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SENATE
LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
Tuesday, 6 June 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

Senator Bartlett for matters relating to the Immigration and Multicultural Affairs portfolio

Senators in attendance: Senators Bob Brown, Crossin, Kirk, Ludwig, Mason, Nettle and Payne

Terms of reference for the inquiry:

Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

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**ILLINGWORTH, Mr Robert Laurence Mark, Assistant Secretary, Onshore Protection
Branch; Refugee, Humanitarian and International Division, Department of
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MURPHY, Mr Kerry, Member, Australian Lawyers for Human Rights 10

**OKELY, Mr John Cameron, Assistant Secretary, Offshore Asylum Seeker Management
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**PARKER, Ms Vicki Louise, Acting Assistant Secretary, Legal Framework Branch,
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**POULOS, Reverend Elenie, National Director, UnitingJustice Australia; and
Representative, Refugee and Displaced Persons Program, National Council of Churches
in Australia 31**

SAMSON, Ms Anna, Campaign Officer, A Just Australia 10

**VIDLER, Ms Jill, Member and Committee Member, Migration Institute of
Australia 37**

Committee met at 8.59 am

CHAIR (Senator Payne)—Good morning. This is the second 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 136 submissions for this inquiry. Most of those submissions have been authorised for publication and are available on the committee’s website. 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 the 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 do 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.

McADAM, Dr Jane, Private capacity

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

Dr McAdam—I appear in my personal capacity. I am an academic in the Faculty of Law at the University of Sydney.

CHAIR—Dr McAdam has lodged a submission with the committee, which is numbered 64. Dr McAdam, do you need to make any amendments or alterations to that submission?

Dr McAdam—No, I do not.

CHAIR—I invite you to make an opening statement. At the conclusion of that, we will go to questions from senators.

Dr McAdam—I would like to thank the committee for inviting me here today to give evidence on the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006. As detailed in my written submissions, my concerns relate in particular to the bill's incompatibility with Australia's obligations under international law. In my view, the bill risks breaching a number of substantive elements of international human rights and refugee law and, more generally, raises questions about whether Australia can be said to be fulfilling its treaty obligations in good faith.

Under international law, individuals have the right to seek and enjoy asylum from persecution. Every state has the sovereign right to grant asylum to refugees within its territory, and the corresponding duty is respect for that asylum by all other states. Asylum is a peaceful, humanitarian and non-political act. Australia has a fundamental legal duty not to return people to persecution. This duty is based on a longstanding principle of international treaty law and custom, is entrenched in domestic law and cannot simply be abandoned for political or diplomatic reasons. While Australia has a sovereign right to determine who enters its territory, this right is not absolute. It is limited by certain obligations which Australia has voluntarily accepted under international treaty law as well as under customary international law. These mandate that Australia must not return refugees to territories in which they face or risk removal to persecution on account of race, religion, nationality, political opinion or membership of a particular social group; torture; or cruel, inhuman or degrading treatment or punishment. Return in this context means both directly returning refugees to territories in which such treatment is feared as well as indirectly returning them due to interception or deflection strategies.

It is also important to recall that refugee status is declaratory rather than constitutive. In other words, a person is a refugee as soon as he or she satisfies the criteria in the refugee convention. This means that the grant of a protection visa by a state is an acknowledgment of an individual's status as a refugee rather than conferral of refugeehood on that person. Accordingly, denying refugees access to fair status determination procedures, including the opportunity for independent review, may ultimately amount to refoulement.

In this context, the particular vulnerabilities of asylum seekers must be considered. Many are traumatised by the events that they have experienced in their countries of origin, and fears of persecution do not simply dissipate on arrival in an asylum country. It is essential that

decision makers are properly educated about the psychological conditions which many asylum seekers face and realise how conditions such as post-traumatic stress disorder may impact on an asylum seeker's ability to recall details with clarity and consistency. There is a real chance that, if asylum seekers are denied access to legal representatives and independent psychologists, their claims may not be properly presented and assessed.

The proposed regime discriminates between asylum seekers who arrive by plane, or who have entered Australia on a valid visa, and those who arrive by boat without prior permission. By contrast to those who arrive onshore, offshore asylum seekers will undergo an inferior assessment process, and those ultimately recognised as refugees will have no automatic right to protection in Australia. Whereas onshore refugees, once acknowledged as refugees, will obtain a protection visa, the new offshore regime will separate the process for recognising convention refugees from the actual granting of visas. This means that a person declared offshore to be a refugee will not necessarily ever receive a visa to settle in Australia. This could result in recognised refugees languishing in processing centres for years, waiting for resettlement by Australia or another country.

The refugee convention is premised on the understanding that states will protect refugees in their territories or cooperate with other states to find durable solutions. Australia, as a wealthy Western nation, risks contributing to the significant problem of refugee warehousing if it allows refugees to remain in camps without any durable solution being forthcoming. In doing this, it is not abiding by the commitments it has undertaken vis-a-vis other contracting parties to the refugee convention.

Furthermore, countries must not penalise refugees for entering their territory illegally when they have come directly from a country where their life or freedom was threatened, have presented themselves to the authorities without delay and can show good cause for their illegal entry or presence—and 'good cause' in this context is something like having a well-founded fear of persecution. This is a fundamental aspect of the refugee convention because it underscores the right of people in distress to seek protection even if their actions constitute a breach of the domestic laws of a country of asylum. It recognises that circumstances compelling flight commonly force refugees to travel without passports, visas or other documentation. Yet asylum seekers who arrive in Australia by boat will have access to a markedly inferior determination regime which lacks the procedural safeguards of the onshore system. This may be regarded as a penalty for unlawful arrival, which is in violation of the terms of the refugee convention which Australia has freely accepted.

Finally, under the refugee convention, refugees are entitled to a status including the right to employment, social security, education and freedom of movement. Clearly Australia will breach these obligations if it recognises people as refugees but fails to accord them a legal status in domestic law.

Senator LUDWIG—I am really interested in the area of good faith, particularly your argument which, as I understand it, effectively says that, leaving aside the issues of breaches of articles of the ICCPR or others, if there is not good faith in the process being proposed by the government in this legislation for offshore processing of asylum seekers, there is a significant concern that we are breaching our good faith obligations. I wonder if you could expand on that a little.

