of the bill to constitute a penalty?

Mr Hunyor—What we say in our submission is that the matters that concern us are the potential risk of excessive detention, the removal of access of independent merits review and

judicial review, and the unavailability of a legal adviser or assistance in OPCs. The commission suggests that those things are suggestive of a penalty.

Senator NETTLE—Okay. In your submission, in 6.2, you talk about the ministerial discretion and the concerns you have about that being inadequate. I wonder if you could explain that point a little bit more.

Mr Hunyor—The act does provide for this unfettered and noncompellable ministerial discretion which could be used in particular cases to meet some of the concerns that have been raised by the commission and others—in effect, allowing people to bring themselves within the Australian system that other asylum seekers are entitled to avail themselves of. That applies in individual cases, and the commission's view is that that is not adequate to recognise Australia's international human rights obligations. To have it as something that can be exercised in specific cases may be of assistance in individual cases, but it is not sufficient in itself to counter the sorts of concerns that the commission has raised.

Senator NETTLE—Thank you very much.

Senator MASON—Mr Innes, I would like to summarise the issues in my mind, so you will have to help me here. This morning we have had evidence from the UNHCR and from Mr Walters about the lack of merits review and legal oversight of the offshore processing. That is one part of the equation. In my mind the other part of the equation is that, if there is this offshore processing, there is further oversight.

Forgetting the legal merits review, the second part of the equation is human rights monitoring of the processing centres—and indeed humanitarian monitoring as well. What are the practical obstacles to human rights or humanitarian monitoring of those processing centres, putting the legal question aside for a second?

Mr Innes—The lack of clarity that we have talked about with regard to the commission's position in monitoring those issues—

Senator MASON—Okay, but also more broadly for other interested groups—the Red Cross, for example; I don't know.

Mr Innes—I will let Mr Hunyor comment in a moment, but one practical issue is the location of the centre. An offshore processing centre, by its nature, means that there are not the same links with the Australian community that people have in onshore processing centres. So there is that.

Mr Hunyor—I will add to that that one of the concerns is that the centres are run in a way such that the public are not entitled to have access to them. Again, it may depend on the detail in these particular cases. We are not aware of the particular arrangements that are made, but the centres, as we understand them and from the department's submission, are overseen by security personnel. The department notes in their submission that security services are provided 'to prevent inappropriate or unnecessary access to the centre by residents of Nauru'. So the extent to which NGOs or the Red Cross, for example, would be able to have access to that centre is unclear, and it is a concern that we think should be dealt with by having some explicit mechanism such as exists for Australian detainees.

Senator MASON—That is a good point.

Mr Innes—That leads me to a related point, which is the issue of whether or not in substance the overseas processing centres are detention. I note that the department's submission asserts that they are not detention. The commission acknowledges that the government has taken steps to improve conditions in some of these centres by allowing asylum seekers outside the centre during the day. However, when children in Australia were in detention centres, when they attended during the day, they still went 'home' to the immigration detention centre at night. It would seem that the same can be said from our knowledge of offshore processing centres—that people must go home at night. Also, it is our understanding that the visa restrictions in Nauru limit the parts of Nauru that people are able to visit. It would seem to the commission that that constitutes a deprivation of liberty and that those things would fall onto the list of indicia which would constitute a definition of detention.

Senator MASON—Sorry, I did not want to go down—

Mr Innes—Sorry—

Senator MASON—No, you make a valid point. I did not want to go down the road of legal definitions of detention centres, but you make a valid point. It was more about who will monitor the humanitarian conditions in these centres.

Mr Innes—I understand your point; it is just that I realised as we were talking that I had not addressed that issue.

Senator MASON—That is all right.

Mr Hunyor—I guess our submission to the committee is that that is something that should be made explicit in the bill. It is unclear who, if anyone, will monitor. There have been concerns about the ability of groups to monitor. You heard this morning that people have been attempting to provide legal assistance, for example, to people in those centres—

Senator MASON—According to Mr Walters, they do not get visas to go in.

Mr Innes—That is what Mr Walters says; that is right.

Mr Hunyor—The commission's submission is that it is preferable that we know and we can answer that question because it is made explicit.

Senator MASON—Thank you.

CHAIR—There being no further questions, Commissioner, Mr Hunyor, Ms Simmons, I thank you very much for attending today and for HREOC's submission, which is very helpful to the committee's deliberations.

[11.28 am]

DASTYARI, Ms Azadeh, Faculty Member, Castan Centre for Human Rights Law

PENOVIC, Ms Tania, Faculty Member, Castan Centre for Human Rights Law

MANNE, Mr David, Coordinator and Principal Solicitor, Refugee and Immigration Legal Centre

CHAIR—The Refugee and Immigration Legal Centre has lodged a submission with the committee, which we have numbered 91. Do you need to make any amendments or alterations to that?

Mr Manne—No substantive ones.

CHAIR—I will ask you to make an opening statement, and we will go to questions after that. As you would be aware from the program which was, hopefully, distributed to you, the Refugee and Immigration Legal Centre was to appear with representatives from the Castan Centre for Human Rights Law. The vagaries of the Australian climate and transport mean that they are not here yet, so we thought we would begin and we will work the rest of it out as best we can.

Mr Manne—We would like to thank the committee for the opportunity to appear before it in relation to the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006. By way of brief background: the Refugee and Immigration Legal Centre is a specialist community legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia. Through its predecessors and in its current form, it has been in operation for over 17 years doing that work. It is based in Victoria, but has operated throughout Australia. RILC specialises in all aspects of refugee and immigration law, policy and practice, and we also play an active role in professional training, community education and policy development. We are also a contractor under the department of immigration's Immigration Advice and Application Assistance Scheme, the IAAAS, and we have visited most if not all of the detention centres in Australia in recent years. I would like to point out to the committee that that includes Christmas Island, where we recently attended and provided legal representation to the West Papuan refugees who arrived in Australia in January.

In the last financial year, RILC gave assistance to almost 3,000 people, and our clientele involves many of the people who would be subject to this bill. They are the types of people in the types of situations that we routinely assist. In fundamentally opposing the provisions of the bill, we wish to briefly outline some of our core concerns. In broad terms, what is at stake here, in our view, is the very question of whether Australia will continue to comply with its core international obligations to protect vulnerable people who arrive in Australia from being expelled to persecution. It is RILC's view that the measures proposed in the bill represent a radical rejection of Australia's obligations under the refugees convention and other international human rights treaties. It does so principally by seeking to export or delegate its own obligations and to thereby deny refugees the right of accessing the refugee determination system in Australia and the measures designed to guarantee protection to refugees under the due legal processes in Australia.

The flagrant violations of the spirit and letter of international human rights obligations are of fundamental importance for at least two main reasons: firstly, because they represent a fundamental repudiation of the rule of law and radically undermine the cornerstone of refugee protection—that is, the principle of nonrefoulement, or nonexpulsion; and, secondly, and far more profoundly, we would say, is what the bill represents in relation to the purpose and the people for whom these very laws and the protection framework were made—some of the most vulnerable people in the world, fleeing from torture, rape, arbitrary detention, extrajudicial killing and the like.

The laws are, of course, reflective of basic standards and values of protection of people at risk of persecution. In our submission, the bill does not accord in any way whatsoever with those values or standards or the laws which reflect those standards. The principle of nonrefoulement is one which requires a state to take the utmost care in the treatment of asylum seekers and consideration of their claims, bearing in mind the risk of potential persecution if an error is made. That is consistent with the beneficial intent of the refugees convention. The bill is completely inconsistent with it, and its measures would place the lives and the rights of refugees at grave risk.

Very briefly, today we hope to offer some practical perspectives in relation to those matters and our work. We would further submit that, under the proposals in the bill, people who arrive by boat in Australia and apply for refugee status would, in being taken to Nauru, be subject to a system of fundamental unfairness, where the fundamental, basic safeguards guaranteed under the Australian due legal processes would almost completely be denied them—that is, the very basic, fundamental prerequisites considered to be essential for fairness in decision making in Australia would be stripped from people seeking protection if they were taken to Nauru.

I particularly highlight this because it is not just a theoretical matter. In the last three years, 3,200 people—that is, Afghans and Iraqis—have been allowed to stay in Australia and have been granted protection in Australia because the Refugee Review Tribunal, the independent review body in Australia, found them to be refugees and overturned the assessments of the department of immigration. The independent merits review tribunal and independent merits review would simply not be available to people on Nauru under the system proposed.

There is clear and concrete evidence of serious routine errors being made in the assessment of asylum claims on Nauru in the last few years—errors that have been so serious as to completely and fundamentally undermine claims which were later overturned when there was intervention by professional legal support and otherwise.

We would also like to highlight that history has in recent times told us how bad it can be on Nauru, and history matters. The system proposed in taking all people to Nauru is a system that in recent years the evidence shows was far from an outstanding success and which fundamentally caused the terrifying destruction and suffering of many people who were subjected to the so-called Pacific solution policy and its practices detained on Nauru. Why? Because people were left in an indefinite situation on Nauru in substandard conditions with poor decision making, people who in many respects were the victims of torture and trauma. We also know that, despite claims that the Pacific solution would be very quick in finding

durable solutions for those who are refugees, in many cases it took an inordinately long time to find resettlement.

In our submission, the current proposal is far worse than the so-called Pacific solution insofar as the Australian government have recently branded and vilified West Papuan refugees, who are partly the subject of this new proposal. In vilifying them on political and racial grounds, they propose to export them to another place and somehow, if they are found to be refugees, to find resettlement elsewhere. This policy and proposal, in our view, is to in effect cast people into indefinite exile, having branded them to be political trouble, and would quite possibly make any form of resettlement illusory, meaningless and ineffective.

Finally, we submit that policies and legislation in relation to Australia's fundamental human rights obligations—that is, our fairness and decency to those in need of protection—should never be dictated to by interference or the agenda of another country as is the case with this bill. It is even more alarming when the country dictating the policy has just been found, on an objective assessment by Australian officials, to persecute its own people. It appears clear that this bill is being proposed not because the Australian government thinks our laws are wrong but because the Republic of Indonesia thinks they are wrong. In our assessment, such a policy and such a bill, were it to become law, would place people's lives at serious risk both on Nauru and beyond.

Senator LUDWIG—In terms of the ability to visit overseas processing centres, you indicated that you had been to Christmas Island—is that the only one that you have been able to go to?

Mr Manne—That is the only one that I have been able to go to, yes.

Senator LUDWIG—Have you tried to go to the others?

Mr Manne—Do you mean to Nauru or PNG?

Senator LUDWIG—Yes.

Mr Manne—No, I have not, but colleagues of mine have and have been denied access—for example, I know Julian Burnside QC was denied access at one point as were other lawyers.

Senator LUDWIG—I think Mr Andrew Robb described the Pacific solution as an outstanding success based on your experience. Do you agree with Mr Robb's comments?

Mr Manne—The question is: on what basis does one assess success? In our submission, success must be based on the principles which ought to apply in this case. The principles that ought to apply are the rights of asylum seekers and refugees—that is, their fair, decent and just treatment. On any assessment of that, we would like to point out that under the Pacific solution policy people were held on Nauru, for example, for many years. The evidence is clear—the psychological, the medical and other evidence—that what was caused to genuine refugees was a terrifying human destructiveness where people literally fell apart, people who ultimately, despite the government assurances early on under the policy, did in fact come to Australia in the end. In fact, the majority of people who were subject to the Pacific solution policy ended up coming to Australia.

Was it a success in relation to the legal process? The evidence shows that the assessment of claims was in many respects a system of fundamental unfairness. Only after a number of years and only after intervention by independent supporters, such as independent legal advisers and the like, was it found that some of the decisions that had been made were so fundamentally flawed that they were not even assessments on the basis of just one person's claims but had been muddled up with other people's claims. Case officers of the Australian government, Australian officials, had muddled up the evidence of different cases, from different files, into one. There were flaws as fundamental as an investigation into the truth of someone's claim, as part of their fears, that they had worked for an international care organisation, World Vision, taking two years—and it was only done at the instigation of someone in Australia, not an Australian official. So this person spent at least two years, it appears, on Nauru.

On the basis of those and other matters, was the Pacific solution an outstanding success? If human suffering and human destructiveness and fundamental unfairness in a system of legal assessment represent an outstanding success, yes. If they do not, no. In fact, we would add that to claim it was an outstanding success is really peddling in revisionist history—and so soon after the fact.

Senator LUDWIG—I have had the opportunity of hearing from DIMA over the last short while about the reforms they are undertaking, which is effectively like trying to turn a boat around in a creek. They have talked about 90-day processing, getting children out of detention, getting reports from the Ombudsman on people who have been in detention for two years and dealing with mental health issues in quite serious ways. They have talked about a whole range of matters to at least attempt the process of reform of Australian immigration—or, to put it more bluntly, dealing with people in detention. What this committee does not know, however, is the process Australia is going to utilise in Nauru or other offshore processing countries to effect asylum claims. This committee does not know how the Australian government is going to use Australian officials to assess the claims, how they are then going to deal with those claims or whether they have any migration series instructions, upon which we rely, to ensure that the training and the procedures the department is so diligently working on for immigration detention centres in Australia is going to be applicable to Nauru. Do you know whether they have? I do not.

Mr Manne—I can perhaps answer that by going further to the source. I note that the UNHCR's submission to this committee notes the comment that what is proposed is to use a UNHCR model of assessment. The UNHCR state that they are not really sure what that means in this context and are not able to comment on it, because they do not even have the information themselves. This is cause for serious concern in that contest. I note that the UNHCR have gone on to state that they do not take the reference to UNHCR-style processing as a suggestion that UNHCR will assess the applications themselves. In fact, I note that they are disinclined to participate. In that context, we note that this matter is not of theoretical importance but, rather, of fundamental importance, because it goes to the cornerstone principle of refugee protection—that is, the non-refoulement or non-expulsion principle that, under any fair and proper system of assessment, there must be necessary safeguards to ensure that there is a proper assessment of whether or not a person is owed and needs protection.

What we do not have here is any proper information about what those safeguards will be. We do know what they will not be. What they will not be are basically the fundamental safeguards under the Australian legal system which are considered to be the basic prerequisites of fair and just decision making in this country.

Senator LUDWIG—Yes. It is a bit like looking at the black-and-white negative and trying to work out what the colour picture would look like.

CHAIR—I note that the witnesses from the Castan Centre for Human Rights Law are at the table, so questions can be asked of them as well. I invite them to table their opening statement because we will not have an opportunity to ask them to make it.

Ms Penovic—My apologies. We will blame the fog.

CHAIR—I understand.

Senator TROOD—Mr Mann, your submission makes some strong references to matters of assessment and failure of process. I gather that is what you were thinking about when you were previously talking about confusion of cases and things of that kind. For the benefit of the committee, could you elaborate on that as to where the shortcomings have occurred in the past?

Mr Manne—I would strongly urge the committee to have regard to a book recently written by the *Age* journalist Michael Gordon called *Freeing Ali*, which at least to my mind is the best account in recent times of what actually occurred on Nauru and, in particular, documented some of those failings. For example, one of the legal advisers who represented many of the asylum seekers on Nauru in a sense did a bit of a study, an appraisal or an investigation into many of the cases of those who had been refused and had then languished on Nauru. They found a pattern of material errors in decision making so serious as to include apparently untested dob-in material—that is, material sent in by a third party confidentially to dob the applicant in—

Senator TROOD—From their home? What was the source of this so-called dob-in material?

Mr Manne—My understanding is that the source was someone who was disaffected or in some cases other asylum seekers. In some cases it was even interpreters who had been interpreting on the cases, who decided quite inexplicably to offer their own personal observations as to the credibility of the applicants. In a third of the files examined by this legal adviser, there had been evidence of merging of facts from other people's cases into another person's case and department of immigration case officers finding it difficult to differentiate claims between different cases. It is a bit like picking the facts that you want to base you assessment on in a case.

There is another example, which I mentioned earlier, where apparently at the core of the applicant's claim was the fact that he feared persecution at the hands of the Taliban, partly on the basis that he had worked for World Vision, a nongovernmental organisation, and therefore would be seen as pro-Western and a target. That claim was rejected and my understanding is that it was two years later, with support from people in Australia to investigate, that the claims were verified and he was finally found to be a refugee.

What is important here is that for many years these people on Nauru had no access whatsoever to any advice or representation. What is also clear, and I think very important to note, is that recently there was a fair, just, decent and reasonable process applied to 42 of the 43 West Papuans who arrived in Australia. I can say that because I was part of it. In fact, I was the head of the legal team for the representation of those people. In my submission I have documented in some detail why it was fair and the process that was followed.

That process, importantly, quite properly involved all of those who arrived here in January this year being provided with independent legal advice and legal representation to prepare their claims, to submit them, to be orally tested on them and to have further legal submissions provided on their behalf afterwards. I will have to presume that the Australian government and the department of immigration had a good reason for facilitating the legal representation—that is, that they considered that it was necessary and appropriate under the stated polices for people to have that advice. None of that advice will be available on Nauru.

Senator TROOD—Do you think it is primarily access to legal advice that has been the variable that has made the difference in relation to the substantive nature of the assessment?