Dr McAdam—You are quite right in distinguishing between substantive breaches of international law and a breach of good faith. The two can occur concurrently. However, the principle of good faith says that states have an obligation to implement their treaty obligations in good faith—that is, according to the spirit as well as the letter of a particular treaty. So if a number of acts or omissions have the ultimate effect of undermining the very treaty on which they are based then that in itself can be seen as a breach of a state's obligations to undertake certain actions. What this really looks at is observing not just the letter of the law but rather the spirit of the law, and when we look to this as a matter of international law what we are looking for is what countries are actually doing rather than what they say they are doing.

So in this particular context my argument would be that Australia has undertaken certain obligations under international human rights law as well as the refugee convention and that, rather than actually repudiating the refugee convention in actual terms, it is finding a way of getting around the obligations it has undertaken there. So effectively it is saying, 'Well, the letter of the refugee convention doesn't mandate that we process people within Australia; we can't point to an actual black-letter provision there,' even if the very spirit of the convention means that, once refugees are on your territory, you have undertaken an obligation to those refugees but also to the other contracting parties to that convention that you will take responsibility for them.

Senator LUDWIG—The second area relates to the suggestion that the asylum seekers are being effectively warehoused in offshore processing places such as Nauru and Manus Island particularly. Particularly if you look at the offshore processing places such as Manus Island, you will see that those countries are not signed up to all the conventions that we would otherwise sign up to. You also seem to be suggesting that, in warehousing them, the appeal mechanisms that we would have in Australia are not there. And, even though the procedures are modelled on UNHCR procedures, some of the submissions I have read say that they are certainly at the minimum or base level. The question then becomes: when you look at all of those issues and our history already, have you examined what we did just towards the end—it is still not ended, I guess; there are still people on Nauru—of the change in these procedures that is now being talked about by the immigration department, as compared to what they have already done? Is there any basis on which to believe that they are going to do it better or more fairly within the principles that we would expect them to do it within, in good faith, or do you find really the same thing happening again?

Dr McAdam—The impression I get from the information that has been available is that the procedures will operate in a similar manner to the way they have been operating in the past. I note that the immigration department says it is considering perhaps whether it can do it better, but I am not yet sure of what substantive changes are being considered. One of the issues is that UNHCR's processing is being held up here as a model of processing, but I think this fails to appreciate that UNHCR, by its nature, is a very different entity from a state. UNHCR has a protection mandate. It undertakes refugee status determination. However, it does not have an independent body to which it can turn for review. This is in contrast to states, which do have levels of merits and judicial review. UNHCR is intended to step in where states do not have functioning refugee status determination procedures. Australia does have such procedures. It therefore seems at odds with having a state system for protection—

which is really the ideal—that we would be reflecting back to or adopting procedures which are those of an organisation which lacks those levels of review.

Senator LUDWIG—And, of course, they would only be a refugee status determination body. Health and welfare issues, particularly mental health issues—in other words, warehousing—would be reflected upon whoever dealt with them. The state—

Dr McAdam—That is right. And the problem with refugee warehousing in this particular extraterritorial processing regime is that it is quite unclear where the responsibilities lie. It is very clear that if Australia is involved, as it will be, it cannot simply get rid of its international obligations by having refugee status determination and hosting refugees on a territory outside Australia. Clearly Australia is still obliged under international law to respect its human rights obligations and so on. But the difficulty is where you are contracting out the actual management of centres to organisations like IOM, which are not parties to and by virtue of their status as international organisations cannot be parties to human rights treaties. We also get the difficulty of the status of the hosting territories such as Nauru, when they are not signatories to international human rights instruments. Were they to exercise their territorial sovereignty in relation to the people housed on their territory, we could end up with basically a situation where there is not effective protection forthcoming.

In relation to refugee warehousing, the issue there is that, even if you do have adequate standards of health care and so on being provided, there is no durable solution. Refugee warehousing simply means people are stuck in limbo. This is particularly distressing when you have people who have been recognised as convention refugees who are simply sitting there—as we have seen overseas, sometimes for up to 10 years or longer—without anywhere to go. That, in my view, is a clear breach by Australia of its obligations under the refugee convention to take responsibility for people that have landed on its territory or have come within its territorial waters and in many cases are fleeing directly rather than being secondary-movement refugees.

Senator MASON—I, too, was interested in your opening few words this morning about good faith. You drew the distinction in response to Senator Ludwig's question that you have breaches of good faith on the one hand and distinct breaches of conventions of the other. You just mentioned the fact that, even though the convention does not mandate onshore processing, offshore processing may constitute a breach of good faith. What other breaches of good faith do you see this bill leading to—not distinct breaches of the convention, but breaches of good faith?

Dr McAdam—Effectively if every party to the refugee convention did what Australia is doing here we would make a nonsense of the multilateral treaty regime. As I have mentioned, under international law, no matter where you put a refugee, if they have come within your territory, you are ultimately the country that is responsible for them. Devising offshore processing regimes does not absolve you of your international commitments. Whether we see that in relation to substantive provisions of international treaties or as part of the obligation to act in accordance with the international treaty regime more broadly, Australia is clearly risking acts of bad faith in relation to what it is proposing here.

Senator MASON—So you would say that this bill—I do not want to put words in your mouth; I sometimes do that, so pull me up if I do—

CHAIR—I will, don't worry.

Senator MASON—Chair will. Do you see this then as a cute legal trick in effect to overcome a political problem the government has?

Dr McAdam—I am not sure that I would describe it as a 'legal trick'. No other country has sought to do what Australia is doing here, but we have certainly seen other countries try to get around the letter of various treaties so that one cannot point to a particular provision that they are breaching while the overall intention of that treaty is being averted.

Senator MASON—Is it to get around the received understanding of their obligations under the convention—that is what you mean?

Dr McAdam—Yes, but because of the nature in which certain international obligations are expressed—and we see in refugee law all the time certain national courts interpreting different provisions in different ways—there is some latitude in how certain obligations are to be interpreted. But I do not see that there is sufficient interpretation in the ones I have raised in my submission—for example, in regard to the notion of penalties to say that this does not constitute a penalty. I think that is going too far.

That said, the reason the refugee convention was drafted and adopted in the first place was to make sure that we did not get a situation of refugees in orbit—that is, shuttled from one country to another. In my view this particular bill risks creating that situation. Even if you are not creating it, if we say these refugees will remain on Nauru or wherever until they are ultimately resettled, if that ever happens, you are saying: 'Australia has agreed to take on protection responsibilities to refugees within its territory and yet it is failing to do so.' Simply providing refugee status procedures and providing an island on which people can be housed is not the same as providing protection, as it is understood; it is not a durable solution.