Mr Manne—It is one of the important factors. I would not call it the factor but I would certainly call it one of the important factors. I also note the submission to this committee from the Victorian Foundation for Survivors of Torture which, from the psychological and mental health point of view, notes with particular concern:

... the lack of any legal representation for asylum seekers sent to Nauru with regards to the preparation of their claims.

It further states:

Without competent advice, people who have virtually no appreciation of the refugee determination—

process—

and the bureaucracy that surrounds it, will struggle to present their claims accurately or adequately.

It also notes that many of these people are survivors of torture and trauma and require assistance in an environment where they feel safe and secure. So it is more than just the concrete advice itself; it is also what it means in terms of the person's appreciation of the process, so that they can properly put their case for asylum and therefore have a system that operates with integrity to assess those claims.

Senator TROOD—Your submission seems to suggest that there were shortcomings in relation to both the DIMA processing and the UNHCR processing. Is that your position or not?

Mr Manne—That is certainly my understanding of the situation, yes. It was not just the department of immigration's but also the UNHCR's assessment processes that were materially flawed in many respects. In a sense, history now tells that a considerable amount of those people who had, if you like, serial refusals of their protection claims were finally found to be refugees. It was only after serious and vigorous intervention by legal advisers, who were finally allowed to assist, that many of the cases were corrected.

Senator TROOD—Your statistic is 3,200; is that correct?

Mr Manne—The 3,200 refers, rather, to refugee claims made in Australia on shore. They were principally by Afghan and Iraqi temporary protection visa holders who then made further protection visa applications to stay here permanently.

Senator TROOD—What is the figure in relation to the people processed on Nauru whose subsequent claims were overturned?

Mr Manne—If I could take that on notice I can provide concrete figures to the committee. I do not have the precise figures before me. They would indicate that there were a considerable number of cases, not just a small handful—scores of cases at least.

Senator TROOD—Now that the department seems to have established a process, with the benefit of your contribution, obviously, that you find satisfactory, could we be optimistic perhaps that they might apply that particular process in changed circumstances in Nauru were they to arrive? Why could we not be confident that that might occur?

Mr Manne—For the following reasons. Principally because very few of the hallmarks of the system that we say is just, fair and reasonable would be present. People would have no access to legal assistance or other supports on Nauru. They would be completely isolated from them. They would have no basic legal safeguards if an incorrect decision was made. There is a good example here. They would have no merits review, and think about the situation of the 43rd West Papuan who, given the inordinate delays in the assessment of his claims, saw fit to lodge an application in the Federal Magistrates Court on the basis of significant evidence that, amongst other things, the delays in the processing of his case had been caused by the improper purpose of the processing being interfered with from higher up on the basis of diplomatic relations between Australia and Indonesia. They are the allegations that he has made in the court, amongst other things. He would not be able to make those allegations if he was on Nauru because there would be no access to the Australian legal system or the courts at all.

In addition to that, he—I can tell the committee today—intends to seek merits review at the Refugee Review Tribunal of that refusal. That would not be available to him on Nauru. Instead, what would be available is in fact a review by the same body that has just refused him, which we would submit is unfair. We would submit that that has been recognised as not a fair or appropriate process in Australia by definition because we actually have an independent merits review system here. There are a number of aspects that would not be present on Nauru.

CHAIR—I have a question of both witnesses in relation to the proposition put by UNHCR when they were here this morning. Mr Wright raised some questions in my mind about whether we should be looking at this as a matter of a third country role or extraterritorial processing by Australia, and where the legislation fits. Mr Walters of Liberty Victoria pressed the fact that there are no procedures set out in the legislation for determination of refugee claims so it is not entirely clear on the face of it. I am interested in both organisations' comments on that. Perhaps we might start with the Castan Centre to get them on the record.

Ms Dastyari—Are you asking whether it is extraterritorial processing?

CHAIR—I am asking for your view of whether it is extraterritorial processing or whether it is in fact a third country.

Ms Dastyari—Fundamentally, it does not make an enormous amount of difference because the way we are processing people offshore is limiting their rights to such an extent that it might as well be extraterritorial processing. It still falls under the Migration Act but in such a skewed way that so many of the rights under the Migration Act have been limited that I do not think it makes an enormous amount of difference.

CHAIR—The reason I am asking the question is that it does make a difference to the committee. It makes a difference to legal application and to a whole range of things. Perhaps, Mr Manne, you might have a contribution.

Mr Manne—Yes. Our written submissions, including the submission which we made to this committee in 2002 concerning the excision laws, submitted that it does matter, to the extent that, in a sense, what is being proposed here is to export to a sovereign nation Australia's protection obligations. Our submission is that Australia does not relieve itself of its protection obligations by seeking to export them or take them elsewhere. We would say that of particular concern in this regard is that, even if it were to purport to do so, what we have here goes to the very heart of the problem, and that is what safeguards are there in reality and in law to ensure that the non-refoulement principle is upheld—that is, that people are not refouled.

What stands at the end of the day is that even if Australia says, 'We will process applications on Nauru,' it does not have an agreement to take over sovereignty of Nauru. Nauru as a sovereign nation exercises, as do all sovereign nations, authority over those people within its territory. As a consequence, it is Nauru that decides under what circumstances people are to go there and for how long they are able to stay. If at any point Nauru decides, quite properly, to exercise its sovereign right to decide that someone should no longer stay there, it is entitled to do so. What we know about Nauru is that it is not a signatory to the refugees convention and does not guarantee any protection to refugees at all, let alone, in our submission, have the resources to do so.

Ms Penovic—I will add to David's comments that I clearly see this as third country processing. In our submission we quoted a number of statements made by the Minister for Immigration and Multicultural Affairs, Senator Vanstone, with respect to the degree of control that Australia is able to exercise over Nauru. We have serious concerns about the extent to which we can exercise control over processing in a sovereign state which has no obligations under the convention. I agree completely with David's comments.

Senator NETTLE—I want to ask, firstly, about how this law would be applied in the case of the three Afghans who recently arrived on Thursday Island. I understand that they have now been brought to Cairns because the child needs medical treatment, and he is in Cairns hospital. Would they be prevented from seeking protection in Australia because of this legislation or because of the current excision legislation? I am just not sure.

Mr Manne—Can I just clarify where they have arrived?

Senator NETTLE—In the Torres Strait.

Mr Manne—My understanding is that they have arrived in an excised place, so they are in the same situation as those who would come under the proposed law, if this bill were to pass. That means quite simply that they are prohibited from making a claim for any visa, including

a protection visa. So they are precluded from making a claim for refugee status in Australia. Incidentally, in relation to the crisis that is unfolding in East Timor, I will pose a question to the committee. Were the crisis to deepen in East Timor—and let us hope it does not—and were East Timorese to desperately flee from non-government persecutors, non-state agents persecuting people, by boat to Australia, is the government seriously contending, as would be the implication of this bill, that it would drag East Timorese people off to Nauru?

CHAIR—We will have to ask the department.

Mr Manne—It appears clear to us that that is exactly what this bill would do: it would cast East Timorese people off into exile on Nauru. But the answer is the same in relation to the Afghans who have just arrived. Their fate at the moment is that they are excluded from accessing due legal processes under the Australian legal system in Australia.

Senator NETTLE—They have been now brought to hospital in Cairns for medical treatment. Is that regardless of the fact that they are now in Australia?

Mr Manne—My understanding, although I have not seen the determination under which they have been brought here, is that as part of an extension to excision, if I can call it that, there were some new provisions. I do not have them in front of me, but my recollection is that sections 198A, B and C of the Migration Act operate as a whole to create a framework for taking people from excised places to the mainland but keeping them excised. They are defined as 'transitory persons' under the act. Transitory persons cannot make applications for refugee status in Australia. So in effect that law, which came into effect some years ago, really meant in practical terms that someone who comes to an excised place first is classed as an offshore entry person and, even if they come to the mainland later, they are a transitory person for whom, in a sense, the whole of Australia is excised and they cannot make an application for asylum at all on shore.

Senator NETTLE—Can you explain what would have been the difference for the West Papuans that you acted for if they had been subject to this legislation?

Mr Manne—The difference would have been this: they would have been taken to Nauru, most likely, and would have been provided no access whatsoever to legal assistance or advice. They would have had no access to independent merits review. They would have had no access to the Australian courts. They would have had no access to all of the expert care and medical support services. They would have had no access to Australian parliamentarians, whom they have met with and explained their story to. They would have had very little access at all to the Australian public or any scrutiny of their situation. They would probably have also been put in a position of being stuck indefinitely on Nauru, even if they were assessed to be refugees. Why? Because what we do know under the Australian policy in relation to this bill is that West Papuan refugees are considered to be people who should not be allowed to stay in Australia because they have been branded by, for example, the immigration minister as supporting a 'toxic cause' and as 'racist' and have effectively been vilified, if you like, as political troublemakers using Australia as a staging post for their political cause. The problem with all of it is this, and why I raise is it—

Senator MASON—That is being perhaps a little over the top.

Senator NETTLE—But they are all quotes.

Mr Manne—They are quotes.

Senator MASON—Yes, but they are taken just slightly out of context.

Mr Manne—I was just about to explain the relevance of them. There is a relevance to it all—

CHAIR—May I remind everybody that we are very limited for time.

Mr Manne—and that is that, if political considerations come into the protection equation in that way, it is completely contrary to the spirit and intent of international protection and could well have the effect of making finding a durable solution of resettlement, whether on Nauru or elsewhere, almost impossible. Firstly, people who have arrived in Australia initially are seen as being Australia's responsibility first and foremost but, secondly, the obstacle would be even greater if they are seen as people who could cause diplomatic problems or tensions. That is the serious point in it—that politicising the situation and importing national interest or foreign relation elements into the protection equation is not only contrary to principle but also likely to threaten people's very ability to get resettlement in other countries. That is the reason I raise it. It is a very serious matter and one which—

Senator MASON—The politics of the situation is very complex, Mr Manne; you are right.

Ms Dastyari—The other concern we have is that those 43 asylum seekers would have also been cared for by the International Organisation for Migration, which has no protection mandate. One of the concerns that the Castan centre has is that, because IOM has no protection mandate, should IOM breach the rights of any asylum seekers that are under its care there are no internal avenues through which those asylum seekers can have that problem addressed. Nor can any of the supporters, nor can states, do anything about the fact that those breaches of human rights have occurred. That is very different to UNHCR, which does have a protection mandate. It is also slightly different to the situation of private companies holding asylum seekers onshore because we have had certain cases recently that have shown us that those individuals may be able to take their claims to court and have those issues addressed through tort law. So not only is the processing problematic but the actual care taking in offshore processing centres is also a problem that those asylum seekers may have faced.

Senator NETTLE—Mr Manne, do you think the West Papuans would have been able to navigate their way through the Australian legal system without legal assistance and, therefore, if they had been subject to this legislation how might that have impacted on the capacity for their claim for protection to be recognised?

Mr Manne—I think that they, as most others that we have assisted, would find it very difficult to navigate their way through what is an extremely complex and difficult system. It is not only legally and procedurally complex but complex because many people who have arrived here, including a number of those who arrived from West Papua, have suffered from brutal mistreatment and are suffering greatly from torture and trauma experiences which has a compounding effect in terms of their ability to confront the legal system and navigate their way through it. So legal and other supports, in our submission, are crucial to someone being able put their case in a system that can then, with integrity, properly determine whether that person is a refugee.

We would see it as a basic prerequisite and legal safeguard for anyone who arrives in Australia that they be afforded proper legal advice and representation, as well as other supports. Why? Because at the end of the day, the undertaking for Australia, in our submission, is this: to ensure, and to take the utmost care to ensure, that the assessment about someone's protection needs has adequate safeguards so that we do not send someone back to a situation where they will be persecuted.

Senator NETTLE—You talk in your submission about the implications of boats being turned back and you have a quote from Minister Ellison about that. I wonder if you could comment on the impact of boats being turned back, whether it be West Papuans being turned back to West Papua or to PNG. We had some discussion this morning with the UNHCR about whether or not West Papuan refugees are afforded adequate protection within PNG.

Mr Manne—The comments of Senator Ellison quoted in one of our submissions give rise to a very serious concern that we have, and that is the current government policy and approach in relation to boats that arrive in Australia, whether from West Papua or elsewhere—how they are going to be treated, what is going to be done with those coming to our country on the seas, for example. From that interview and from some other experiences, some of which we were directly involved in, we have serious concerns that, again, the basic fundamental requirements of assessing whether someone needs protection in Australia without being refouled or expelled back to a situation of persecution are not being guaranteed at the moment.

We would have hoped that, to any question to the government concerning what its approach would be, the response would, first and foremost, be one based on the protection needs—not protecting the borders but protecting people—and that there would be a guarantee of a proper assessment process to assess what people's protection needs were before taking any steps whatsoever to send them back to a place where they could be persecuted. Our concern at the moment is that those guarantees have simply not been given. That raises the very real prospect, in the absence of guarantees, that we are looking at a situation where the Australian Navy, for example, could be put in the completely impossible position, in our view, of somehow having to determine on the face of it whether or not someone should be sent back to a situation of persecution. There are no guarantees or no proper measures that have been guaranteed to ensure that that would not occur. For example, there are no proper measures to ensure an assessment to work out whether that person needs to come to Australia to have their claims assessed. On the other issue, Papua New Guinea, the country information in our submission makes it clear that Papua New Guinea cannot provide a proper, durable solution to West Papuan refugees in general and is not a solution for those refugees.

Senator TROOD—Both of your submissions make the point that, were this arrangement put in place and further refugees placed on Nauru, it would be very difficult to secure their resettlement. I would be interested to know why you think that is the case.

Mr Manne—The fundamental reason is that the international protection framework is predicated on burden sharing by countries. As part of that burden sharing, we would say that the practice as well as the principle dictates that, if an asylum seeker comes within the territory of a country, it is first and foremost that country's responsibility to share the burden, if you like, by taking all steps to assess the claim and provide protection if it is deserved. In

that context, we would submit that one of the fundamental obstacles to seeking third-country resettlement is that other countries quite properly take the view that it is Australia's responsibility under those arrangements. And we saw that play itself out in clear and concrete terms under the Pacific solution, where although the stated policy at the start of the Pacific solution policy by Australia was that no-one would set foot on Australia in fact the majority of people did. They did because of that very problem—the fact that other countries in general were not prepared to take up what is properly Australia's responsibility.

With the proposal under this bill, we are looking at the prospect of something far more radical and far worse, if we are talking, for example, about West Papuan refugees, because of the very thing that I mentioned before: that is, quite frankly, that West Papuan refugees have been defined by the government as a major political problem in relation to diplomatic relations between Australia and Indonesia. Therefore, there is an added obstacle to their resettlement. They have been defined as causing political trouble. They have been defined as people who, if granted protection in another country, would attract the ire of Indonesia and cause serious problems in diplomatic relations. So we say that that radically compounds a serious pre-existing obstacle to resettlement and ultimately means that the proposals could quite seriously involve indefinite exile to Nauru with no genuine prospect of resettlement for many years, if indeed ever.

Ms Dastyari—I would add that we seem to have had that situation with asylum seekers we have returned to Indonesia. I do not have the most recent statistics, but in October last year UNHCR reported that 28 cases from Indonesia—that is 60 individuals—who were turned around from Australia were still on Nauru after having been assessed as refugees who were not able to be resettled in another country. So that possibility of indefinite detention is very real. To add to what David said, only four per cent of asylum seekers under the Pacific solution were taken anywhere other than Australia and New Zealand. There is no indication that New Zealand is willing to take anyone this time around. Australia took 60 per cent of all of the asylum seekers under the initial Pacific solution. If we are to learn from history, we must see that other countries are not willing to do this and it is only a matter of time before we do have indefinite detention.

Ms Penovic—I would just like to stress a point that naturally flows from this, and it was probably addressed before we arrived. I would like to reiterate the acknowledged and well-documented impact of detention on mental health. I am aware that DIMA is saying that this is not detention because these people are free to move around the island, but I do not think there is any serious, credible argument that can be accepted that these arrangements are not detention. These people are subject to security checks, their movement is confined, they have a 7 pm curfew. According to UNHCR guidelines, this is detention. The parliament of this country has accepted that long-term detention has harmful mental health impacts and bears upon a large number of human rights concerning the right to health and rights under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights. This government recognised this last year in its amendment of detention arrangements, and I believe that this legislation would be a radical departure from this position. It would cancel out all the good work that has been done in the last year.

CHAIR—The committee is due to break for lunch. Mr Manne, Ms Dastyari and Ms Penovic, thank you very much for joining us. Are you able to table your Castan centre opening statement?

Ms Penovic—We can email it to you. We do not have it in Word format here, but we can certainly send that onto you.

CHAIR—Thank you very much. We might receive that as a further submission. Thank you for coming.

Proceedings suspended from 12.22 pm to 1.02 pm

FISHER, Mr Paul Stephen, Member, Administrative Law and Human Rights Section, Migration Subcommittee, Law Institute of Victoria

KUMMROW, Ms Joanna Maree, Solicitor, Administrative Law and Human Rights Section, and Acting Manager, Advocacy and Practice, Law Institute of Victoria

RODAN, Mr Erskine, Member, Law Institute Council, Law Institute of Victoria

Evidence was taken via teleconference—

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Mr Fisher—I am also a solicitor at Victoria Legal Aid.

CHAIR—Thank you very much. The Law Institute of Victoria has lodged a submission with the committee, which we have numbered 90. Do you need to make any amendments or alterations to that submission?

Mr Rodan—When we talked about the parliamentary committee supervising the outcomes of this particular bill, if it is actually going to happen, we also thought that a sunset clause should be placed in the bill for a period of, say, 18 months or two years—that is, if the bill passes parliament.

CHAIR—We will place that on the record. I invite you to make a brief opening statement, and then we will go to questions from senators.

Mr Rodan—Our main concern is that this is a political issue which is basically dressed up as an administrative law remedy for a foreign policy issue. That is one of the issues. A second issue of concern is that, while we believe that the borders of Australia should always be protected, we also believe that there should be a balance between the protection of our borders and our obligations under international human rights conventions—and, in particular, the refugee convention, which you have probably heard about quite often this morning from other more focused groups such as the UNHCR.

There are other issues that we concern ourselves with. The Law Institute is concerned that the legislative amendments will effectively reverse the key reforms made in 2005 to the treatment and processing of asylum seekers' protection visa applications. In particular, the proposed amendments are likely to: not apply the principle that children should be detained only as a measure of last resort; not provide for asylum seekers to access independent legal advice and legal representatives to assist them in making their protection visa applications; provide indefinite detention; not provide for the minister to grant a visa to asylum seekers detained at offshore processing centres, regardless of whether they have applied or are eligible for a visa; not provide for reports by the immigration department, the Commonwealth Ombudsman or, at the present moment, the Australian parliament on asylum seekers detained in offshore processing centres; and not provide asylum seekers with the right to have a negative decision on their protection visa application reviewed by an independent tribunal such as the Refugee Review Tribunal or a court.

We also note that two countries which are interested in this particular compact are Indonesia and Nauru. Both of those countries are not signatories to the refugee convention. We could, therefore, be handing over asylum seekers to countries that are not signatories to the refugee convention, and we think that that is most inappropriate. So, to summarise, we are saying that this is bad law. It should have been a foreign policy issue. It is a matter which does not take into consideration the reforms that could have occurred and which were in the process of occurring in the immigration department after the Rau and Solon cases. We will be very deeply disappointed if this particular bill becomes law.

CHAIR—Thank you. Mr Fisher and Ms Kummrow, do you have anything to add?

Mr Fisher—Obviously, we had a very short time in which to supply a response to the bill, as did everyone else. We did put in written submissions. As Mr Rodan has said, other people have perhaps canvassed some of the legal issues more eloquently than we could—particularly some of the research academics who put in submissions. What we and our members do have is practical experience. I would like to raise very briefly with the committee what I consider to be some of the unforeseen practical consequences which this legislation, if passed, would bring about.

Under the current situation, someone who had, for example, arrived here as a stowaway, might come to my office and say that they fear persecution in their home country. I would try to assess the merits of their claims and, if I thought they were meritorious, I would perhaps offer to assist them to present their claims to Immigration. I have had many clients in that situation over the years and quite a few of them have successfully progressed to being granted refugee status by Australia.

Under this new system, if a stowaway who happens to have avoided immigration clearance comes to my office, I will have to advise them that if they go and approach Immigration then they will be detained and transferred to Nauru or some other place. That is a complete disincentive for a person in that situation to try to regularise their status. Perhaps it is an unforeseen consequence. Perhaps the drafters of this bill were imagining that all of the people who arrived in these circumstances would in fact be detained on arrival, but experience tells us that that is not the case. Some will inevitably avoid detection and those people have no incentive to regularise their status here. They will go underground. Is that really what this parliament wants? From a broader perspective, there is a concern that I feel many of my colleagues in the legal profession also share that, if Australia turns its back on some of its obligations—as we say it will be if it passes this bill—and other countries also take up that approach, the whole framework of international protections could collapse or could certainly be placed under threat. Thank you, senators.

Ms Kummrow—I will add two points in support of my colleagues' submissions. The LIV considers that this bill, if enacted, would set a dangerous precedent for Australia as a good global citizen. By enacting this legislation, Australia would clearly be seen as a pioneer in the area of avoiding its international obligations and human rights obligations also, and we highlight that fact to the committee.

Also we note in the explanatory memorandum to the bill—and we have highlighted this in our submission—that it states there are no direct financial implications from the bill as it

simply provides flexibility to the government to move a wider group of people to offshore processing centres. The LIV disagree with this. While we are legal practitioners and not economists, we would ask the committee to consider the cost of transferring asylum seekers to offshore processing centres, the cost of resourcing those centres, including the cost for health service providers, caretakers and so on, and operating those offshore processing centres. Thank you.

Senator KIRK—Thank you very much for your submission. I just want to follow up a few of the matters that you referred to—firstly, that of the sunset clause, and I think you said that is not actually contained within your submission. Perhaps you could elaborate a little more upon that. I think that is the first time that anyone has suggested that, and it seems to me to be quite a good idea.

Mr Rodan—It appears that if this particular bill does get sufficient votes in the Senate and the House of Representatives to be enacted, parliament has the opportunity to supervise the operation of it in a number of ways. One of the other ways I thought of was, if a parliamentary committee were able to go over to Nauru or Manus Island occasionally in the next period of time, it could find out what is actually occurring there and what procedures are happening and whether there are breaches of international law. That was one part of it.

The second part of it concerned the sunset clause. A sunset clause would show that this is purely a temporary measure, a measure which has been pushed through parliament. This is a necessary measure to try to ensure that Australia has the opportunity to redeem itself by reviewing this particular law within a particular period of time. I have not set any particular time—I said maybe 18 months or 12 months or whatever. It is up to parliament to think about that. To me it is very important that, if this particular bill does become law, there must be some kind of way in which it is constrained. Extreme measures do require these kinds of safeguards.

Senator KIRK—I wanted also to ask you about your view in relation to review—or, rather, lack of review—that is available here. Of course, these types of decisions are normally reviewable by the RRT on their merits. I just wondered what your view was in relation to review of decisions made on Nauru. Do you consider that decisions ought to be reviewable by the RRT or, if not by the RRT, by an independent body? If so, which body, or what type of body needs to be established?

Mr Rodan—They should be reviewed by the RRT on merit issues. That is quite obvious. I think under the post-Tampa reviews there was one in which some other officer would say yea or nay, like it used to be in the old UNHCR camps. Our view is that proper merits review should be provided to these people through the RRT.

Senator KIRK—So that is your only preference? You do not think there may be any other possibility of some other sort of independent officer reviewing the decisions? Do you say that the RRT is really the optimum outcome?

Mr Rodan—I think also the Ombudsman already has a part to play under the Migration Act at the present moment—that is, to look after or report upon people who have been detained for a period of two years. We are hoping that these people will not be detained for that long if this bill is passed. But it may be that these people should have access to the

Ombudsman as well, especially in relation to their conditions, any delays that are occurring as a result of the refusal of a decision of the primary delegate in Nauru and where the matter is not being pushed forward quickly enough to the Refugee Review Tribunal. So there is a place there for the Commonwealth Ombudsman as well. Also, the Commonwealth Ombudsman should have the opportunity to go and visit these camps as well. So there is the RRT, the Commonwealth Ombudsman and also a parliamentary committee. I think those are ways of supervising this extreme measure.

Senator KIRK—That sounds like a very good idea. Thank you.

Senator MASON—Thank you very much for your submission and for pointing out the practical consequences of the bill. I have just a couple of perhaps argumentative points, if I might put it that way. Mr Rodan, I thought you came close to hitting the nail on the head when you said that perhaps this should be a foreign policy issue and that the consequence is, to quote you again, 'bad law'. I am wondering whether really it is the other way around—this is a foreign policy issue, Australia's responses are limited and this bill is part of that armoury. What you describe as 'bad law' is, I think we can say without any doubt, difficult law. But this is an extremely complex foreign policy issue. Indeed, as you say, it relates to one of our closest neighbours. That really is the issue, isn't it?

Mr Rodan—Of course, it is foreign policy dressed up as administrative law in many ways. From our point of view it is bad law. It may be difficult law. You also have to look at it this way: we have always tried to have a good relationship with Indonesia, but there are times when we as a nation have to say to them: 'Back off our domestic policies and our international obligations. We have those; you look after your own area.' That is a foreign policy issue.

Senator MASON—At least you are being honest. I think you are being honest, because I am being rather wicked, in a sense, referring to foreign policy issues, because it is the brief of neither this committee nor the Law Institute of Victoria, I suspect. But to be very frank with you, that ultimately is the problem that this government will face. I want to leave it there, but I congratulate you on your frankness and perspicacity.

Ms Kummrow, I have a habit of doing this when I hear these sorts of comments, but I think you said Australia is becoming a pioneer in avoiding international obligations. You are not suggesting that Australia is somehow an international pariah in terms of its human rights record or avoiding international obligations, are you?

Ms Kummrow—In relation to asylum seekers and refugees, it is my understanding that there is no other country in the world that has this system or a similar one in place. If you know of another one, I would be pleased to hear about it.

Senator MASON—I see; so you are pointing very narrowly to this bill; you are not talking about human rights in general.

Ms Kummrow—I did not specify, but if you would like me to: in relation to asylum seekers and refugees.

Senator MASON—Surely not refugees in general, because we take many refugees—do you mean as it relates particularly to this bill? You be as specific as you like. You tell me what you think.

Ms Kummrow—Thank you. When we have people seeking asylum, if they manage to reach us, we do not generally send them off to a third country for processing. Let me speak frankly, as Mr Rodan has: there is a good argument to say that if someone turns up on your doorstep and asks you for assistance that you do not divert them to another door and into another country. You take on that responsibility as a good global citizen and you apply your laws, being the Migration Act, to that problem to assist them. I am suggesting that Australia, to the best of my knowledge, is the only country that would be, as I said, pioneering this type of program.

Senator MASON—So it was a narrow point; it was not one of those comments made to besmirch Australia's international human rights reputation.

Ms Kummrow—We are just talking about our asylum seeker processing.

Senator MASON—That is true; we are, but many witnesses, Ms Kummrow, like to draw a wide bow from one instance—that is all. I knew you would be intelligent enough not to do that, but we have many witnesses who do try to do that. I usually come to these committee meetings to ensure that does not happen.

Senator NETTLE—In the Law Institute submission, there is a suggestion that third countries would be unwilling to take West Papuan asylum seekers, in order not to offend Indonesia. What impact would that have on Australia's capacity and responsibility under the refugee convention to find a durable solution for these refugees?

Mr Rodan—I have to go back to the post-*Tampa* situation. You will probably find from the statistics that, when resettlement occurred, most of those people who were placed on Nauru or Manus island were resettled—apart from New Zealand—in Australia, mainly because other countries did not want to have those particular asylum seekers or refugees. I would think that history will repeat itself in the same fashion, and that is the reason for that particular part of our submission. Does that help you?

Senator NETTLE—Yes, I think it does. Did you want to add anything more? I am concerned about the capacity to find a durable solution. I refer you to some comments by Minister Vanstone in relation to West Papuan asylum seekers in which she said that she does not want Australia to be used as a staging post for political causes and she has gone so far as to call supporters of self-determination racist. What impact do you think this will have on the likelihood of Australia finding third countries willing to take West Papuan asylum seekers, and do you think that those sorts of statements are appropriate for a minister, given her substantial role and powers within the Migration Act?

Mr Rodan—Firstly, if we were to be a staging camp—we were a kind of staging camp with East Timor and for a number of people from Fiji after the series of coups there in the eighties and the early 2000s, so there is a precedent there; that does happen.

Ms Kummrow—A possible result or consequence if the bill is enacted is that, if other countries are unwilling to accept West Papuan asylum seekers, in particular, for the same

reason that Australia seems to be unwilling to accept them, it could result in possible indefinite detention of those asylum seekers. That is one serious concern that the LIV has. If they cannot be resettled in Australia or elsewhere, such as in New Zealand or any country in this region, they could end up scattered anywhere throughout the world. If Indonesia is able to exert this pressure on Australia, I cannot imagine that it would not be reasonable to suggest that it would also be able to exert the same pressure on other countries, particularly in our region.

Senator NETTLE—In your submission you talk about considering that these laws represent a substantial politicisation of refugees. Do you have a comment on the consequences of politicising refugee law?

Ms Kummrow—That is dangerous. As lawyers, we uphold the rule of law and due legal process. Politicising the genuine right of asylum seekers to seek protection in Australia, Australia being a signatory to the refugee convention, is a terrible reversal. As we have said in our submission, it is bad law or a misuse of law to use it as a foreign policy tool for political purposes. Of course, that does happen, but we are talking about a very vulnerable group of people, whether they be West Papuans or from other countries.

Senator NETTLE—Do you think that Australia is seeking to shirk its responsibilities under the refugee convention through this law?

Ms Kummrow—We have made that point in our submission, and I think I have the support of the two members here with me to say yes. In our submission we suggest that by enacting this legislation Australia would be shutting the door on asylum seekers. This bill has been specifically drafted to address the 'problem' of West Papuan asylum seekers and it is effectively shutting the door. Well, it is opening a door, but to another country—a country that is not a signatory to the refugee convention. We are not providing them with legal representation and we are not providing them with a right of review. How long will they be retained in the offshore processing centres if they cannot be resettled?

Mr Fisher—Part of the rationale for excising parts of Australia originally—about three or four years ago now—was that the bulk of the asylum seekers that were then arriving in boats on our shores were people who had passed through other countries on the way here and that Australia was not the country of first option for them. I do not know if that made its way into our final submission, but it is certainly on the parliamentary record in the second reading speeches and the explanatory memoranda, I believe, for those earlier bills. A distinction is drawn clearly between people who are coming here via other countries and people who are coming here directly from the country in which they are at risk of persecution. And so, yes, it is perhaps not only shirking our responsibilities under international law but also amounting to something of a policy backflip.

Senator NETTLE—I just wanted to thank you for raising the mental health issues related to detention and potential indefinite detention, because we have not had much discussion of that to date. I wanted to thank you for including that in your submission.

CHAIR—There being no further questions, I thank you all very much for appearing, Mr Rodan, Mr Fisher and Ms Kummrow. I am sorry for the delay at the commencement. As I said to Mr Rodan, those people trying to contact you were advised by the Law Institute of Victoria

that they could not find you in the building, so it took a little while to do that. We appreciate your submission. Thank you very for your assistance to the committee.

Mr Rodan—That is okay—the Law Institute is a warren anyway!

Ms Kummrow—Thank you for the opportunity to speak to you via telephone today.

[1.31 pm]

MATHEW, Dr Penelope Elise, Private capacity

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear before the committee today?

Dr Mathew—I am a reader in law at the ANU College of Law. I appear in my personal capacity as an academic.

CHAIR—You have lodged a submission with the committee, which we have numbered 96. Do you need to make any amendments or alterations to that submission?

Dr Mathew—I do not. I apologise for the lateness. As you can probably hear from the voice, I am not that well. I did find at least one typo somewhere in there, but I am not sure I could tell you where it is now. I might see if I can point it out later—

CHAIR—I would not worry.

Dr Mathew—but I do not have anything I need to change.

CHAIR—We would like to ask you to make an opening statement and then we will go to questions from senators.

Dr Mathew—Thank you for inviting me to come to speak with you, and I will do my best to answer any questions you may have. I am opposed to this bill. I think what is fundamentally wrong with it is that it seeks to use the somewhat controversial concept of a safe third country—that is, the idea that Australia can rely on protection elsewhere to avoid its responsibilities in a manner which does not conform with accepted practice, which operates to the detriment of refugees and diminishes rather than extends protection as intended by the refugee convention. As others have pointed out in their submissions, the bill may even risk actual refoulement, or return to a place of persecution, because it is clear that the refugee status determination system will not be as full and fair as the one onshore in Australia; nor, as I have pointed out in my submission, are there satisfactory supervisory arrangements in place. There is a ministerial declaration under section 198A. On what basis that declaration is made, I am not sure. And there are the MOUs with countries like Nauru and PNG which, to my knowledge, are not tabled in parliament and are not really public documents and which may not even be legally binding.

I think the legal premise of the bill would be that, so long as refugees are granted protection, it does not matter where that protection takes place, and further that, while the refugee convention grants protection from refoulement or return to a place of persecution, it does not expressly guarantee a right of entry. Moreover, in the case of refugees who arrive unlawfully, as a matter of domestic immigration law, article 31 of the convention contemplates that those asylum seekers could be required to seek admission elsewhere. So the message to refugees is, 'You cannot be returned but you may not be allowed in.'

The problem as I see it with this bill and with the Pacific solution before it is that the asylum seekers do not have anywhere else to go. If the experience with the Pacific solution tells us anything, it is that Australia would be extremely lucky if any country came forward to

take these asylum seekers off our hands. In the end Australia took many of the asylum seekers back from Nauru and PNG on some kind of visa category. So point 1 is that the Pacific solution is not a solution. It was an illusion—the Pacific illusion, if you like—and this bill seems to share the hallmarks of that.