Senator MASON—I fully agree. Would you argue that the fact that the bill makes little provision for 'public scrutiny'—I think that was the term you used—of conditions on the offshore detention sites is a potential example of lack of good faith?

Dr McAdam—I am not sure that I would bring that into the international dimension of a lack of good faith as such, but I do think that there are certainly standards which require openness and public scrutiny. My understanding from reading the department's submission and of the questioning on it in the last hearing was that the Ombudsman, for example, would not necessarily have a right to oversee matters that have occurred in the extraterritorial locations.

Senator MASON—Does the distinction between a breach of convention and as you call it, a lack of good faith, have standing at international law? You are talking about a breach of good faith, in effect, as opposed to a distinct breach of convention.

Dr McAdam—We can look to the Vienna convention on the law of treaties for the underlying principle.

Senator MASON—Okay, so that would be an essential—

Dr McAdam—But it is an argument that has been raised in the House of Lords, for example, in this context. It is not just kind of an airy-fairy notion that I have made up.

Senator MASON—We do not want any airy-fairy stuff before this committee!

Dr McAdam—No, it is not.

Senator NETTLE—Thank you for your submission and I am sorry I missed your oral presentation earlier. In your submission, you talk about the six million refugees worldwide who are currently housed in situations, whether they be perhaps similar to what is envisaged in this bill, and only one per cent of them being resettled. Do you see that what is being created here is another refugee camp, in whatever form, where Australia is asking the international community to put this group of refugees ahead of those other six million refugees who are already waiting in other refugee camps? Is that what you see that this bill is asking the international community to do?

Dr McAdam—I do not necessarily see the bill as asking the international community to prioritise the refugees that would be hosted on Nauru or wherever else they might be, but I certainly think that Australia is saying, ‘We are going to add our numbers to the overall number of refugees awaiting resettlement.’ I should say that, internationally, these kinds of mass refugee camps are in countries where they face hundreds and thousands of refugees crossing a border as part of a mass influx which occurs very suddenly. They are countries which lack the economic and environmental capacity to permanently host refugees and to locally integrate them. In many situations we have seen people languishing in camps for decades at a time. So I think it is fundamentally irresponsible of Australia as a wealthy Western country to be contributing to part of this international problem.

I do not want to denigrate at all Australia’s response as a resettlement country. Normally Australia, behind the US, is the second-largest resettlement nation. For that reason also, I find it quite peculiar that Australia would, rather than resettle these refugees itself, be panning them off to the rest of the international community. If I can make one final point, with the *Tampa*, when Australia proposed a similar sort of resettlement regime, the international community really regarded this as Australia’s self-created problem. The international community did not think that it had an obligation to resettle refugees and the reason why certain countries like Sweden did take small numbers of refugees was for family reasons only, not because they thought they had an obligation to do so.

Senator NETTLE—Following on from that, if the bill is not asking for those people on Nauru to be prioritised ahead of the six million people who are already waiting in refugee camps—and, as you described, those people wait in refugee camps for decades—does it follow that they will also be there for decades because that is the time frame that other people in similar situations in Africa or other poor countries sit waiting for this process to occur?

Dr McAdam—I do not see any reason why that should not be the result. I think the government is hoping that countries like New Zealand may step in to assist because these people are within the region. But that would be relying on humanitarian considerations rather than on any legal obligation of a country like New Zealand to assist here.

Senator KIRK—Thank you very much for your submission. I want to ask generally about oversight of compliance with international law obligations and the bodies that exist in

international law that can oversee compliance. Also, from your point of view and from a legal point of view, what obligation does Australia have to ensure that there are in Australia oversight bodies, whether they be parliamentary committees or the Ombudsman, to ensure that we are complying with international obligations?

Dr McAdam—At the international level there is no refugee court or anything like that which could be the ultimate arbiter of any disputes here, although UNHCR has a supervisory role. International bodies that could be turned to by individuals could be ones like the Committee Against Torture or the Human Rights Committee, although those committees will only hear individual claims brought by people if all domestic remedies have been exhausted first. There might be a situation here where individuals do not really have access to domestic remedies, in which case those committees may consider their cases. They rely, however, on the goodwill of states to follow their recommendations and therefore have no means by which they can bind Australia to follow their views. We have seen in the past Australia simply rejecting views of those committees.

I would say Australia as a nation state has an obligation, firstly, as part of the rule of law. But, secondly, looking at what Australia has done with respect to its onshore determination system, it has no grounds to create a lesser system for people it chooses to process elsewhere. As I said in my submission, that could be regarded as a clear instance of discrimination but also, and related to that, it is being imposed as a penalty in contravention of article 31 of the convention. The two operate in tandem and there is no real material difference between asylum seekers arriving by boat and asylum seekers arriving by plane.

Senator KIRK—In terms of sanctions, at the international level there appears not to be—

Dr McAdam—The other option would be for another contracting party to the refugee convention to take Australia before the International Court of Justice. That has not happened before in relation to the refugee convention but it is certainly something that could happen if a country felt strongly enough that Australia was effectively repudiating its obligations under that convention. But, again, the international community relies on political embarrassment as well as an understanding that countries will abide by their obligations. Certainly post-*Tampa* in the executive committee at UNHCR there was a lot of disquiet about what Australia had done. Most of the international community was very vocal in denouncing what Australia had done in that situation.

Senator KIRK—So, if anything, we are likely to see that same sort of denouncement following from here.

Dr McAdam—I would think so.

Senator KIRK—In terms of what might happen in Australia with parliamentary scrutiny or oversight by other bodies, I mentioned before the Ombudsman, but I suppose he or she would not be looking so much at compliance with international obligations but rather at compliance with Australian law as implemented.

Dr McAdam—That is right. The issue is that there are various bodies that can engage in such oversight. HREOC as well could do that. The difficulty is, of course, if they are not being given access, and my understanding is that they are probably not going to be. NGOs similarly can provide information provided they have access to it. It is very hard, if such

access is not forthcoming, to simply speculate on what is going on, even if such speculation has certain backing based on the legislative regime in place.

Senator KIRK—It is similar for parliamentary committees as well. Unless there can be physical access to the destination—

Dr McAdam—That is why it is so important, yes.

CHAIR—Thank you, Dr McAdam, for appearing this morning.

[9.31 am]

GAUTHIER, Ms Kate, National Coordinator, A Just Australia

SAMSON, Ms Anna, Campaign Officer, A Just Australia

BECKETT, Mr Simeon, President, Australian Lawyers for Human Rights

LESTER, Ms Eve, Victorian Convenor, Australian Lawyers for Human Rights

MURPHY, Mr Kerry, Member, Australian Lawyers for Human Rights

CHAIR—Welcome. A Just Australia has lodged a submission with the committee, which we have numbered 81. Do you need to make any amendments or alterations to that submission?