When there is no prospect of resettlement elsewhere, Australia is duty bound to provide protection itself. Article 31 of the refugee convention, which deals with the unlawful arrivals, talks about two alternatives. One is regularisation of status—granting someone refugee status and allowing them to stay. The other is giving asylum seekers the facility to seek admission elsewhere. There is no third alternative of keeping someone in limbo.

When the framers adopted the convention they recognised that only states bound by the convention would accept other people. Only if you were bound by the obligation of nonrefoulement could you be relied on to provide protection. The assumption of the framers was that if there was to be burden sharing it would be amongst parties to the refugee convention. The protection offered by Nauru and PNG under the Pacific solution was not protection. I think it is best to use 'protection' in inverted commas there. It was not the sort of protection contemplated by the refugee convention.

Pursuant to article 31 of the convention, unlawful arrivals may be subjected to such restrictions on freedom of movement as are necessary. It is well accepted that this does not mean detention for the duration of determination of status, and parliament has recently recognised this with recent changes to the onshore system with the residence determinations, the extension of the bridging visa system, the scrutiny of long-term detention and so on. Yet refugees were detained for the duration, and even longer in some cases, as they waited on Nauru and PNG for some unknown country to step forward and take them. In the case of Nauru, that is really not very surprising. It is not party to the refugee convention and in fact it is not party to many human rights instruments at all. It is party to the Convention on the Rights of the Child and it is also bound by customary international law to respect the right to liberty.

To the extent that Australia and Nauru colluded to detain asylum seekers, both countries are liable for breaches of human rights obligations—Nauru because it has obligations to those within territory and jurisdiction and Australia if only because it cannot use a country to do something that it could not do itself. You cannot pay another country to violate human rights on your behalf. Point 2 is that the protection under the Pacific solution was illusory as it entailed a violation of rights, and Australia remains liable for that as a matter of international law. I think it is absolutely essential that parliament know whether detention will occur if this bill is enacted before it proceeds with passing the bill.

As you can see from what I am saying, the framers were concerned to protect, to the extent that they could, the sovereign right to control immigration. But they had to acknowledge that if you cannot return someone you are going to have to admit them and permit them to enjoy the rights contained in the convention. The scope of those rights will gradually get broader the longer an asylum seeker or refugee remains in the country, so that at the end of the day states are exhorted to facilitate naturalisation and to allow refugees to stay permanently in their country.

It was also recognised that you should not penalise a refugee for unlawful entry. Refugees often have to enter a country unlawfully. Yet, pursuant to the Pacific solution, when Australia did take asylum seekers back from Nauru and Papua New Guinea, it was on categories of visa that offered less protection than was available to asylum seekers lawfully within the country. We do not know yet what the visa arrangements would be. Again, I am extremely concerned about parliament enacting a bill when it does not know what the changes to the visa regime might be. I think that is extremely concerning. It is rather unwise too if you are really hoping that another country would accept asylum seekers for processing—Nauru, for example. Surely Nauru would want to know that there would be some visa available under the Australian system before agreeing to participate.

If the sorts of visas proposed are similar to those under the Pacific solution, there are a number of problems with that. First of all, because they are essentially an offshore category of visa, they are discretionary. So there is no guarantee that refugees sent off under this proposed bill to a place like Nauru will be granted Australian protection. They were temporary visas. In the case of one category for offshore entry people, they were rolling temporary visas. There are a number of disadvantages that flow from that. One very important one is that an asylum seeker does not get the benefit of family reunion. That is a penalty within the terms of article 31 of the convention. It is invidious discrimination—it may violate article 26 of the International Covenant on Civil and Political Rights. In the case of rights like family reunion, we may be in violation of the provisions protecting the family unit in articles 17 and 23 of the International Covenant on Civil and Political Rights. The third point is that I am very concerned that, even if Australia does end up accepting asylum seekers under this new arrangement, it will do so in a way that nevertheless involves violations of human rights. I think it is essential that parliament knows what is happening to the visa regime before the bill is enacted.

Those are the three major legal objections. I have mentioned some policy ones as well in my submission. I remain concerned that the options of interdiction or introducing some sort of national interest test might still be on the table. I am concerned about how the bill will work since we do not seem to know whether there are countries willing to participate in a kind of Pacific solution scheme mark II. What we may end up doing is passing the bill, there will be a bar on applying for onshore visas and there will be no other place where asylum seekers can go. What are we going to do then? Do we just rely on ministerial discretion to lift the bar on visas? That seems very inefficient and impractical.

Secondly, I am concerned by the statement in the explanatory memorandum that the bill has no financial implications. I was listening to the Law Institute just then articulating the same concerns. I find it difficult to see that there will not be rather major financial implications. I think there should be a full costing of the bill. Finally, I am distressed—I think that would be the word to use—that, instead of sticking to agreed values as contained in international human rights instruments to which we have freely consented, Australia is simply doing what another country has told it to do. We are just doing what Indonesia tells us.

In conclusion, my main concern is that, instead of interpreting the refugee convention by following normal treaty interpretation tools and filling in any gaps or uncertainties in the treaty—and there are a few gaps and uncertainties—with commonsense and compassion, we

are unravelling the convention's protections. I cannot understand why. Forgive me for getting a little emotional about it. As the Beaconsfield drama unfolded, Australians went to extraordinary lengths to rescue two miners underground, as they should. It struck me that refugees show exactly the same kind of tenacity, courage, resilience and perseverance. They effect their own rescue. All we have to do once they arrive is say: 'You are safe. We will protect you.' It is really very easy. In a world that is conflict ridden and that we have little capacity to change sometimes, the refugee convention gives us a very precious and empowering opportunity and it should be grasped with both hands.

Senator LUDWIG—One thing that struck me amongst the matters that have been canvassed today was talk of a model or modelling like the UNHCR for Refugees determination. Do you know what that means?

Dr Mathew—I have to say that I do not. My limited understanding is that what the explanatory memorandum is saying is that we will not be applying the same sort of system for refugee status determination as applies onshore in wherever the asylum seekers end up going. And that was the case with the so-called Pacific solution as well. In some cases, UNHCR actually undertook the determining of refugee status. I understand that they are not keen to undertake it in this instance. It might mean immigration officials from Australia undertaking initial status determination with no independent review, or it might be another immigration official undertaking the review on the basis that that is probably what UNHCR has to do—it is an international organisation and there is no higher authority than it, and so you get appeals being undertaken by another officer from UNHCR.

Senator LUDWIG—And Caesar will judge Caesar again.

Dr Mathew—Possibly, but the one thing I would say about that—and I said it previously when this issue was considered in the further excision legislation that was not passed—is that it is rather difficult to compare the Australian or any immigration department with UNHCR. UNHCR is an international organisation which is tasked to protect refugees. I do not think it is a flawless organisation, but it has a certain rationale, if you like, that may not be shared by immigration departments. Immigration departments are often driven by a philosophy of exclusion, and it is very important to have some independent appeal rights where it is an immigration official making the first-instance decision.

Senator LUDWIG—If there is a refugee determination and the person is granted that status, hypothetically on Nauru, during the period in which they would then wait for settlement to either Australia or some other country to be arranged, would they still be in detention? If they were, I wonder if that is permissible, or would Nauru say that they were free to wander about Nauru?

Dr Mathew—I think the problem is that we do not know. I have read recently that there was a statement made by the new president of Nauru that they would have an open door policy. I think that is very interesting and parliament needs to know if that is actually the case. It certainly was not the case under the Pacific solution. Essentially, people were in detention, including after they had had their status determined. It is well accepted that you should not hold people in detention for the duration of the status determination, and even more so when they are actually determined to be refugees. There is absolutely no reason to then hold them in

detention. Unless they pose some sort of threat to security or something like that, there is absolutely no reason. That is one of the uncertainties with which you are operating here. You really need to know what is going to happen: whether or not significant rights violations like that are going to occur.

Senator LUDWIG—We are keen to talk to the department this afternoon about some of those matters. Thank you.

Senator MASON—To take up where Senator Ludwig left off, we heard a bit of evidence this morning about the determination process, and I want to get it clear in my head. On part 1 of the Pacific solution—or illusion, as you say—I am told that, in terms of the determination of refugee status, the percentage of successful applicants that was determined by Australian immigration officials as compared to UNHCR officials—and you alluded to that before—was fairly similar. In fact, I think Australian officials were slightly more generous. Is that your understanding?

Dr Mathew—I do not know, and you may well be better placed to say.

Senator MASON—Let us assume that that is right, or at least let us assume that it is very similar. What you are arguing, though, is that, even if that is right, we still need independent appeal rights. Why? Because the UNHCR determination would, for example, not have been fair. Or is it simply a matter of principle? Do you see my point?

Dr Mathew—Yes. It is a fair question, and you may well have the statistics and I do not, so I have to take that on face value.

Senator MASON—I think that is right from what I have been told.

Dr Mathew—It was my understanding that one of the reasons Australia went with the Pacific solution was the idea that we were being more generous onshore than UNHCR was, and there was something wrong with that. Frequently, in fact, you cannot compare those stats. It may be that there are different groups of asylum seekers that UNHCR is processing as compared with the ones that are arriving onshore in Australia. To make that sort of blanket comparison is not always a good idea, and Peter Mares, I think, has written something quite good on that which might be useful, and I could dig that out. That is a preliminary point to make about the danger of comparing statistics.

Secondly, UNHCR, while I am a big supporter of the United Nations generally and of that organisation in particular, is not a flawless organisation, and it is often critiqued, including by its own officers and sometimes in the scholarly literature. Again, I am happy to point you to critical articles discussing UNHCR's policies on various things. They are not perfect.

The final point is that, yes, as a matter of principle we do need an appeal process. This has been said almost since the year dot. I think it was ExCom conclusion No. 8, way back when—and Australia is on ExCom, of course—which dealt with these issues and said, 'Yes, you need to have appeal rights'—

Senator MASON—Domestic appeal rights, in effect.

Dr Mathew—Some sort of appeal right. You should not just have an initial decision and that being absolutely it. If it is going to be an officer within an immigration department that operates under certain constraints and that is often experiencing great pressure to make

decisions of a certain kind—just think about the context of the West Papuans here and the enormous pressure that is effectively being put on members of the immigration department by the government stepping in and saying: 'We've got to revisit that issue. Fancy 42 West Papuans being granted visas!' That is why you need appeals, and it should be independent. That is why Australia has the system that it has in the first place. That is why we have the Refugee Review Tribunal. We used to have an appeal system with, I think, three governmental officials sitting on the Refugee Status Review Committee, including Foreign Affairs, Immigration perhaps and Attorney-General's—I cannot quite remember them—but we decided to move away from that. It was not independent enough. There were all sorts of issues being brought in that should not have been brought in, such as foreign policy concerns.

Senator MASON—You talk about independent appeal rights. I wonder whether that is a matter of principle that we should be adhering to or whether it makes a difference in practice. For example, let us say we are in Angola and people's refugee status is being assessed. As I understand it—you are an expert—it would often be done by UNHCR or UN officials. There would be no domestic appeal rights there. In other words, the vast majority of the world's refugees, in places like Africa and so forth, would surely not have Western rule of law, independent appeal rights. Surely it would be done by UNHCR, they would make a determination and that would be that. Is that right? I think that is right.

Dr Mathew—I will try and deal with the question; it has many elements to it. Despite being an expert, I do not have the list of parties to the convention in front of me. Angola may well be a party; it may well be a party to the OAU convention on refugee problems specific to Africa as well. I would have to look first. I do not like trying to answer questions on the basis of facts brought up.

Senator MASON—Sure.

Dr Mathew—In any event, if we were dealing—for the purposes of argument—with a country that is not party to the refugee convention, then it has made no statement to the international community that it will conduct full, fair, efficient refugee status determinations, so it has not taken on any obligation. That is the main point. Australia has, and any time you use a process that is not the normal process that you would use and not the one that you have developed specifically for the purpose because you think it is—to use Philip Ruddock's words—the Rolls-Royce of refugee status determination you have to question why that is. Is it, in fact, to ensure that you return people in violation of article 33 of the convention? That is what you are risking when you do not have independent appeals procedures.

Senator MASON—I have a final question, which I suspect Mr Ruddock would ask if he were here. Are you saying that a determination by a UNHCR official is in practice unfair or is in principle unwarranted because we have signed up to the convention? You see my point, don't you? I am a politician; I try to be practical.

Dr Mathew—UNHCR undertakes determinations in countries that are not party to the convention; that is the best option you have there. We are a developed country; we are able to do better than that and we should do better than that. In offering a lesser system we are actively discriminating between different classes of asylum seekers, and I do not know why. The basis for discrimination in this bill is that people are unlawful arrivals by sea. Why should

that determine whether they get access to the RRT and judicial review while lawful arrivals get that sort of treatment and unlawful arrivals by plane get it?

Senator MASON—You are flirting with me, Dr Mathew, because I think you point to the reason on page 10 of your explanation.

Dr Mathew—Do I? I would be very surprised if I had given the Australian government any justification for doing this. What is the reason?

Senator MASON—I do not mean to mislead you or the committee, but I think your reference to Indonesia makes sense. But we do not need to ask questions about that, I think.

Dr Mathew—I am lost, but never mind.

Senator MASON—Down the bottom of page 10 you mention the *Tampa* incident. You quote the Prime Minister, in one of his famous quotes. I think that might have something to do with it.

Dr Mathew—That is a political reason. I noted the questions that were being asked, such as 'Isn't this is an important foreign policy issue and don't we have to pay attention to what Indonesia says?' I think the answer to that is a simple 'no'. I do not think that foreign policy—

Senator MASON—Is that as a lawyer or in your private capacity?

Dr Mathew—Both, actually. I have a first-class honours degree and, in fact, I was equal first in the political science department at the University of Melbourne—not that that has much to do with politics in practice.

Senator MASON—But you are not a politician, Dr Mathew. I am a politician.

Dr Mathew—I am not a politician. But I fail to see how—

Senator MASON—But you see my point, don't you? I am not trying to—

Dr Mathew—No, I do not. I fail to see how accepting West Papuans is going to irrevocably endanger relations with Indonesia. Refugees have come to Australia from all over the world, from many powerful countries—including China. We are brave enough to stick to our guns and say, 'Asylum is not an unfriendly act.' We grant it because we accept certain human rights standards. We are brave enough to do that and not bring the politics in. I just cannot see that it is going to badly affect our relationship with Indonesia. It is something we should be doing in light of our legal obligations. We are bound by those legal obligations, and the foreign policy simply should not come into it.

Senator MASON—I am going to get you to talk to my constituents. Thank you.

Senator TROOD—If the Indonesians think it is going to affect our foreign policy then presumably it is going to affect our foreign policy.

Dr Mathew—It will be interesting to see the wash-up at the end of the day. I do not think you can speculate. I am not an expert on the West Papuan independence movement and I do not really want to get into all of those issues, but I do not see how we are helping Indonesia deal with those issues by simply sweeping them under the carpet and pretending that human rights abuses are not going on there. I do not see that that is at all helpful.

Senator TROOD—That may be so, but you are saying that objectively this issue should not affect the bilateral relationship. But subjectively it is—

Dr Mathew—It looks as though it is now. They have made indications that they are very upset about it. Whether they will continue along that path I do not know, but I make the point that Australia has accepted refugees from all over the place during many political contretemps, and it has not really resulted in the ending of an alliance or a friendship. Those are the sorts of blips in international relations that you just have to wear if you are really committed to the idea that you do not return people to a place of persecution and that you protect them because, if you do not, you are becoming just as bad as the persecutors. If you are committed to that principle, you wear those small problems in international relations.

Senator NETTLE—On that issue of politicisation of refugee law, could you explain what you think are the consequences of going down the path of politicising refugee law in the way in which we make refugee decisions?

Dr Mathew—The main consequence is that you may end up returning people to a place of persecution in violation of your international obligations and in violation of principles that we hold dear. Australia was the sixth country to ratify this convention, and we did it because we agreed that to send someone back, not to offer them protection, is exactly the same as doing the killing and the raping and the torturing yourself. So when you politicise it, when you bring in some sort of national interest test, as I think was proposed at some stage, you do not apply the elements of the definition any longer in an objective fashion; you simply ignore whether someone has been subjected to gross human rights violations on the basis of one of the prohibited grounds in the definition. You are applying politics and not law, and the result is you violate the law and you may risk someone's life and freedom at the end of the day.

Senator NETTLE—You mention in your submission the interception by the Navy and the turning back of boats. I think the example you give is about a boatload of West Papuan refugees that came directly being turned back. I wonder if you want to comment on that. I do not know if this is an area of your expertise but we have had some discussions about whether or not West Papuans are able to get adequate protection in PNG. So boats might be turned back to PNG or to Indonesia.

Dr Mathew—I am concerned with interdiction, full stop, because you end up not knowing what might happen to a person. You send them somewhere else and you have then got no control over what happens to them. With the Pacific solution we returned people to Indonesia, effectively, although we did not do it in a particularly safe way. Boats were interdicted at the contiguous zone; they might have been escorted back, they might have just been left to sink. We really were endangering lives with that interdiction program, and the Navy was pretty upset about it. So it is not a particularly safe way of doing things anyway.