Ms Gauthier—No.

CHAIR—And Australian Lawyers for Human Rights have lodged a submission with the committee which has been numbered 78. Do you need to make any amendments to that?

Mr Beckett—No.

CHAIR—I am going to ask you both to make an opening statement. I would encourage you to make brief opening statements. That gives senators more time to ask questions.

Mr Beckett—ALHR's position on the migration amendment bill is based on our concern for the protection of the human rights of some very vulnerable people. Our written submission considers the bill from the point of view of protection of human rights available in international law but also considers whether asylum seekers are treated equally in the application of Australian law. It sets out in detail how the migration bill will breach Australia's obligations under the refugee convention and undermine the international regime for the protection of refugees.

At the same time, the bill allows for asylum seekers to be removed from Australia not just physically but in a legal sense, where they are denied the protections afforded by Australia's legal system. Their presence in a third country will also deny them human rights protections available in Australia and guarantees in Australia against non-refoulement.

In the discussion of human rights breaches in the abstract, we particularly say that it is important not to lose sight of the main issue. We have 42 Papuans who arrived recently and who have been found to have a well-founded fear of persecution. It is defenceless people like these who, without the support of the country of whose citizenship they hold, will bear the brunt of a policy envisaged in this bill.

Regrettably, the reinvigoration of the Pacific solution goes against the tide of recent immigration policy. DIMA policies and practices have been severely criticised by the Palmer inquiry and by successive reports of the Commonwealth Ombudsman about poor administrative practice. Revelations about the treatment of Cornelia Rau and Vivian Alvarez Solon point to appalling human rights breaches, where officials have been able to operate with wide discretion and minimal accountability. Those are some of the key things that we are worried about: wide discretion and minimal accountability, which seem to be continued in this

bill rather than following the trend which was going the other way. We seem to have been brought back by this particular bill.

The minister, for example, has a discretion not to remove a person to a third country, but that discretion is without legislated criteria, so we see a model that has been familiar in old migration legislation, where you have a hard law softened by what we say is a non-compellable discretion. In other words, there is an inability to compel the minister to exercise his or her discretion in favour of a refugee.

Once in a third country, a person's refugee status is determined by officers who are not subject to oversight by an independent tribunal or, more importantly, by the courts. The standards applied are below those available in Australia. If past experience in Nauru and Manus Island is anything to go by, independent lawyers, journalists and doctors will be prevented from providing the detainees, and indeed the Australian public, with information about their legal status, condition and treatment. Their detention will be without a time limit, and their ultimate destination, of course, remains unknown. This compares poorly with the 90-day processing in Australia. A real question arises as to whether law-makers are willing to expand DIMA's non-reviewable powers, given the poor record of implementation in the last few years.

The migration bill will have further negative ramifications for the international refugee protection regime, which is something we concentrated on in the submission. The convention provides a balanced way in which the world can address the problems posed in protecting nine million refugees. The responsibility of individual states to afford protection to refugees who seek it in their states is enshrined in that convention. By deflecting asylum seekers to a third country, Australia breaks with the cooperative nature of that convention. This migration amendment bill sends a strong message both to those who have ratified the convention and to those who have yet to do so that it is acceptable, even for First World countries such as our own, to deflect asylum seekers to other countries.

We are deeply concerned about the lack of access to lawyers that detention on Nauru or Manus Island will bring. As you may know, ALHR attempted to facilitate the provision of lawyers to give legal advice on Nauru after *Tampa* but were successively blocked by the Nauruan government in that endeavour. The fact that DIMA have said that they might not oppose the provision of such advice begs the question: if people are to be detained on places such as Nauru or Manus Island, don't DIMA and DFAT have a positive obligation to ensure the provision of legal advice that would otherwise be available in Australia?

CHAIR—Thanks very much, Mr Beckett.

Ms Gauthier—A Just Australia represents over 13,000 Australians who believe our country can do more to achieve just and compassionate treatment of refugees consistent with the human rights standards that Australia has developed and endorsed. Today I seek leave to present you with a petition signed by more than 30,000 Australians who ask you not to support this proposed legislation.

In our submission we looked at the values of our community and applied those to this proposed law. In particular, we looked at the values for Australian schooling developed by this Howard government. Values were listed such as care and compassion, integrity, respect, a fair

go and responsibility. We believe that this proposed law provides a test of these values and, in particular, a test of the integrity of every federal parliamentarian. After all, integrity is about being prepared to stand by your values, particularly when it may be difficult to do so. It is our view that, as individual parliamentarians and as a Senate committee, you cannot believe in these values listed and still support this law. That is why we challenge each of you, our elected representatives: if you support this proposed legislation, explain to Australians how this law supports the values by which this government wants us all to live. The simple fact is that you will not be able to. For example, how does having different levels of rights depending on your method of arrival in Australia meet the test of a fair go? How does punishing innocent and vulnerable men, women and children for the sake of appeasing another country meet the test of integrity? This law offends fundamental Australian values and will leave those who support it with no claim to integrity. It will render Australian values empty and will leave our nation diminished.

The evidence presented to this inquiry by a number of organisations shows that international law will be breached, that children will be detained, that conditions on Nauru are inadequate to the point of appalling, that there will be no oversight of government actions and no appeals processes protecting rights, and that resettlement options will not be found, leading to the indefinite detention of proven refugees. And the latest in a long line of bureaucratic spin-doctoring from DIMA has been that the Nauru facility is not a detention centre at all.

In our submission we looked at three main issues: the diplomatic outcomes sought by this policy and whether they will be achieved, a comparison of offshore asylum versus onshore detention policies, and whether this law meets the values that the Australian community holds. This law will not achieve the desired results as a political solution. Indonesia was offended that Australian government officials granted protection to West Papuans. Until Indonesia stops human rights abuses in West Papua, Australian immigration officials will still have to make diplomatically embarrassing decisions, be they made on the Australian mainland or on Nauru.

We looked at the key principles of onshore detention policies and analysed how those principles could be applied in an offshore setting. Although we believe that this policy should not go ahead, for a multitude of reasons, we came up with a key list of issues that need to be addressed before offshore programs can hope to come close to acceptable Australian standards.

Looking at the recent detention reforms, these show important principles that the government has accepted: that children should not be detained; that detention should be humane; that indefinite detention can be rectified with community release; and that, most importantly, Australian people have a basic right to know what our government is doing in our names. To guarantee this right for Australian citizens, the Commonwealth Ombudsman and the Human Rights Commissioner have powers to oversee conditions of detention and the duration of detention. Our submission shows that these basic principles will be difficult to meet on Christmas Island and will be impossible to meet on Nauru.

This law goes so far that it will make us look back with nostalgia on the good old days when we detained children on the Australian mainland. This is not just the opinion of A Just Australia. We would like to seek leave to put into evidence this petition from GetUp! that has

been signed by over 30,000 Australians who oppose this bill. Each and every one of them has been prepared to stand up for basic Australian values. On their behalf, we invite our parliament to do the same.

CHAIR—Thanks very much, Ms Gauthier. Let us deal with that issue first. The committee is able to accept that document as a document, but not as a petition to the Senate because the committee has no capacity to do that. If you wish it to be presented as a petition to the Senate, it needs to be presented by a senator. I will seek the views of the committee as to whether they wish to receive it as a document.

Senator LUDWIG—Could it then still be put as a petition? I was concerned that they would not lose that right.

CHAIR—By a senator; not by this committee.

Senator LUDWIG—No, I understand that. But I do not have a difficulty with getting it.

CHAIR—Does the committee wish to receive it as a document?

Senator BOB BROWN—Chair, to clarify that: is there some written ruling that the committee—

CHAIR—I have sought advice through the secretary from the Clerk, and have been advised that that is the case.

Senator BOB BROWN—That the committee cannot—

CHAIR—That is right.

Senator BOB BROWN—Then I am sure others would be prepared—

CHAIR—I am sure, yes. I understand that absolutely. I am just making the point that—

Senator BOB BROWN—If you would just let me finish the sentence—

CHAIR—Sorry, Senator.

Senator BOB BROWN—I would be prepared to do that, but my advice would be that we accept this as a document, and also make it available to senators to present to the Senate.

CHAIR—It can be made available to senators by the organisation that has compiled it. I seek the agreement of members of the committee to accept it as a document. Senator Crossin, Senator Kirk, Senator Mason and I will receive it as a document and then, as I said, if the organisations concerned wish to make it available to senators to present as a petition, that is a matter for them.

Ms Gauthier—Yes.

CHAIR—Thank you very much. That is agreed. We will now go to questions.

Senator BOB BROWN—You have made it very clear, ladies and gentlemen, that the legislation we are dealing with here is effectively illegal in terms of international law. Is that correct?

Ms Lester—Our position is that this law, if it were to be passed, would violate the Convention Relating to the Status of Refugees, and would also violate other international human rights instruments. Certainly, I noticed that UNHCR's position was that it is not the

legislation itself that would violate the convention. But they said the implementation of the legislation could well violate the convention.

I think we would probably take a stronger position than that, and I will explain why. This legislation is articulated in the explanatory memorandum as being for deterrent purposes. That means that, effectively, the message being sent to West Papuans is: 'Don't try and come.' The way the principle of non-refoulement is couched in international refugee law terms is that rejection of people attempting to enter a territory for the purposes of seeking asylum at the frontier constitutes a violation of the principle of non-refoulement. So closing your borders or blocking people from entering, which is the consequence of the passage of the legislation before it is even implemented, would, in our opinion, violate that provision.

Ms Samson—Our stance goes even further than that with regard to the principle of non-refoulement. A lot of DIMA's evidence has indicated that people who are found to be refugees will not be sent back to persecution, but the problems with the way that the processing system is intended to work on Nauru mean that people who are refugees might very well not be declared to be refugees by DIMA. The very narrow process does not include any kind of independent review of that decision. So, if that occurs, we will see refugees being sent back to persecution, because even though they are refugees they are not declared as such by the DIMA officer.

Senator BOB BROWN—Is there any way in which legislation like this could be seen as racist?

Ms Lester—I think it raises a difficult question. It is important. The allegation of racism is actually a very emotive one and I think it is important to be very careful about dealing with that. It is possible to draw a distinction between something that has a racially discriminatory effect and something that is a kind of racist attack, so I would say that there are real questions about whether this legislation could have a racially discriminatory effect. I would be much more hesitant to say that this legislation is inherently racist. I think that is a very difficult line to run.

Senator BOB BROWN—Because there you have to look at the derivation of the legislation and the causal factors. I guess that is more in the political arena than in the legal arena?

Ms Lester—I think that is right, but it is about examining both the purpose and the effect of the legislation. The purpose of this legislation, as we understand it, is to appease the diplomatic reverberations that have resulted from the granting of asylum to West Papuan refugees. It may be that it is due to the diplomatic reverberations rather the particular ethnicity of the group, but, as I say, that is why you have to draw that distinction between racism and racial discrimination.

Senator BOB BROWN—Can you see in this legislation the potential to create persecution rather than to save people from persecution?

Mr Beckett—There are a couple of points there that ought to be made. In terms of legislation that operates to keep people within Papua when they might be seeking to flee from a position where they are being persecuted, there is a possibility that their human rights will be violated within Papua if they remain there. Obviously, we do not have sufficient detail

about that because we are not on the ground in Papua and there is insufficient access, as I understand it, for journalists to be able to report on what is in fact happening in Papua. If people are able to escape from that and are then removed from Australian waters to Nauru or Manus Island or wherever it might be, there is in fact the imposition of a penalty, contrary to article 31 of the refugees convention, plus you are placing them in a third country where there are no guarantees—Nauru, for example, is not a signatory to the refugees convention—and where they may be subject to non-refoulement at some stage. Obviously, they have Nauruan visas and they are under the control, legally speaking, of the Nauruan government.

Mr Murphy—I would not go so far as to say it is persecution; I just think that the legislation is procedurally flawed in that it is making the model the lowest common denominator—namely, the UNHCR refugee status determination process—rather than the more sophisticated, albeit flawed, Australian model. There are a number of critics of that. We have referred to Michael Alexander’s criticism. More recently, Michael Kagan, in the *International Journal of Refugee Law*, has also criticised UNHCR’s processing model. So I would not go so far as to say that it is persecution, but we are encouraging a flawed model to be used in processing.

Senator BOB BROWN—Even though refugees in Nauru may not come to Australia if they are found to be refugees.

Mr Murphy—That is right.