We then end up sending them to Indonesia on the basis, presumably, that we think people have basically transited Indonesia before coming here and they might have been able to seek protection in Indonesia. The reality is that Indonesia was not a party—is not a party—to the refugee convention, so it has not accepted the obligation of non-refoulement. So we do not know what might happen to them at the end of the day. There could be chain refoulement:

they could be then sent back to a place where they would be persecuted. And, in the meantime, there is a query about what sorts of rights protection they would have in Indonesia.

So there is a problem even when you send people to the country that is not the country from which they have come. But I am even more concerned if the suggestion would be that you would just send them straight back to West Papua—and that did look as though it was being seriously discussed. Then it is like the Haitians: the United States interdicting Haitian asylum seekers on the high seas and sending them straight back to the arms of their persecutors.

With respect to whether they would get protection in Papua New Guinea, I am not enough of an expert to comment on that, but I am sure you have had those with some experience of the system there comment on it. PNG is a party to the refugee convention at least. It does have some significant reservations. I know it has one on issues of freedom of movement. I do not know how it conducts refugee status determination. Does it implement it? PNG has significant problems with law and order. My husband worked in PNG for a while and was mugged there. It is not a particularly safe country. And in any discussions about effective protection, when people are trying to thrash out what a 'safe third country' should look like, if we are going to have that safe third-country concept here, those sorts of issues about what basic human rights protection is going to be like in that country are going to be pretty important. So, just off the top of my head, it does not sound like Papua New Guinea is going to be a great idea.

Senator NETTLE—In your submission you talk about direct return of asylum seekers from West Papua. I think you mention that that may be contradicting the refugee convention.

Dr Mathew—Absolutely. That is the clearest violation you could possibly have. The United States has tried to justify its interdiction program by arguing that the convention obligations only have territorial reach, and that simply is not the case. You cannot exercise jurisdiction on areas like the high seas to ensure that you do not respect the obligation of nonrefoulement. Article 33 of the convention is very clear. It says there will not be refoulement in any manner whatsoever. It is very clear that that applies to an interdiction program.

Senator NETTLE—You also mentioned the role of IOM in running camps on offshore detention centres. Do you want to elaborate on your views for us? You talk about providing access to legal services but there are also issues of health and welfare. We have had some discussion about who is responsible for the provision of those services and whether they are able to do that.

Dr Mathew—I have to say that I do not know a lot about IOM. I know a lot more about UNHCR than I do about IOM. The fact that IOM's mandate is not really fairly and squarely protection of refugees is of concern.

The other thing that has been concerning with IOM is simply the lack of transparency about what Australia got it to do under the Pacific solution. I had a flick through the report from this committee on the further excision bill to see whether the Senate had managed to get a bit more detail about what IOM actually did, and it seemed to me that we did not know. It was very hard to get real details. Was there some sort of contractual arrangement? Yes, it

appeared that there was. Did we see the contract? I do not think so. We do not actually know what the arrangement was—how IOM was going to manage the camps—and I think that is really unsatisfactory. We need to know how they are going to run it and how they are going to provide for the basic necessities of life—health care and so on. You cannot just send people off not knowing how they are going to be treated. So it is of concern.

CHAIR—It is my recollection that the MOUs in relation to the work of IOM on Nauru and previously Manus have been given to this committee before. Have they, Senator Bartlett?

Senator BARTLETT—Have they been tabled?

CHAIR—Have they been given to this committee through either the estimates process or a previous hearing process?

Senator BARTLETT—You would have to ask the department; I cannot remember.

CHAIR—I would have to check whether they are on the public record, but I seem to think we have had some engagement with them in the process. Dr Mathew, there are no further questions. Thank you very much for your assistance to the committee and for your submission.

Dr Mathew—Thank you.

[2.08 pm]

GIBSON, Mr John, President, Refugee Council of Australia

MERKEL, The Hon. Ron, QC, Practising Member, Victorian Bar; and Representative, Public Interest Law Clearing House

Evidence from Mr Gibson was taken via teleconference—

CHAIR—Welcome. What I intend to do, with your agreement, is invite each of you to address your submissions individually and then members of the committee will ask any questions of you together.

Mr Gibson—I am very grateful for the opportunity, and I think the extraordinary number, range and depth of submissions reflects the value placed upon the deliberations of your committee as well as the scale of opposition to this bill. I would like to add one additional point which I think is only implicit in our submission—that is, the question of legal representation or the absence of it on any proposed offshore facility and the risks of refoulement which would flow from the absence of legal representation assistance in framing claims for refugee applicants. That is implicit but not explicit in what we say.

We obviously repeat what is contained in the submission but there are six very short points I would like to make of some general observations—no doubt you have heard a whole range of different submissions that have been put. First, what is currently partially bad law in the form of partial excision will become wholly bad law in the form of the complete excision of Australia. It involves shifting the burden from our asylum responsibilities to resettlement, with the various doubts about that that are expressed by a number of parties. Second is the context of what we as a council have supported: the process of cultural change in DIMA, which is being implemented. From our point of view, the fact that the department will have the carriage of any process will indicate as a retrograde step.

Third is a general point—I do not know if it has been touched upon—and is the question of turning the clock back to a period which was a highly divisive and dark period of our history, the period during children overboard, of demonisation of asylum seekers and of being economical with the truth, should we say, during children overboard. I think it is a period most Australians would have hoped had ended. There is little doubt that if this bill is enacted those sorts of situations will occur again. The question of public support, whether it impacts on the deliberations of the committee, is still something that is the context in which this bill is sought to be brought into law. We have absolutely no doubt that there is a groundswell of opinion covering a whole range of interest groups and sectors of the community that see this bill as highly undesirable.

The penultimate point is that, by turning a blind eye to the repression that is going on in West Papua, from a refugee point of view, it will impact negatively on refugee flows. It will impact negatively on burden sharing within our region and particularly on Papua New Guinea. We are doing democratic forces in Indonesia no favours by not taking a stand and by enacting this law. Finally, the core position of the council, which is set out in a document that

we can supply after the event, updated August 2004 but has been in place for five years since Tampa, concludes:

> The excision of islands and territories from the Migration Zone cannot expunge Australia's protection obligations to persons who seek protection at such places. Treating people who land in excised zones differently from those who reach the mainland is contrary to the spirit of the Refugee Convention ...

They are the only points I would like to make. Thank you.

Mr Merkel—I make my statement with some trepidation, not knowing what the committee has had preceding us. The structure of our submission is based very much on the parliament's responsibility in relation to the executive government's treaty obligations. The context of the refugees convention was the terrible tragedies that occurred in Europe in the Second World War and the civilised world's response to that in the form of the 1951 convention. Some of the great excesses of that tragedy occurred, for example, at the Swiss border, where refugees were turned away and sent back to Germany. As a result of that, one of the primary obligations in the convention was the undertaking by contracting parties of protection obligations to refugees.

I want to comment briefly on the structure of the convention because the DIMIA submission, which I have had the opportunity to read, slides over a very important distinction. DIMIA is correct in that under the convention no individuals get rights of protection. But that is not what treaties or conventions are about. Treaties and conventions are about government-to-government obligations. Australia has contracted with all of the other contracting parties to give refugees that come to seek protection within our national boundaries the protection of the convention. It is no answer to say that individuals do not have a right under the convention; that is correct. What needs to be confronted is whether the Australian government is in effect repudiating its obligations under the convention. I want to go directly to that.

The DIMIA approach and indeed the explanatory memorandum is that this bill is addressing and implementing our protection obligations, not the contrary. With respect, in our submission we would wish to present an alternative view. At the outset we say that what the proposed bill is doing is repudiating Australia's convention obligations in a substantive way. I will put forward the one example that makes it fairly clear. Under the convention we have agreed to undertake protection obligations to refugees. The convention spells those out. Article 31 makes it clear that part of that process will be a determination of whether a person is a refugee. It is well known in the law that a repudiation of an obligation occurs where one puts it outside one's ability to comply with an obligation. That is exactly what this bill does. Instead of Australia undertaking obligations to the putative or presumptive refugees that come to our land and seeks its protection, it deports them and thereby declines them access to the process that determines their refugee status. That is a clear case of repudiation.

I can give one simple example. If one Commonwealth government sold, say, the National Gallery to A and the next government came in and found it expedient and profitable to sell the same building to B and transferred it to B, it is not breaching any particular term of its contract with A; what it is doing is putting itself outside its ability to ever perform its contract. What we have contracted with other governments is to give protection to the refugee claimants that come to our shores and are refugees. If each government enacted this law, you could throw away the convention because there would be no-one undertaking protection

obligations on the shore within their boundaries. That is the essence of what the convention achieved. All contracting states undertook protection obligations to individuals within those states. So there is a substantive breach by Australia preventing itself from fulfilling its obligations to the persons it will be deporting to Nauru. That is a very serious breach. By declining access you decline protection. These are obligations that we would submit are non-assignable to non-contracting parties. Australia has no arrangement with Nauru or anyone else that anyone found to be refugee will be given protection in Australia or by Australia. We say there is a substantive repudiation.

We also say that there is a procedural repudiation. By that we mean that it is implicit in the convention and it is virtually explicit in article 31 that unlawful arrivals will be given access to our system or a system determined by us that will bind us as to whether they are refugees. We have denied that access and therefore we have repudiated that part of our obligation.

It seems that it is a very important matter that is often overlooked by parties looking at particular aspects of the convention that give equal rights and certain opportunities to those found to be refugees or those described as refugees. But we would wish to place the matter on a higher level and say that this is walking away from the convention. The convention itself allows parties to walk away from it by denouncing it under the process provided for in the convention. So we are in effect doing that, but without following the convention's procedures and without being honest about the consequences of the conduct this country is about to undertake. I do not want to get into the argument of partial excision, because this really covers the whole of the mainland and the whole category of unlawful arrivals by sea.

I want to briefly comment on article 31. Article 31 covers the very situation with which are dealing, saying that refugees coming to a country and seeking protection must not be subjected to penalties. With respect, we would say that mandatory deportation is a penalty. It is involuntary. It involves the use of coercive power to ensure people are detained in Australia until deported. There is a requirement that they go to a location which is against their choice and, within that location, Australia has no contractual or enforceable obligations as to how they are to be treated, merely a declaration by the minister as to his state of mind on a particular state of affairs. We say that, in any person's terms, is penalising those persons for arriving in the way they did. If those kinds of outcomes were offered to Australian citizens, I do not think there would be any difficulty in saying, 'This is a penalty.'

Finally, I would like to say that the procedures we have under Australian law—and I think this comes from some questions asked just previously—with two tiers of executive review and then judicial review, are the standards that we put forward as a civilised country. To compare them with the standards of other countries, it is our respectful submission, is not the issue. If, in the performance of our obligations, we are adopting our standards, then it is a severe denigration of our values that we subject those who should be entitled to those standards to something that is plainly and obviously far less.

This committee and the Senate are the only things that stand between an inerasable stain on Australia's human rights record if this bill becomes law. As I say, the very context in which this bill has come before the parliament—namely, the West Papuans—has chilling reminders of what occurred in the Second World War, when the Swiss returned people who had been persecuted in Germany to Germany. I am not suggesting for a moment that Nauru is a

Germany; it plainly is not. But the principle that this convention was designed to implement—that people will not be turned around at the border because of their unlawful entry but be given the opportunity to be refugees—is being fundamentally undermined by this bill. Thank you.

Senator KIRK—Thank you for very much for your submission, gentlemen. I wanted to take up the question of procedures for review that you mentioned in your last few comments. You said that currently in Australia there is the two-tier review and then of course court review, and none of that is provided for under this bill for the refugees on Nauru. You also talked about the refugee convention. Are any guidelines for the review of decisions set out in the terms of the convention?

Mr Merkel—I feel that I have a bit of an advantage over Mr Gibson! I think I can answer that. My view is that the convention does not deal with the question of what are or are not appropriate procedures. I think that is left to domestic implementation. In Australia, many years ago, we had the DORS committee, which was a very limited procedure. We now have evolved a very established procedure under our own legal framework. I am not suggesting that the convention requires a two-tier review and a judicial review; what I am saying is that the values that we accept for administrative decision making in this country require that outcome because they are our legal values. They are fundamental values in our society, but they are not fundamental values in many other societies.

Senator KIRK—Just to play the devil's advocate here, do you think it is necessary to in fact have that two-tier review—that is, the initial review and then the RRT review followed by judicial review? I am sure that is what you think is required, but would some lesser form of independent review satisfy what you regard as the values you alluded to?

Mr Merkel—I think there might be a reasonable debate as to whether there is duplication in departmental decision-making and then RRT decision-making. If it is more efficient for government processes to have the kind of summary decision that it has allowed at a departmental level but the more structured tribunal decision then that is a more reasonable way of dealing with it. Many cases would be decided at the initial level and the Refugee Review Tribunal is a manageable tribunal. What I would say is non-negotiable in our values—and I mean our legal separation of powers values in our society—would be the absence of judicial review. I think it is well-established that unaccountability in administrative decision-making is a recipe for bad decision-making. Judicial review and accountability is the bulwark between the citizen and the state. That is a very necessary element.

Mr Gibson—Obviously, part of the debate is that, in this particular instance, we are not going to put in place standards that we set for ourselves. As to the question of RRT review, it is quite clear from the Victorian Bar submission and others that it is a very desirable feature, not least because a significant number of refusals are overturned. In relation to the point that Mr Merkel made about the desirability and need for judicial review, it is quite clear that, in the last three years since the High Court handed down the judgments in Plaintiff S157, a significant number of cases have been sent back as a result of some form of jurisdictional error. It is vital that that safety valve and scrutiny be retained.

Senator KIRK—Just on that question as to whether or not in your view section 75(5) judicial review would still operate, in these circumstances given that it is Commonwealth officers, who will be doing the processing of the asylum seeker claims?

Mr Merkel—That is very good question. It was raised in the course of the submission. I would suspect—and I would not want to put it any higher than that—that, if they are exercising functions as Commonwealth officers then there is no reason why geography would protect them from 75(5) review under the Constitution. But if they were acting, for example, as delegates of the Nauru government and they were seconded for that purpose, you get into a much greyer area as to whether what they are doing is as Commonwealth officers. There is a well-travelled body of law. For example, Supreme Court judges exercising power under Commonwealth jurisdiction were not regarded as Commonwealth officers. So it is well-travelled area, but whether this area has been looked at I cannot say off the top of my head. But I think that would be the way in which one could demarcate the issue.

Senator BARTLETT—In terms of the issue of the political context of the decision-making process, we had a bit of a discussion with the last witness which Mr Gibson would not have heard, although Mr Merkel would have, about foreign affairs issues, political considerations and real-world issues needing to be taken into account. What part should those sorts of things play on the determination of people's refugee claims?

Mr Gibson—The view that we have expressed in the submission is that these sorts of considerations are subordinate to our treaty obligations. If the crux is essentially one involving the return of people fleeing from a country like Indonesia then, quite clearly, our obligations in international law treaty terms under the refugee convention should take precedence.

Mr Merkel—Can I briefly supplement that by saying that, to me, the contest is whether we enter into what has been described by some as an appeasement of a neighbouring state and get a short-term gain, where the long-term cost is what I have just described as repudiating our contractual obligations with all of the contracting parties to the convention and undermining our human rights record as a human rights citizen in the world. That, to me, is the contest, and it seems to me that when short-term outcomes are sought to be gained against serious long-term consequences, principle should always win over short-term pragmatism.

Senator BARTLETT—As you know, there have been a number of public comments made by the immigration minister and, I think, by other government ministers that Australia should not be used as a staging post for people's beliefs or concerns about overseas countries or their country of origin. In regard to West Papuans, the immigration minister wrote:

> It is the Government's strong preference that protection is not offered in Australia to Papuan separatists.

I am wondering, in regard to the refugee convention and the law as it currently stands, whether or not the political views of an asylum seeker regarding the situation in their home country—whether they be on independence or anything else—are appropriate to take into account when assessing an asylum claim?

Mr Merkel—The test of whether they are a refugee is whether they have a well-founded fear of political persecution in their country of nationality, so everything that is relevant to

that must be relevant to the inquiry. But they cannot be disqualified from access to the convention by reason of their political views. What I find surprising in the DIMA submission is that on page 2, about 10 lines down, DIMA accepts that it is open to Australia to make different arrangements to address its refugee protection obligations. It acknowledges that we have protection obligations to those who fall within the convention. It is not a question of what their political beliefs are and whether we like them or not; it is whether they have a well-founded fear of persecution because of their political beliefs. We would say that is a very fundamental issue under the convention.

Mr Gibson—I could add that once someone does receive protection, they are entitled to the same freedoms that Australians have. In terms of the refugees convention, as Senator Bartlett has suggested, there are provisions for people who have committed certain acts or engaged in activities such as crimes against humanity, acts contrary to the purposes of the United Nations or war crimes to be excluded from the protection of the convention. That is the limit that should apply and that is applied appropriately by DIMA and by the AAT and that is the limit on any restriction that there should be on somebody who, for example, comes and wishes to articulate within the laws of Australia their opposition to the country from which they have fled. History is littered with countless examples of immigrant groups who have quite properly articulated their concerns about the regime or government from which they have fled.

Senator BARTLETT—Have either of you had experience with any of the asylum seekers who came to Australia from East Timor in the early nineties and had difficulty getting their claims even assessed?