Ms Lester—I think persecution in the context of refugee law evokes the notion of violation of human rights in the country of origin or former habitual residence. If we speak in terms of persecution, I think it can cloud the issue but there is vulnerability to violations of human rights. There is very clearly vulnerability to violation of human rights both on Nauru and on Manus Island or wherever in the context of interdiction and transfer to those declared countries. There is a range of human rights issues that arise in the context of the procedure and the quality of the procedure. Picking up on the point that A Just Australia made earlier, if the process is applied in a flawed way and those flaws cannot be scrutinised then the consequence can be returned to persecution. That again would be a violation of article 33.

Senator CROSSIN—Thanks very much for your submission. I thought it was quite creative to link the bill with the current policy of this government about values in schooling. It was a very creative way to prove a point, and I think you have done that quite successfully. I want to go back to something Dr McAdam raised in her submission: Nauru and Papua New Guinea are not party to key human rights instruments and Nauru is not party to the refugee convention. What implications does that have for people who will settle on or be transported to Nauru?

Mr Murphy—I think it raises some serious problems as to how the minister can make a declaration under section 198A that these places meet these basic criteria when in fact they do not. In our investigations as to these statements, we have found it very difficult to find any on the public record. The only one we have found in relation to Papua New Guinea was dated October 2001 and the one in relation to Nauru was curiously dated in 2002 after the people were already taken there. I think that adds another flawed aspect to the whole processing: you have an unreviewable statement by the minister based on who knows what information that

objectively seems to be flawed, and it is reinforcing it further down the line in terms of policy application.

Ms Lester—I think one of the other issues about whether Nauru or Papua New Guinea are parties to key human rights instruments is the question of accountability. It is the question of international accountability for violations. There has been a lot of discussion in the international scene about whether you ought to require a state to be a party to relevant conventions or whether what is critical is implementation of the standards that are set out in those conventions. While in theory it is fair to say that the implementation is more important than being a party to the convention, there is very little evidence to suggest that states that are not parties to these instruments actually comply with the relevant standards. I think while it is a theoretical argument that can be made, it does not bear itself out in reality.

Senator LUDWIG—This legislation will not set the standards in offshore processing; in fact, it will be the department that will set the standards. They will determine how the standards are to be operated under. They will set not only the standards but what level of compliance is required, what appeal mechanisms will be available, what primary documents will be received—all of those matters will be set by the department.

Ms Samson—It is worse than that: DIMA has said that it will be done under—

Senator LUDWIG—I was going to go there as well, I should say.

Ms Samson—Nauruan law; it will not be done under Australian law, so the extent to which the Australian government and DIMA will be able to set those standards is also questionable.

Senator LUDWIG—DIMA itself could say that they will not set the standard or guidelines or policy because it might then be reviewable under section 75 of the Constitution because that would be a public servant doing something. They might move it one step further and say they could contract it to a company or get the Nauruan authority or whoever to set those standards or guidelines on their behalf, and therefore remove it from at least review. That is obviously a matter we can pursue. But the real issue in all of this is that, no matter what you might say of the legislation, no amendment to it will improve it in that sense because the standards or the guidelines or the way it will operate will all be dealt with by, presumably, either the Department of Immigration and Multicultural Affairs requiring Nauru to set the standards or them doing it themselves, all under guidelines, without any review possible in Australian law, unless they make some gross errors along the way.

CHAIR—Senator Ludwig, I missed the beginning of that series of questioning; I was following up on the matter we were pursuing before. Did I understand that discussion to be about the processing arrangements on Nauru?

Senator LUDWIG—Yes.

CHAIR—Ms Samson, you said it will be done under Nauruan law. That is not the impression the committee received on the last occasion following the appearance of DIMA. We are still seeking information on that. But it is most certainly not the impression the committee received.

Ms Samson—That was taken straight from DIMA's submission to the committee. They indicated that people will be held in Nauru under Nauruan law, not Australian law.

CHAIR—I thought we were talking about processing. That is different.

Ms Samson—Yes. The conditions of detention are what I was getting at, and they are part and parcel of the way people are processed.

CHAIR—We can draw lines all along the road, actually. That is another issue. Thank you for letting me clarify that, Senator Ludwig.

Mr Murphy—The department said that their procedural guidelines on these matters are publicly available. That is a mystery to all of us who practise in the area. My research on this has shown that if they are publicly available it must be in a locked drawer at the bottom of a filing cabinet somewhere. There is nothing in the procedural manuals that are publicly available about offshore processing. If the offshore processing in those cases that were done in Nauru and Papua New Guinea is different from what is done offshore, that also is locked away in a draw in a filing cabinet somewhere. There is nothing publicly available on that. I think this is one of the major concerns that our organisation has: we have an onshore system for which the procedures are set out and which is independently reviewable; offshore it is a mystery and nobody really knows what goes on. It is basically the department saying ‘Trust us’—the same department that has appeared in numerous inquiries and had difficulties in its own reform. Whilst we would encourage the reform of the department, I would not say at the moment that we would be inclined to give them unreviewable powers.

Senator LUDWIG—The last time the department was before us I sought more specific information about what guidelines, what MSIs, they would be operating under. I do not think the committee has heard from them at this point but we will have an opportunity this afternoon. I wanted to work out whether they were doing a coin-flipping operation.

Senator CROSSIN—I would like to follow up on that. Not only is it not reviewable but also it is not able to be tested. That is a problem, is it not?

Mr Murphy—There is a theoretical right of appeal to the High Court under section 75(v) but, as we have said in our submission, there is a de facto attempt to remove that by the fact that legal representation for these people is effectively blocked in the way it is accessed. The whole process is a mystery. We just do not know what happens. I am sure the process is quite sophisticated and follows usual procedural fairness and administrative law practices which are accepted in a developed Western nation such as Australia. We appear to be saying: let us use a model that the UNHCR admits is flawed and we will not tell anyone how we do it.

Mr Beckett—Can I say something about that blocking. It is a very practical thing and it happened last time: there were a group of lawyers who wanted to provide pro bono assistance who could get themselves to Nauru. There were numerous applications made to the Nauruan mission in Melbourne and each time they were met with, effectively, no response. So at that first hurdle we were able to actually get those visas. Some people were able to get in, but most of the lawyers who wanted to provide advice to people—to take instructions to mount section 75(v) applications in the High Court or whatever it might be—were blocked at that stage.

Even though last Friday DIMA said they were not opposed to such advice occurring, there is a further step that has to be taken, and that is to ensure that that advice is able to be given—so facilitating and ensuring that lawyers are able to leave Australia and go to Nauru. In other words, to get the Nauruan government to agree to grant them visas to allow them to get into

the country so that that advice can be provided. We are not talking about blowing up the whole process—it is all about saying that there are minimal levels of judicial review that these people are entitled to under Australian law and they should have access to that facility.

Senator CROSSIN—I want to ask a question about something you raise on page 5 of the Lawyers for Human Rights submission about addressing the root causes. Christmas Island is actually in my electorate of the Northern Territory so we get some very good feedback from the residents about the status of people who are sent there for detention. I have to say it came as some surprise to people on Christmas Island that the West Papuans were granted refugee status very quickly, as opposed to, say, the group of Vietnamese that they had dealt with just previous to that.

The question that was put to me by email was: was this because DIMA had finally got their act together or was their case for refugee status so strong that it was able to be determined quickly? I think it is the latter rather than the former. We are all pretty convinced that their claim for refugee status is convincing and genuine and can be determined very quickly, but you raise a very good point about us addressing the root causes and actually entering into a dialogue with Indonesia about the movement of West Papuan asylum seekers. I do not hear anything from this government about seeking to genuinely enter into that dialogue. Do you want to give us some evidence about why that is in your submission and why you think that is important?

Ms Lester—First of all, in relation to the processing of the West Papuans, I come at this from the outside so I do not know what happened in the individual cases, but certainly I think the speed with which the decisions were made is a testimony not only to the strength of the claims but also to the efforts that DIMA was clearly putting in to process claims quickly—I actually think they deserve a pat on the back for that. What we are concerned about now is that we have this back-peddalling.

Back to the question of root causes—it is not possible for us to give evidence as to what Australia is doing to address the issue of root causes, and it may be that there are diplomatic demarches being made in relation to this issue, but it is clearly a critical component. It has been recognised globally for a long time that addressing the root causes of refugee movements is a critical component of each state's responsibility in the international protection regime. So, in a sense, you have the three components: one is to grant protection to those who seek it in your territory, another is to support this notion of international burden and responsibility sharing by alleviating the undue burdens that are borne by some states around the world and, finally, to address the root causes that actually cause the refugee movements in the first place because there is broad acknowledgement that people do not want to leave—they leave because they feel compelled to do so.

Mr Murphy—Briefly on the Vietnamese, I understand that all the Vietnamese were subsequently approved either on merits review or by ministerial intervention as well, which I think reinforces the value of independent merits review.

Senator MASON—Ms Gauthier and Ms Samson, this committee has received a lot of evidence over the last day and a half from learned people about aspects of international and domestic law which relate to this bill and indeed the refugee convention. But you have been

game enough in your submission to talk also about foreign policy, which of course is not necessarily directly within the bailiwick of this committee. Nonetheless, you have done so and that is terrific. You say on page 7 of your submission:

Many Government MPs have expressed the view that it is necessary to take all possible steps (including those that may breach international obligations or operate discriminatorily) to appease—

a loaded term in Western diplomatic history—

the Indonesian government over this matter because to do otherwise would help to undermine the present moderate Indonesian leadership, lead to an upsurge in terrorism in the region and ultimately result in the dismantling of the Indonesian archipelago.

We know you think this is bad international law. Are you saying this bill is bad foreign policy as well?

Ms Samson—Absolutely. While that claim sounds as outrageous as your inflection would imply—

Senator MASON—It is pretty big.

Ms Gauthier—I was surprised when that claim was made to me, and I reacted in quite the same way when it was put forward as an argument in support of this bill.

Ms Samson—That is not a claim that we have made up; this is a claim that is coming directly to us that we find as—

Senator BOB BROWN—It has been in the press.

Ms Samson—Exactly.

CHAIR—That must make it true then, Senator Brown!

Senator BOB BROWN—It is part of the public discourse.

CHAIR—I understand that, but it does not make it true.

Ms Samson—It does not make it true, but I think that if it is part of the public discourse then it is definitely something that is weighing on the minds of some senators and some MPs. We felt that it was an important thing to address.

Senator MASON—Would you say it is a legitimate concern? This is a terrible thing to say but, putting aside the concerns about the convention just for a second, if we look quickly at the foreign policy and our relationship with Indonesia, surely it is a legitimate concern. You would accept that?

Ms Samson—Absolutely.

Senator MASON—And how we deal with Indonesia and how we respond to the West Papuans.

Ms Samson—Yes, but A Just Australia would argue that the way in which we are seeking to deal with this diplomatic issue by targeting boat arrival asylum seekers immediately in the wake of the approval of 43 asylum seekers to Australia and granting them refugee status does not actually solve the problem of this diplomatic blue. In fact, it may exacerbate the situation. In our submission, we go through some of the reasons that might occur. I notice that there is also a submission that has been made to the committee by Dr Richard Chauvel, who also goes

into the issue about how the proposal for offshore processing will not actually solve some of these broader diplomatic issues around how Australia deals with its relationship with West Papua and with Indonesia more generally.

Ms Gauthier—The point is that we will still have Australian government officials making diplomatically embarrassing decisions, whether it is happening here or in Nauru.

Senator MASON—I have heard the word ‘appeased’ being bandied about—that Indonesia is being appeased. Do you think Indonesia is being appeased?

Ms Samson—I think the statements in the media that have been made by representatives of the Indonesian government would indicate that to be the case. I think we need to link this clearly also to the question of the penalty which we are arguing is being applied, which would be in breach of the refugee convention. The Indonesian government sees this as a satisfactory outcome for them. They were initially critical of onshore processing. They see offshore processing as a good way of dealing with the West Papuan situation—that is, people fleeing from alleged persecution in West Papua. But also the Australian government, in the explanatory memorandum, has indicated that this is about deterrence and preventing people who are coming into Australian territorial waters from ever entering the mainland.

Senator MASON—So it is bad law and bad foreign policy.

Ms Samson—Absolutely.

CHAIR—We have five minutes further for questioning.

Senator NETTLE—I wonder if someone could make a comment on the impact of this legislation on refugee families. There are a number of people who have one or two family members here. What is the impact of this legislation going to be on the capacity of those families to be reunited under this legislation?

Ms Gauthier—This is going to impact on families in two ways. One is the difference in how families are going to be accommodated throughout the processing, and the other will be the resettlement options. The government has gone on the record as saying that they do not want people to be resettled in Australia under this policy. As Dr McAdam stated before, under the previous use of Nauru and Manus Island, some people were resettled in countries other than Australia and New Zealand—but only 4.3 per cent of people were sent to other countries, and they were predominantly family reunions. For family reunion for people from, say, West Papua, the majority of them are going to be in Australia. It is highly unlikely that there are going to be family reunions of West Papuans in Sweden.