Mr Gibson—I was, interestingly enough, one of the few RRT members who made a favourable decision before the issue of dual nationality arose, which, as you will remember, led to considerable delay in the processing of East Timorese claims. It is quite clear that those people were left in limbo for a considerable period of time essentially for reasons beyond their control.

Senator BARTLETT—Is it your view that the foreign affairs issues or political dynamics of the time had a fairly strong influence on the stance that the Australian government took towards those East Timorese in refusing to assess those claims?

Mr Gibson—I do not intend to undermine the independence of the Refugee Review Tribunal, but my recollection is that political considerations certainly played a role in the dynamics of the process. I think the preferred course would of course have been that the East Timorese be treated as Portuguese nationals and then have gone to Portugal. That would, in a sense, have removed one of the potentially significant sources of friction with Indonesia.

Senator BARTLETT—This was under the Labor government, I should hasten to add before my Liberal colleagues on my right accuse me of being partisan.

Mr Gibson—Actually, it was over both periods.

CHAIR—You should not have stopped him, Mr Gibson; he was just trying to be constructive!

Senator BARTLETT—In terms of the public interest law role, I have one wider question that concerns me. In your wider role than just that regarding refugee and immigration issues, in terms of the principle, from a public administration point of view, of Commonwealth officers being able to make decisions and determinations without any scope for review of those decisions or indeed any transparency involved at all, I am wondering whether that raises concerns for you in respect of the public administration side of things and the encouraging of those sorts of practices being adopted more widely.

Mr Merkel—I think it depends on context. For example, a reference was made to Angola. If Angola sought Australia's help to send some officers to assist them in refugee processing, the fact that there may not be a review process in Angola would not necessarily undermine the bona fides of Australia assisting. But I think it is a very different question in terms of DIMA and how we are addressing Australia's refugee obligations. There is simply no basis in principle for denying anyone who is seeking access to our refugee protection the culture, the legal system and the review process which has been set in place for very good reasons. So it is in that latter situation that I would say we are undermining the integrity of our system when we use our officers in an unreviewable, unaccountable way to determine what our obligations are to be.

Senator TROOD—Mr Merkel, I just wanted to pick up on something that you said in your opening remarks—and Mr Gibson, if you feel you want to respond, please feel free to do so. Mr Merkel, as I understood it, you put the case eloquently, if I may say so, to say that in your view Australia was repudiating its obligations under these various conventions. But these are minimalist requirements, as I understand it, in the conventions. They do not require the fairly elaborate arrangements that Australia has had in place in the past for dealing with these asylum requests. The Australian government are taking responsibility for the housing of refugees. They are taking responsibility for feeding them. They are taking responsibility for the assessment of the refugees' claims. They are taking responsibility perhaps in the end for their resettlement. Why, in your view, does that not meet the obligations that exist under the various conventions?

Mr Merkel—It is for the simple reason that, once a person is found to be a refugee, they get access to most of what is available to other Australian citizens. But the question of repudiation arises because we are denying them access to that process. We are throwing them outside the system of our protection. We have no basis for offering anyone who is found to be a refugee in review to return to Australia for Australia's protection. So, by declining access, we have declined the facility of protection. We have prevented ourselves from fulfilling or ever getting to the stage of giving protection to these particular persons who are deported. So we have repudiated the convention—not just one clause or another clause but the convention itself.

What is important in this process is the recognition that this bill and the minister's declaration do not say that persons found to be refugees in offshore processing will be entitled to Australia's protection in Australia. If that were the case, it would be an argument about whether there should be onshore or offshore processing. Their views might differ but that is not really the point here. We have not undertaken any protection obligations to any person found to be a refugee in Nauru. We have thrown them into the black hole. Where they go from

Nauru and what might happen to them, whatever they are found to be in Nauru, is something that Australia has wiped its hands clean of. That is why we have walked away from the convention. That is why I said that, if each convention party enacted this law, the convention would be set at naught overnight because no-one would accept protection obligations. We are passing the buck, but to whom we do not know. That is unacceptable.

Senator TROOD—I see that point, but we are taking them into our care to process them. You are right, the minister has said that she has a strong preference for resettlement elsewhere. But, as I understand it, she has not said, 'They will under no circumstances be permitted to come to Australia.'

Mr Merkel—She has not said that, but the point about it is that under this convention contracting parties have agreed with each other to give protection to those meeting the definition of refugee that come within their shores. That is why I pointed to DIMA's submission as to how Australia addresses its refugee protection obligations. We have, by the minister's speech, made what is an obligation, and DIMA recognises it to be an obligation, a matter of the minister's discretion. As I said, if others did that, the refugees would be floating around in a no-person's-land and we would be back to the very circumstance that led to the creation of the convention. That is why I say that it is really a very fundamental point. It is not a matter of looking at article 31 or article 19; it is looking at what is the gist of the substance of the convention.

Mr Gibson—I have two or three points to make. The first is the point about creating two classes of refugees based on the mode of arrival. The second point is, essentially, the one that the UN High Commissioner for Refugees made about this being probably one of the first instances, apart from situations of mass influx, where a state with a fully functional credible system is deflecting its responsibility to another country, but they are claims that are made on its territory. But there is the additional compliance in relation to standards. We are not adhering and we will not be adhering, notwithstanding what you said, Senator Trood, about obviously some standards of detention, food, care and what have you. It is quite clear from our own experience over the last three years, as reflected in the return of 25 failed asylum seekers, that the effect of long-term or medium-term detention of people is deleterious, and the minister herself acted upon medical advice last year to bring those people to Australia. There is no time limit set. As we know, there is no guarantee of any form of resettlement. It certainly did not occur except in a very minor away under the first Pacific solution. It is no answer to say that there are liberal conditions of detention when you are dealing with, for example, children in detention, given the standards we set for ourselves within our own legislation.

Senator TROOD—Mr Gibson, do you want to hold us to the standards that we establish within our own society, rather than the relative standards which might apply elsewhere in the international system?

Mr Gibson—It is always a very difficult question to ask, 'What is the correct balance?' But, on any view, we are effectively applying at the very least a significant double standard by, essentially, determining that people who arrive in a particular way should be treated in an inferior system with all the consequences that we have discussed.

Senator TROOD—Mr Merkel, I have one further question. Would it be true to say that many of your anxieties about it might be alleviated if the Australian government were to be rather more open and relaxed about the possibility of some of these people, were they to come, were they to be assessed, were they to be eligible, being resettled in Australia?

Mr Merkel—I think it would be fair to say that the submissions we have made about repudiating the convention in a substantive way would be undermined, or rectified, if I can put it more attractively, by Australia undertaking protection obligations to any person found to be a refugee by the offshore processing. That would make Australia perform its protection obligations and perform its convention obligations by an offshore rather than an onshore processing method. That is its choice under the convention. What is not its choice is to deny protection to someone who would otherwise be entitled to it, because those people are Australia's responsibility. It is not just a matter of being more sympathetic to resettlement; it is a matter of undertaking the obligation for resettlement and saying, 'We'll do that by an offshore processing system.' If Australia did that it would probably set up its procedures and its standards for that offshore processing because it would not want to be caught between two stools. That would certainly rectify our objection about substantive breach, but it would not deal with the other matters which we have outlined in our submission.

Senator TROOD—That is helpful. I doubt that would rectify your concerns, Mr Gibson.

Mr Gibson—No. We have indicated, and I think other speakers have probably indicated as well, all the elements in the mix, including legal representation to enable people who often do not have the means to properly frame their claims within the convention a proper degree of independent review. As I said—for the reasons I think Mr Merkel and I earlier mentioned—the overarching scrutiny of the court system to rectify errors, remembering at all times that article 33 is the engine room of the convention and we have to avoid at all costs the risk of refoulement, is the whole purpose of the convention. That is clearly indicated, for example, by the West Papuan situation.

CHAIR—We will go to Senator Nettle. We are slightly constrained for time but Senator Nettle and I talked about that.

Senator NETTLE—I wanted to ask a question of Mr Gibson. You made reference in your opening statement to the impact of this legislation on PNG and in your submission you speak about the impact on PNG with regard to Australia not taking steps to address the human rights situation in West Papua. I wanted to draw your attention to comments this week by the foreign minister of PNG in which he spoke about the resources and the capacity of PNG being stretched by this proposal and to ask you more broadly if you wanted to comment further on those two ways in which you thought this legislation would impact on PNG.

Mr Gibson—That is not surprising in the sense that Papua has, as I think was discussed earlier, significant difficulties of its own. As we state in our submission, it has been the country's first asylum for more than 10,000 refugees from West Papua who are essentially confined to areas close to the border, which involves the risk of incursions by militia from West Papua. By these steps we are not actually saying to the Indonesians that they should put their own house in order and should move to cease repression and to essentially put in place human rights standards within West Papua. If that does not happen then there will be added

pressure on PNG and probably a country least able to, as it were, sustain and look after refugees will have an added burden, because unless the situation in West Papua improves there will be a further flight of asylum seekers. It is certainly not consistent with our duties as an international citizen, as a good neighbour and as one of the major supporters of the convention.

Senator NETTLE—You also made reference in your submission to pressures being placed on Australian defence forces, Navy and coast guard in particular, with regard to intercepting and turning around boats. I wondered if you could comment on what kind of interview and assessment process you think would be necessary in order for the Navy not to find themselves foul of conventions by returning people who require protection.

Mr Gibson—Even before it gets to that stage, there is a serious concern about the rules of engagement and the extent to which our naval forces will be asked to assist the Indonesian navy. If, as we have said, we provide intelligence and information and boats are actually turned back, that is a direct contravention of article 33. As you remember during the period of Operation Relex, there were rules of engagement that essentially required the Navy, irrespective of whether claims were made, to tow vessels out to the open sea. I heard the tail-end of Dr Matthews, and she was making that same point.

With regard to the extent to which the Navy is equipped to make this sort of assessment, obviously it is not. What should be absolutely clear is that we should provide no assistance at all to turn people back. If they came into our care, they should be treated and their claims should be received. As we have indicated, we oppose this bill in its entirety and, essentially, we should not be placed in that position as a country and nor should our armed forces.

Senator NETTLE—Mr Merkel, in paragraph 7 of your submission, you talk about the driving force behind the bill and the West Papuan asylum seekers. You then go on to say that it is not a bona fide implementation of Australia's protection obligations and is a violation of the convention. Can you please explain that point a bit more?

Mr Merkel—Yes. The genesis of the bill is the political issues that arose from the 42 West Papuans getting refugee status in Australia. The initial political announcement, if I recall correctly, was that we must address this system. It was directed at the West Papuans. It was obvious that you could not discriminate against one group, so we ended up with a bill that discriminated against all groups. Whatever may be said on the print of the paper, the bona fides of this legislation is clearly driven in convention terms by unacceptable discrimination against political refugees who fall into a particular group. It is for that reason I used the Swiss example in the Second World War. Switzerland was determined to maintain its neutrality with Germany. It saw that neutrality as being compromised by accepting Jewish people, political refugees and others. It turned them back at the border. We have set out that there were some 28,000 to 30,000 people. That was the genesis of the convention. If they rejected everybody, including these refugees, it would still lack the bona fides, so by being on the surface equal in treatment of all but being motivated by the West Papuan problem, what you are doing is not implementing your obligations in a bona fide way. It is the problem that form can never triumph over substance, and that is what this bill is seeking to do.

Senator NETTLE—On paragraph 39 of your submission, you refer to a quote by the president of the Human Rights Commission about whether being held in an offshore detention centre was a form of detention. Is it the view of the organisations that you represent that the proposition to hold people in offshore centres is considered to be detention?

Mr Merkel—Yes. We take a slightly broader view and that is that the detention starts with apprehension as an unlawful non-citizen. They are required under the law to be placed in mandatory detention in Australia. They are then placed in involuntary detention, because they do not volunteer to go to Nauru or Papua New Guinea; they are being compelled by the use of coercive force to another location where their freedom will be circumscribed. There is nothing in this bill and nothing in the second reading speech I have seen that says that their freedoms will not be circumscribed and that they will be free in these countries to go and leave as they please. Those legal restrictions or impediments taken globally and together are undoubtedly a form of detention.

Senator NETTLE—I have one more question. In paragraph 10 of your submission, the last sentence says:

It is no answer to that proposition to contend that the Bill also discriminates against other refugees.

Was that referring to the comments in the second reading speech in which the government sought to justify the legislation by saying it removed discrimination?

Mr Merkel—It does discriminate against offshore refugees as opposed to the ones who arrive onshore. In our submission we have said that there is no rational basis for that kind of distinction, particularly given the statistics, which show that offshore refugees seem to have a higher rate of refugee status findings than onshore. But, yes, it does relate to that and also to the point that I made about the West Papuans.

Senator NETTLE—Thank you very much.

CHAIR—Mr Merkel and Mr Gibson, thank you very much for appearing today. Mr Gibson, thank you for going to these ends to make sure that we were able to hear from you and receive your submission.

Mr Gibson—I am very grateful for the opportunity. Thank you.

Mr Merkel—Madam Chair, I thank you, on behalf of the bar and PILCH, for the very fair and reasonable hearing we have had before this committee.

CHAIR—Thank you very much for coming to Canberra for the hearing.

[2.56 pm]

BICKET, Ms Robyn, Chief Lawyer, Legal Division, Department of Immigration and Multicultural Affairs

CORRELL, Mr Bob, Deputy Secretary, Department of Immigration and Multicultural Affairs

HOITINK, Mr Robert, Assistant Secretary, Border Intelligence and Unauthorised Arrivals Branch, Department of Immigration and Multicultural Affairs

HUGHES, Mr Peter, First Assistant Secretary; Refugee, Humanitarian and International Division, Department of Immigration and Multicultural Affairs

ILLINGWORTH, Mr Robert, Assistant Secretary, Onshore Protection Branch; Refugee, Humanitarian and International Division, Department of Immigration and Multicultural Affairs

PARKER, Ms Vicki Louise, Acting Assistant Secretary, Legal Framework Branch, Legal Division, Department of Immigration and Multicultural Affairs

CHAIR—Welcome. The department has lodged a submission with the committee, which we have numbered 118. Mr Correll, do you need to make any amendments or alterations to that submission?

Mr Correll—No.

CHAIR—I remind senators that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of the department are reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. Mr Correll, do you wish to make an opening statement?

Mr Correll—Yes. I have a relatively brief opening statement. I will work through that.

CHAIR—Thank you.

Mr Correll—Australia's offshore processing arrangements were introduced in October 2001. The refugees convention does not prescribe how states should give effect to their international obligations nor any particular process to use in deciding who are refugees. These are matters for states to decide. The offshore processing arrangements draw on this flexibility to remove certain unauthorised arrivals from Australia to another country for appropriate processing and arrangement of protection, if needed.

The planned legislative changes widen the class of unauthorised arrivals covered by the existing offshore processing arrangements but otherwise largely apply the existing scheme. The proposed changes effectively eliminate the distinction between unauthorised boat arrivals at an excised offshore place and those who reach the mainland. The offshore processing

scheme will apply to all designated unauthorised arrivals, irrespective of their race, religion or country of origin. Offshore processing is an administrative measure and does not impose a fine, prosecution or imprisonment or other such penalty on asylum seekers on the basis of illegal entry.

Specifically, article 31(2) of the refugee convention allows signatory states, where they consider it necessary, to detain unauthorised arrivals who may be refugees until their immigration status is regularised in that country or they are admitted to some other country. The offshore processing arrangements give effect to these state rights in a way which ensures that asylum seekers are removed only to countries where appropriate protection and refugee assessment arrangements are in place.

Further, the offshore processing arrangements do not constitute penalties on account of illegal entry within the meaning of article 31(1). Material available at the time of negotiation of the convention indicates that the reference to penalties in article 31(1) was intended to be with regard to criminal and civil penalties or sanctions that would ordinarily be imposed for illegal entry to another country. This view is supported by leading academic commentators on the convention.

Offshore processing centres are not detention centres, and conditions of movement are determined by the respective governments of Nauru and Papua New Guinea. Offshore processing centre residents in Nauru are not held in detention but reside legally in Nauru, holding a visa granted by the Nauru government, subject to certain conditions. The arrangements will ensure that all designated unauthorised arrivals will have access to an effective refugee determination process, including an opportunity for review. These arrangements will continue to comply with the accepted, non-binding international standards suggested for refugee assessment processing. People handled under offshore arrangements will also be protected from return to their homeland if they are found to be refugees.

Under the existing arrangements, 1,515 people have been accommodated in offshore processing centres. Of those, 1,509 have had their refugee claims assessed. Each claim was assessed on its own merits; the case load was shared by Australia and the UNHCR. The overall refugee approval ratings for Australia's case load was 66 per cent, which compares favourably with 64 per cent for the UNHCR. Importantly, not one person found to be a refugee was returned to their homeland against their will.

The Australian offshore refugee assessment process was modelled closely on the process used by the UNHCR and was developed in close consultation with that organisation. Assessment of refugee claims on Nauru has been undertaken by both UNHCR and the department. The assessment processes to be undertaken by Australia are not set down in the bill but, rather, are administrative matters developed and implemented by the department.

The refugee approval rates on Nauru compare well with rates in Australia for similar case loads. As detailed in our submission, Australia's onshore protection approval rates are also comparable to and frequently more generous than the refugee approval rates in comparable European countries. The time for processing refugee assessments and making any resettlement arrangements at overseas processing centres also compares favourably with the times for assessment and refugee resettlement in other locations. For example, 41 per cent of

persons in offshore processing centres spent less than 12 months in the offshore centres, and 81 per cent spent less than 24 months in the centres. This can be contrasted with the experiences of many other refugees around the world. For example, 38 per cent of people resettled in Australia under the offshore humanitarian program spent over two years in a refugee camp environment, 24 per cent spent more than six years in a refugee camp and 15 per cent of the humanitarian program intake had spent 10 years or more in a refugee camp awaiting resettlement. I thank the committee for the opportunity to make a statement.

CHAIR—Thanks very much, Mr Correll. Has the department been monitoring the evidence the committee has been receiving today?

Mr Correll—Yes, we have.

CHAIR—That is a good start. It is not always able to be the case, so that is helpful. Also, I will flag with you that the committee is convening again in Sydney on 6 June. At this stage we have not identified the department as a witness for that hearing but, depending on what emerges from this afternoon and the committee's deliberations, the department may be invited to appear in Sydney.

Senator LUDWIG—In terms of the processing of asylum claims, what do you mean by saying your process is 'modelled on the UNHCR'?

Mr Hughes—I will start by reinforcing that the convention does not lay down any particular requirements about how states should determine whether a person meets the convention requirements or not. The only piece of public information about standards is a UNHCR Executive Committee conclusion, which dates back to 1977, which is non-binding and talks about the kinds of practices that might be used by states to determine refugee status. We believe that the process that has been set up for the offshore processing centres is in accordance with these non-binding suggestions for a model process. In relation to your question about UNHCR and how the procedures were developed according to a model that UNHCR follows, I will ask my colleague Mr Illingworth to answer that specific point.

Mr Illingworth—In dealing with the first groups of people taken to the Nauru offshore processing centre, the UNHCR had agreed to conduct refugee assessments for some of that group, and the Australian government had undertaken to provide refugee assessments for the balance of the group. As a result, the department consulted frequently and closely with UNHCR regional office officials at the time so that we could develop a process which mirrored as closely as possible the administrative process which would be used by the UNHCR on Nauru to process its case load. This was done through a succession of meetings and the exchanging of documentation, including correspondence, consultation on how and when communication with the case load about the processing of their claims would occur and coordination right down to issues of the timing of hand-down of decisions. There was a concern at the time to ensure that individuals going through the processes did not have a feeling that some people were being treated differently from other people, so the processes were aligned. As I understand it, the process that we modelled our process on was the process which UNHCR uses basically around the world to conduct refugee assessments in other environments.

Senator LUDWIG—Do you have a copy of the model you intend to use?

Mr Illingworth—I believe it is on the public record, but we can certainly give it to you now.

Senator LUDWIG—When you say that you believe it is on the public record, I am not sure what you mean.

Mr Illingworth—I believe it was tendered in evidence to a previous committee inquiry some years ago.

Senator LUDWIG—We have no way of knowing whether that is what you are going to apply now, do we?

Mr Illingworth—Until such time as there is any decision to change the model, this would be the model that would remain in force. We will provide it.

Senator LUDWIG—But we only know that now that you have said that.

Mr Correll—We can provide that.

Senator LUDWIG—How do you intend to provide educational services, mental health services, health services and the like to children in offshore processing centres like Nauru? Will they be equivalent to what you provide in onshore facilities in Australia, such as at the Baxter detention centre?

Mr Correll—In looking at services such as health and education, we have a senior officer on Nauru at the present time who is involved in discussions with government officials there looking at the range of services to ensure that those services are available, supported and accessible through IOM to people who are having their claims processed on Nauru. So the answer to that is, broadly, yes and the types of standards we are looking at, subject to govern considerations of the policy settings, would be based around similar situations applying in Australia.

Senator LUDWIG—Applying where in Australia? To what standard?

Mr Correll—To the types of standards that are used in facilities in Australia, whether people are in the community or in facilities such as Baxter.

Senator LUDWIG—In terms of the record of Nauru for instances of mental health problems and the like, have you investigated those previously and provided a report to this committee or others?

Mr Correll—I would need to check whether we have investigated and provided a report. I am not sure whether any of my colleagues are aware of that. We would need to check whether any report has been provided in the past in that area.

Senator LUDWIG—Have you had a look at the area of mental health issues in Nauru at all?

Mr Correll—Certainly. We have had visits by specialists to Nauru. We have a focus on the services that are being delivered. Indeed, the officer who is on Nauru at the present stage is obtaining advice through our specialist detention health services area in terms of the types of support services that need to be available there.

Senator LUDWIG—Can you say whether or not there have been any incidences of people whose mental health has been negatively affected—I suppose you would call it that—because of their detention at Nauru? In fact, whether or not they were detained.

Mr Correll—People who are on Nauru are not in detention. They are residing on Nauru under conditions established under special visa arrangements with the Nauru government. We do monitor very closely health issues and mental health issues for any of the persons on Nauru. Services are available in that area through IOM, who are providing and facilitating those services on Nauru.

Senator LUDWIG—Do you have reports from IOM regularly about what issues arise in mental health and what the population's incidence of mental illness might be as a consequence of the special visa residency?

Mr Correll—We will periodically have issues and reports brought to our intention from IOM on individual cases. We will also initiate follow-up action ourselves on individual cases where we are aware of persons who may have particular issues with mental health.

Senator LUDWIG—What do they say? I did not want to make the allegation unless you were able to provide a report, but that does not seem to be available. But it seems to me that many of the reports are highly critical of the impact of detention on the mental health of detainees, including the special class visas because of their residency. Is that right?

Mr Correll—We receive reports on persons on the processing centre on Nauru. I would emphasise again that they are not detainees or in detention. Those reports will comment on the particular individual's mental state, the prognosis for the future and appropriate action. Often those individuals have experienced highly traumatised previous life circumstances and there are many factors that are contributing to their mental health condition.

Senator LUDWIG—You have not really answered the question, in a sense. Are you able to say whether or not there are significant instances of mental illness for the detainees because of the detention and because of the special class visa residency requirements imposed by the immigration department?

Mr Correll—I would avoid making a generalist comment in that area. I think it has to be considered on a case-by-case basis and on the circumstances in each case. Certainly, individual circumstances that may relate to a person's presence on Nauru may contribute in one case in an assessment of mental health considerations. But I do not think one can make a sweeping statement or generalisation in that area.

Senator LUDWIG—In fact, I did not want to. I wanted to know whether you have actually yet done any assessment or considered whether there is any impact of the detention on a person's mental state or whether in fact you have taken into consideration what these measures will do or how they will impact upon particularly vulnerable groups such as children, family units, women and some men.

Mr Correll—My answer to that question would be that we do take that into consideration and we do have a close focus on the health and mental health circumstances of individuals on Nauru. We monitor those cases closely and there are specialist services available on Nauru to support those cases. We do have a very close monitoring role. But the monitoring is always

very much on a case-by-case basis because of individual circumstances, which are very different and often need to be handled in different ways.

Senator LUDWIG—Are you able to provide any statistical information to the committee about how many cases have been opened, what the type of mental illness might have been and any other matters that would arise? I am sure you have kept that type of information—in fact, I am positive that you have. Is that available to the committee?

Mr Correll—I would need to take it on notice. We would certainly have information in that area. We would just need to check on its format. I do not have it to hand immediately, but we could take that on notice.

Senator LUDWIG—Perhaps you have already done this, but could you compare it with statistical norms that exist in Australian cities or even statistical norms, if that is the right word to use, that exist in other detention facilities in Australia? I am sure that you have already checked that to see whether or not they deviate significantly from the norm. I imagine that you would do that, quite frankly, to ensure that you are providing a safe environment and looking after the welfare of these people that you have sought to detain in offshore facilities.

Mr Correll—We are acutely interested in the health and welfare of people that we are working with through IOM on Nauru. I would make a point on your comments in relation to detention centres on the mainland and how the mental health issue would relate to overall Australian standards and norms in that area. The issue that needs to be remembered is the point I made earlier. People in detention centres on the Australian mainland normally have experienced a background that has involved significant trauma and it is not necessarily a background that is consistent with the total population.

Senator LUDWIG—On page 6 of the submission No. 117 in the third paragraph on IOM, it says that the issues of mental health do not mean a lot when you look at whether it is appropriate to be on Nauru for the treatment. If there are issues, what do you do? Do you leave them there for treatment in Nauru or will you remove them or bring them to Australia for appropriate treatment if there are issues that arise?

Mr Correll—It would depend on the specific circumstances in the case. There are services and hospital facilities available on Nauru. In particular cases it may be necessary for the individual to be relocated to the mainland. Is a question of what the nature of the issue is and the nature and availability of the service that needs to be accessed.

Senator LUDWIG—Isn't that what happened to the last 27 persons who were detained on Nauru? Because of issues of the impact of Nauru, it was recommended that all but two of them be brought to Australia. As I understand it—I am sure you can check—there was a report to Mr Govey.

Mr Correll—Of the last group of 27 on Nauru, 25 have come to Australia. There are two individuals remaining on Nauru. Are you referring to the two individuals?

Senator LUDWIG—The fact that you brought 25 back and left two there. How long have they been there now?

Mr Correll—It is over four years.

Senator LUDWIG—And the longest in an Australian onshore facility?

Mr Correll—In an Australian detention facility, it would be approximately 3½ years.

Senator BARTLETT—In your opening statement and I think in your submission you refer to refugee approval rates on Nauru comparing favourably to here. Is that assessment made in terms of the end result or initial primary assessments?

Mr Hughes—In both cases it probably compares favourably. If we look at the situation with the particular case load on Nauru which, as you know, are Iraqis and Afghans, the situation was very volatile in those countries through the period of time people were there, with major regime changes in both Afghanistan and Iraq. That certainly affected onshore decisions in terms of where the initial decisions went on refugee status and where subsequent decisions went as country situations changed. So there was quite a volatility over a period of time. That equally applied to the cases in Nauru. As you will recall, there were many occasions where, of those people not initially approved, a number of them—several hundred—chose to return home voluntarily. But of those that remained, their cases were reopened several times as country information in Afghanistan and Iraq changed dramatically over a period of years. So there were initial figures that were comparable to UNHCR, as we mentioned. And if we look at the end result, after the subsequent reviews, it was certainly comparable to the situation in Australia.

Senator BARTLETT—You might like to take this on notice, given the time constraints. There is a submission from Ms Marion Le which I think has only just been made public—I have just seen it on the web and it was not there half an hour ago, so you might not have read it yet. It contains material that I am sure is quite familiar to at least some of you at the table and I am sure you are aware of the work she has done in this area. At pages 7 and 8 of the submission she contrasts the different results for Iraqis who were claiming onshore in 2001-02 and Iraqis who were being assessed offshore, predominantly in Nauru, in that period of time.

She gives the example of 28 cases presided over by RRT members, all but one of which overturned the original DIMIA rejection, and then contrasts that with the process that was followed in Nauru. If you go to the end result I suppose they were all accepted, but that was in 2005 rather than 2002. She specifically talks about emails sent around to state directors by a person in central office, a DIMIA officer, to sign but not date their decisions about people's claims until they received a document from onshore protection about imputed political opinion in Iraq, which seemed to then be pivotal in the rejection of most of those decisions. I do not know if you are aware enough of those claims to make a response to them now or whether you could respond to them on notice.

Mr Hughes—I think it might be better, since we have not had access to that document, to respond to that on notice and make sure that we are comparing like with like. In relation to our assessments of Iraqis on Nauru, we were assessing some of those cases and UNHCR was assessing some of them. At one point, when we were doing successive reviews following change of country information, UNHCR declined to assess some of its cases and asked us to do the assessments instead—asked Australia to do the refugee determinations on some of the cases it previously had responsibility for. In terms of their view of the assessments we were making on Iraqis, they had enough confidence in the work we were doing to ask us to look at cases that they had previously taken responsibility for. I saw that as a sign of confidence on

their part, not lack of confidence. We will look at the exact statistics and provide you with an answer.

Senator BARTLETT—One of the issues that has been expressed in many of the submissions is the lack of an independent review of a decision. If there is a review, it is done by another departmental officer. In the material put forward by Ms Le—and it is relevant that it is from her because she is the one who, as you know, has worked on the vast majority of cases of people who were on Nauru for a long period of time—she makes a range of allegations about what she discovered when she finally got hold of the files. She was requested to eventually act for 284 asylum seekers.

The first point is that it took her 16 months to get all of the files so that she could assess what it was that needed reviewing. She found examples of assessments being made on the basis of untested dob-in material and apparent decisions that contained merged material from two different people in the one file. There was a case of somebody being refused because their identity got mixed up with somebody else. There was another case where she provided large amounts of new material for reviews by the department that appeared not to be taken into account in the reviews and not even included on file. Again, you would be aware of the sorts of concerns that she has raised.

Mr Hughes—Yes. Your initial statement was about the number of cases she was involved in; I think it was actually quite a small number of the total number of cases on review. Do I understand you to be saying that she was involved in a significant number of the long stayers as opposed to a high percentage of the total population? I think the figures I had were that she was involved in about 10 per cent of the cases on Nauru.

Senator BARTLETT—She did not get involved until 2003, after people had been there two years.

CHAIR—I think it is difficult for the department not having Ms Le's submission, which I have not seen in full. I do not know whether this is the best way to advance our discussions this afternoon. My only concern is about the time.

Senator BARTLETT—I appreciate that and I understand, but they are pretty damning claims of serious problems in the competence, let alone the content of assessment, which are unreviewable. It was only by a range of circumstances that they became reviewable last time around. Could you respond to that as soon as possible in terms of the specific criticisms and what things may have changed to prevent them happening again. I asked questions at estimates a couple of days ago about access to advisers. Was the department able to give a guarantee that anybody on Nauru who sought to have access to an adviser, whether a lawyer or migration agent, would be able to have access to them?

Mr Hughes—I think I may have answered that question at estimates. I think the position from our point of view was that we had no objection to people having an adviser assist them in their work and, as I understand it, that when advisers sought to become involved in the latter stages of the caseload on Nauru they were given access by the Nauru government to go there for that purpose.

Senator BARTLETT—Without revisiting all that, we would seek as strong as possible a guarantee. It is nice that you do not have any objection, but we would like to make sure that it

will actually happen and also that it will happen at the start rather than just when things get difficult two years down the track. Can you give any stronger indication that that will occur at the start?

Mr Hughes—As I said, at the moment there is no caseload but, should there be one, we would have no objection and certainly would not be seeking in any way to stop anyone having access to an adviser. I know, Senator, that, in the context of Senate estimates, you raised the question of whether some positive assistance could be given in terms of advisers for any cases that go there and claim protection. That is clearly something the government can choose to take up if it so wishes.

Senator BARTLETT—Can you confirm that last year some permanent protection visas were provided to a number of people who travelled to Australia directly from a part of Indonesia, Ambon, and made a refugee claim?

Mr Hughes—Yes.

Senator BARTLETT—Were any concerns expressed by the Indonesian government that you were aware of about those protection visas being granted to people coming directly from Indonesia?

Mr Hughes—That particular caseload, as you know, were in Australia for some years on safe haven visas. It is quite possible that at some time during that process, during the time they were in Australia, concerns were expressed. I cannot say definitively whether they were or they were not over that whole period of time.

Senator BARTLETT—Is that able to be taken on notice?

Mr Hughes—It is.

Senator BARTLETT—As I understand it, those people, through all the period they were here, were not in detention at all or, if they were, it was for a very short period of time and then they were out in the community on safe haven visas with work rights and a range of other things. Why did we take that approach with people that came here directly from Ambon and we are not going to take that with others that come from another part of Indonesia?

Mr Hughes—I was not involved at the time the initial decision was made to offer safe haven visas to that group of people so I cannot comment on why that choice was made, and the choice that has been made recently is a matter of government policy.

Senator BARTLETT—Is Operation Relex still happening in the northern waters?

Mr Hoitink—Yes.

Senator BARTLETT—So we are still in a situation where Australian officers, whether they are from Defence, Customs or other organisations, may intercept a boat and push them back?

Mr Hoitink—Yes, there would remain a whole-of-government effort in respect of protecting the Australian borders more generally.

Senator BARTLETT—If there is a potential to push people back before they actually get to any part of Australia and then presumably engage this bill in some way, shape or form, would that still be an option that the government would pursue?

Mr Correll—If there was any evidence or suggestion of any asylum claims then such action could not and would not be taken. Such action would be overseen by a group called the People Smuggling Task Force, which is an IDC with representation across a number of agencies. That task force looks very closely to that issue before any action is taken to turn around a boat.

Senator BARTLETT—So that is different from what happened in 2001, when the people who were seeking asylum did not matter. Now, if there is any feeling they are seeking asylum, will they be allowed through?

Mr Hughes—The situation in 2001 had to do with people who were coming to Australia as secondary movements—it was not a question of first flight—and there was a possibility of returning them to Indonesia, where arrangements had been made for them to be looked after and for them to stay while any protection claims were heard there. I think the situation is different for any people who might be coming to Australia from a neighbouring country as a matter of first flight.

Senator BARTLETT—The Commonwealth officers—DIMA officials and the like—who go to Nauru to make assessments will still be under the jurisdiction of the Commonwealth Ombudsman, I presume?

Mr Correll—At this stage, my understanding is that they would not be.

Senator BARTLETT—Who would they be acting for while there were there? The Ombudsman oversees the actions of all Commonwealth officials, regardless of where they are, I presume.

Mr Correll—I will stand corrected by my colleagues, if necessary, but my understanding is that the Ombudsman's jurisdiction does not extend to processing on Nauru.

Senator BARTLETT—Okay. From my reading of a lot of things, it seems that this applies to people who arrive unauthorised predominantly by boat as opposed to people who fly in on commercial airlines, for example. I know it is very difficult these days to get on a commercial airline without proper documentation, but I presume there are still a small number that manage to do that. Will they still be treated differently if they manage to do that?

Mr Correll—The essential reason for that is that people coming in via aircraft are covered through the layered border security system for the country, including our advanced passenger-processing systems. Therefore, the detection in that area is far more sophisticated than is possible for arrivals by boat, and that is the primary reason for the differences—the quite sophisticated techniques that are in place for air arrivals.

Senator BARTLETT—But do people get through?

CHAIR—Was that a yes, then, Mr Correll? They will be treated differently?

Mr Correll—Yes.

Senator BARTLETT—Maybe on notice, could you give me an indication of how many people have arrived via that method in the last 12 months?

Mr Correll—Yes, we will take that on notice.

Senator BARTLETT—Thank you. You mentioned Papua New Guinea and its having ratified the refugee convention. Isn't it the case that PNG has reservations on seven different parts of the refugee convention, including article 31, which you quoted a couple of times in your opening address?

Mr Hughes—There are reservations on a number of aspects of the refugee convention, as you have mentioned, including on article 31. However, our understanding is that the practice in Papua New Guinea is to have an administrative refugee determination process which can result in either a determination of being a refugee under the refugee convention or permissive residence in PNG. I heard UNHCR saying, when they were giving evidence this morning, that they were happy with the way that PNG was fulfilling its refugee convention obligations.

Senator BARTLETT—So you are able to ensure that, in effect, they have fulfilled the full terms of the refugee convention for practical purposes?

Mr Hughes—It seems in practical purposes yes. The reservations that they have made relate to employment, yet my understanding is that those given permissive residence have the right to move freely, to engage in business activities, to work under the same conditions as PNG citizens, of freedom of worship and marriage and of access to health and education services.

So, in practice, it seems that those things are available. Also, I do not believe that there is any suggestion of refoulement by PNG. I think there was a recent United States Department of State country report that pointed out that they had not heard of any reported cases of refoulement. Having listened to the UNHCR evidence this morning, I felt that they had given Papua New Guinea quite a positive bill of health in implementing refugee convention responsibilities.

Senator BARTLETT—I have a hundred more questions that I would like to ask, but I suppose I should not be greedy!

CHAIR—Thank you, Senator Bartlett. Mr Correll, is my understanding correct that, since about 2001, just over 1,500 asylum seekers had been held on and then processed through Nauru itself? Is that about the right number?

Mr Correll—That is approximately correct. I think the figure was 1,509.

Mr Hughes—That would include Manus as well.

CHAIR—Okay. Of those, Australia took 586 for resettlement.

Mr Hughes—It might be slightly more than that.

CHAIR—New Zealand took in the mid-300s.

Mr Correll—Correct.

CHAIR—Sweden took almost 20.

Mr Correll—Correct. Those numbers are included in our submission.

CHAIR—I am just clarifying them with you. Canada took about 10, Norway four and just over 480 were returned to their country of origin. Is that right?

Mr Correll—Yes, that is correct, as I recall from the submission.

CHAIR—So a significant proportion of those 1,509—some 586—were accepted in Australia. As I understand the minister's statements with regard to this piece of legislation, and certainly her press statements, she has indicated quite clearly that people found to be refugees will remain offshore until resettlement in a third country is arranged. That is the position, is it?

Mr Hughes—My understanding of what is on the public record is that it is the government's preference to resettle in a third country any people found to be refugees under these arrangements, but the possibility of any such people being resettled in Australia has not been precluded.

CHAIR—It is not precluded—that is quite true—but it is emphatically and painfully clear, on the face of the material before the committee, what the view is. What discussions have been held with New Zealand, for example, to ensure that they might take a similar sort of case load to the one that they took previously? What has changed in the attitudes of the other countries that might encourage them to take more than the 33 out of 1,509 that they took previously, given that this bill proposes a policy that individuals will remain on Nauru until resettlement to a third country is arranged?

Mr Hughes—In the absence of a specific case load, there have not been any discussions with other countries as yet about their taking anyone for resettlement.

CHAIR—In that case, when there is a specific caseload, no matter what its size, and a third country cannot be identified, what is the longest period of time that an individual might be expected to remain on Nauru?

Mr Hughes—As we said in the submission, as far as our success in getting people resettled from the original case load is concerned, 41 per cent of people spent less than 12 months and 81 per cent spent less than 24 months on Nauru. That was with a very large case load of 1,500 people. I do not know that there is any expectation that there would ever be such a large case load, which means that it ought to be easier to achieve resettlement for smaller numbers, but no formal time limit has been set at this stage.

CHAIR—A number of the witnesses who have appeared before the committee today, including the Hon. Ron Merkel, the UNHCR and I think Liberty Victoria—but I will check the record to make sure that is correct—put to the committee the proposition that, if every country that deals with asylum seekers and/or refugees dealt with them in this manner, it would have a significant impact on the operation of the convention; that is, it would basically reduce the convention to nothing. What is your response to that?

Mr Hughes—I do not agree with the basic proposition, in that different countries choose different ways to deal with people under the convention, according to their own circumstances. For example, some countries choose to resettle people internationally; some do not. The United States, for example, has chosen to intercept possible asylum seeker case loads from Haiti and Cuba and process them in a place that is not on the mainland of the United States. There are quite different practices around the world to respond to particular circumstances. I know of no proposal for everyone to choose this particular policy.

CHAIR—If there were a significant conflagration in an island nation very close to Australia which necessitated the residents of that island nation leaving by boat at the same

time as Australia was sending Defence Force personnel to protect them, and they arrived by boat on our shores, say, tomorrow or next week, would it be the case—given the statement of the minister in her announcement on this on 13 April that the new legislation would apply to people arriving from the date of the announcement—that they would be taken to Nauru?

Mr Correll—My comment to that would be: not necessarily. It would depend on the nature of the conflagration concerned. The minister is in a position under the nature of the bill to be able to exercise decisions in relation to exemptions and have categories of exemptions.

CHAIR—I was not suggesting Norfolk Islanders.

Mr Correll—No; I can imagine which country you may have been suggesting. On that basis, there would be an overall government policy position on handling matters in relation to that country.

Senator NETTLE—Just following on from that—the suggestion that the minister is able to decide between groups of people what sort of treatment they should get—I am not sure that the Australian government has had the same response to refugees fleeing from places where our troops have been involved in conflict. I am not sure that I have the same level of confidence as you do, Mr Correll, that in instances where Australian troops would be involved we would make different decisions in relation to their refugee claim. Is that what you were suggesting?

Mr Correll—Not necessarily. But, in relation to the conflagration that is currently being looked at, the government is looking at that from an overall policy position. It would be a matter of government policy for the way it handled it. A decision could be, as part of that policy, to handle it in the usual way. That could be a decision. Or it could be a decision to handle it differently, given the circumstances that applied in that country.

Senator NETTLE—If the minister decides to exempt certain people from being treated as this legislation is proposing, is that an outright politicisation of refugee processing?

Mr Correll—I would not have thought so.

Senator NETTLE—Why is that? Why would it not be?

Mr Correll—It is simply a matter of consideration by the government of the arrangements to apply in a particular conflagration situation.

Senator NETTLE—Like many of the decisions the minister would make under the immigration act, none of this would be reviewable. Is that correct? Could an asylum seeker from a country where Australian troops are not involved seek review to be treated in the same way as East Timorese asylum seekers, or would that decision not be reviewable because it is the minister's decision?

Mr Correll—There is a discretionary removal provision in the bill; it is provision 198A. So under the provisions of the bill there is the capacity for that sort of call to be made on an individual basis.

Senator NETTLE—It is not reviewable; is that correct?

Mr Correll—I am advised it would be a reviewable decision.

Senator NETTLE—Could somebody who was not granted that exemption seek to also have an exemption granted to them?

Ms Parker—If I could just intervene there: it is not the case of an exemption. We are looking at the exercise of the discretion under section 198A, which says that a person may be taken to a declared place. There are also review provisions on that under the legislation. I indicated to Mr Correll that the matter would be reviewable, but under section 494AA there is a provision that indicates that proceedings relating to the exercise of the powers under section 198A are, in fact, not reviewable.

Ms Bicket—With the exception that the constitutional jurisdiction of the High Court remains under section 75 of the Constitution.

Mr Correll—In that case, I would like to correct my earlier response.

Senator NETTLE—So would it or would it not be reviewable?

Ms Parker—There is a limitation on review in the bill as it currently exists in the legislation, but the provisions also indicate that the High Court's original jurisdiction under 75(v) of the Constitution is not affected. So there would be review on that basis.

Senator NETTLE—Is it now explicit within the laws that the minister can seek to make a decision on the basis of foreign affairs if they so choose, because of that exemption? Does the minister have that capacity?

Ms Parker—It always existed; it is not anything that is new under the bill. Excuse me; are we talking about the exemption power or the discretion to remove people to a declared place? They are separate provisions.

Senator NETTLE—I thought we were talking about the exemption.

Mr Correll—If you are talking about the exemption, it is a different situation to the 198A, which is the discretionary power for removal to another place. There are basically two elements in the bill. One relates to the discretionary power for removal; the other relates to the provisions for exemptions that apply within the bill.

Senator NETTLE—And which of those are reviewable?

Ms Bicket—Both are reviewable. On the question of removal, though, there are certain limitations and only the High Court jurisdiction continues. A decision on exemption would be made under an enactment by the minister and would normally be reviewable, as are all other delegatable powers under the enactment.

Senator NETTLE—Would people have access to the High Court from Nauru for review?

Ms Bicket—That of course would be a decision made by the minister. So yes.

Senator LUDWIG—How does a lawyer get a visa to Nauru?

Ms Parker—They would need to have somebody lodging an application on their behalf in Australia.

Senator LUDWIG—And to get advice you would then have to be able to get to Nauru, wouldn't you?

Ms Bicket—Not necessarily. They can communicate, and there have been instances where people have instructed on legal proceedings from Nauru.

Senator NETTLE—So you do not believe there is any requirement for the Nauruan government to give permission for a case to be launched in the High Court in Australia that relates to somebody in Nauru? That is the evidence that we had earlier today.

Ms Bicket—It would depend on the circumstances. In relation to a matter that pertained to a decision of a minister of Australia, I would not think that the Nauruan government had to give permission for someone making any sort of action under Australian law.

Senator NETTLE—Perhaps you could go back and look at the evidence of Mr Walters on that issue.

Ms Bicket—I am happy to. I am not aware of the particular matter that you are referring to.

Senator NETTLE—In respect of the issue of medical care and people needing to be evacuated from offshore detention centres to Australia—which I think is an interesting one in terms of the indication by the department that there would be no financial implications for this bill—do you know what it would cost to medivac somebody from Nauru to Cairns? For example, there is an Afghan family whose nine-year-old boy is currently in hospital in Cairns. What would the cost have been to medivac them if they had already been transferred to Nauru?

Mr Correll—I reiterate that it is not an offshore detention centre; it is an offshore processing centre. We would have to take on notice the costs of a medivac arrangement and whether such an arrangement would need to be used or whether opportunities would be available through other flight arrangements from Nauru. We will have to take that on notice to give an estimate of the cost.

Senator NETTLE—Do you have an update on the condition of the boy in hospital in Cairns?

Mr Correll—I have not had a further update on that situation today, but I understand that he is in hospital and is being given treatment. I cannot comment further than that.

Senator TROOD—Mr Correll, I notice that throughout your evidence you have insisted that in this matter we are not talking about a detention centre, we are talking about a processing centre. Does it follow that were one of these hypothetical asylum seekers to leave Nauru then that would not be a problem?

Mr Correll—No. The individual would be in Nauru on a visa granted by the Nauruan government, so there would be no difficulty with an individual leaving Nauru.

Senator TROOD—And if they turned up on the Australian mainland again, they would be dispatched back to Nauru. Is that the story?

Mr Correll—Yes. If they arrived in Australia as an unauthorised arrival then their processing would be handled back at Nauru. Presumably, in those circumstances, the Nauruan government would issue or update their visa.

Senator TROOD—Mr Hughes, you have made several references to the fact that you were listening to the UNHCR evidence this morning. You will have noticed, no doubt, that they expressed some disquiet about the relationship they now have with the department. In particular, they were anxious or regretful that there had not been discussions with the high commission about this particular piece of legislation. Is your account of this relationship much the same as theirs?

What UNHCR specifically mentioned, though, was a concern that they were not given a copy of the legislation before it was introduced into the parliament. It would have been their preference to actually physically have the legislation as opposed to having a sequence of briefings on its contents. Given that they have asserted that they should be able to do that, I have recently checked with a number of other countries. I checked with colleagues in the United Kingdom, Canada and the United States. My understanding is that none of those countries would in the normal course of events show the UNHCR legislation that they were proposing to introduce before they introduced it into the parliament or congress, as the case may be.

Senator TROOD—Has it been your practice to do that in relation to the UNHCR representatives in Australia for previous pieces of legislation?

Mr Hughes—It has been our practice to brief them but not to physically show them legislation before introduction into the parliament. I have heard of a case before my time in this job when that was done and I have also heard that there were some concerns that it was then leaked and became public very quickly at the time that was done. But that was before my time.

Senator TROOD—On this occasion they were not briefed? They were not given a copy of the legislation, but they were not briefed either—is that correct?

Mr Hughes—They were briefed. I said there had been numerous meetings with them dating back to the time of the government announcement. I think their main concern was not being given a copy of the legislation before its introduction into parliament.

Senator TROOD—Would it be your expectation that, were there to be people placed on Nauru or offshore, UNHCR would be assisting in the assessment as they have done in the past?

Mr Hughes—It is not necessarily our expectation. In the various discussions we have had with them, we have said that the door is open to them to do that. In other words, if it would allow them to have more assurance about the process, we would be perfectly happy to consider models which involve them in the primary decision making or review. Certainly, we would be perfectly happy for them to be involved in the process of resettling any people should the need arise. At this stage they have said they regard their previous involvement as a one-off and they cannot see a role for themselves, for the time being at least, in the current arrangements.

Senator TROOD—So the department would then assume this responsibility itself for both assessment and resettlement if that came to be the case?

Mr Hughes—Yes, unless there is some change along the way. I think UNHCR indicated that they are watching the evolution of these arrangements. They also have an open mind about what might happen in the future.

Senator TROOD—Just to follow up on Senator Payne's question about resettlement, can you give us any reason, encouragement, belief or argument as to why we should be hopeful that, were there to be people placed in Nauru, for example, and they were assessed as refugees, there would be a reasonable expectation that they could be resettled somewhere other than Australia?

Senator LUDWIG—In less time than four years?

Mr Hughes—As I said, Senator, in giving figures before, they were resettled in a much shorter time than people who we resettle under the humanitarian program.

CHAIR—Yes, but overwhelmingly in Australia.

Mr Hughes—Sixty per cent in Australia, I think, and 40 per cent elsewhere.

CHAIR—They are the sorts of numbers that I would like to have as a politician. In fact, they are the sorts of numbers that I would like to have as this politician.

Senator LUDWIG—I would even like those odds!

Mr Hughes—I can think of various circumstances where I would like to have those numbers too. The expectation would flow from the fact that there are a significant number of resettlement countries apart from Australia—the United States, Canada, the Nordic countries and the United Kingdom. They have resettlement criteria and they do routinely resettle between them, I think, about 70,000 or 80,000 people a year. They may well be prepared to consider that a group of people in Nauru meet those criteria and resettle them. New Zealand also is a resettlement country. It has been responsive in the past, but I cannot say what their attitude would be in relation to this caseload. There are clearly opportunities, if it is important to the government, for high-level approaches to be made in order to reach some form of cooperation on that issue.

Senator TROOD—It is obviously a hypothetical question, but I must say that past practices—

Senator LUDWIG—How come he gets a hypothetical question, Chair? They always close me down!

CHAIR—It's not estimates, Senator.

Senator TROOD—As I understand it, the resettlement that took place previously in relation to Canada, Denmark and Norway, and all countries bar Australia and New Zealand, were largely in relation to cases where there was some family connection between the individuals concerned. Were that not to be the case in the future then the prospects would seem to me to be, on the evidence available, slim or dim.

Mr Hughes—That it is a hypothetical question! Family reunion helps but it is not the only determinant.

CHAIR—Thank you very much for appearing this afternoon. We look forward to seeing you again in Sydney on 6 June. I thank all witnesses who gave evidence today, and particularly those who travelled from interstate. The committee does appreciate that.

Committee adjourned at 4.07 pm