Additionally, in Australia the government has made very significant reforms to the detention regime with the use of the residence determination program. These have been fantastic reforms, and we have been working very closely with DIMA and the welfare agencies who put these together. DIMA are being really proactive in putting these forward and making sure that, where there are no security concerns, families are living in the community with decent welfare options, living in dignity, and that the welfare of the children is being taken care of. We really commend the government and the department for the steps they are taking in this direction. This will not happen in offshore processing areas. They did do it on Christmas Island. It was limited in its scope because there was less welfare agency

presence in that island, so it was very difficult to do it. It will be completely impossible in Nauru to do that. We have read the submissions from DIMA and the answers that they gave to questions on notice saying that it is not detention and that children will not be detained because they are going to be let out during the day. These arguments are, in a word, ridiculous. They are conditions of Nauru. I hope you have all looked into the conditions of the processing centres, seen the photographs and read the reports of what Nauru as a country is like. In essence, the entire island, which is only 10 times the size of Central Park, becomes the detention centre itself. The conditions for children are going to be appalling. Again, families are going to have great difficulty reuniting in Australia, where many of them have family members who have already been granted protection visas in Australia. They are not going to be reunited.

Senator NETTLE—You talk about the changes that have been made to the immigration department as a result of the Palmer reforms. What do you think this legislation says about the genuineness of the government in implementing the recommendations that come out of Palmer? The intention is to implement them for one group of refugees but not for another group of refugees.

Ms Gauthier—We find it very disappointing. We believe the Australian people have clearly spoken, and the government answered by writing into the Migration Act the principle that children shall be detained as a measure of last resort. These principles are about actions—they are not about geographical location—in that the government has said, ‘We will not do these actions.’ And now we find that children are going to be detained on behalf of the Australian government. So essentially the action is the same thing. Again, with the reforms that were recently made with DIMA that go across the board—things like the 90-day deadline for decision making—they have acted in good faith. At first we were quite sceptical about what was going to happen. We have been really pleasantly surprised by the steps that they have taken. They are working really closely and proactively with welfare agencies and going above and beyond their requirements under the new legislation, which is why it was so surprising to us when they then turned around and put forward this proposal that is going to have incredibly negative welfare effects on families and single asylum seekers.

Mr Murphy—I want to add something about family reunion. I understand the visa the department was proposing would result from the offshore processing was the 451 secondary movement visa, which they would rename. That visa has a period of five years residence in Australia. But you cannot actually apply for any other visa once you are on that visa in Australia unless you apply for a protection visa. That protection visa cannot be decided until 54 months after you have been granted the 451 visa. The 451 visa does not provide for family reunion in terms of sponsoring family members from elsewhere. At the moment I have a number of clients in our office—Afghan and Iraqi gentlemen—who have been separated from their wives and children for six and seven years. They are now trying to bring them over in the process. They have been grinding through the temporary protection visa process. This visa is going to reinforce the stress that is caused for those people and make it even more difficult for them to resettle in the Australian community.

CHAIR—We are almost out of time—in fact, we are out of time.

Senator NETTLE—I will be quite brief.

CHAIR—The answer needs to be brief as well.

Senator NETTLE—In your submission you talk about the capacity for offshore asylum seekers to be refused protection on medical grounds. I wondered if someone could explain what that refers to.

Mr Murphy—The offshore visa class has a category where you have to be assessed against medical criteria. There is a possibility of a health waiver, but it is still possible and I have had clients who have been refused. For example, down syndrome children have been refused entry to Australia and that means the whole family cannot come, because the situation is 'one refused, all refused'. Onshore, that process is just not possible. You cannot be refused onshore on health grounds. You will be treated. You will be provided medical care and attention. Offshore, you can be refused and the whole family cannot come.

Senator NETTLE—You are saying that could occur as a result of this legislation?

Mr Murphy—Yes, and it is not reviewable.

CHAIR—Thank you. I am afraid that does bring us to the end of this session. I thank Australian Lawyers for Human Rights and A Just Australia for appearing and also make one clarification in relation to the document that Ms Gauthier tabled: in fact, the committee will receive a copy of the document because the petition must be tabled by a senator in original form, so we have agreed to receive a copy and I understand that will be made available to the committee in due course.

Ms Gauthier—Yes.

CHAIR—Thanks very much, and thank you all for appearing today and for your submissions.

[10.17 am]

CROCK, Associate Professor Mary Elizabeth, Private capacity

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

Prof. Crock—I am an associate professor in the faculty of law at the University of Sydney, but I appear in a private capacity.

CHAIR—Dr Crock, you have lodged a submission with the committee which we have numbered 66. Do you need to make any amendments or alterations to that submission?

Prof. Crock—No.

CHAIR—Then I will ask you to make an opening statement and then we will go to questions from members of the committee.

Prof. Crock—I think you have already heard from a number of eminent experts in this field. In fact, it is hard to think of anything that has not been put to you already in the clearest possible terms.

CHAIR—We can all go home!

Prof. Crock—I am basically here to assist the committee as much as I can. There are, however, four matters that I would like to focus attention on if possible. I had the honour—something or other—of appearing on a program with Senator Brandis which is going to be screened tonight on SBS television, and there were a couple of things that he stated in the course of that program which I found deeply disturbing. One was that in fact this measure was no more and no less than addressing an anomaly in Australian law that arose from the excision of offshore islands. He said it was an anomaly that people were able to bypass that and come directly to the Australian mainland and apply for asylum here when they could not do so offshore. That concerned me and I would like to speak to that if possible.

The point that needs to be made here—it was not possible to make it on this program—is that the excision laws were themselves very poor as a matter of international law. He is quite correct: the effect was just the same as if you were to excise the central business district in Sydney in terms of Australia's obligations. You cannot do that under international law. You cannot simply say, 'Sorry, this is not our territory, so the law doesn't apply.' I would, however, point out that that measure back in 2001 was introduced expressly because of the concern that Australia was receiving secondary movement refugees—people who had protection in other countries and were seeking an immigration outcome here. What is different about the measure before you now is that it expressly captures people who are coming directly from a country where they face persecution.

Senator MASON—Such as West Papua.

Prof. Crock—Such as West Papua. With respect, I see no difference between what we are doing and, to be emotive, the West Germans suddenly turning around and saying that they would not receive refugees over the Berlin Wall. Indeed, if we go to the extent, as some media reports have suggested, of allowing our officers to patrol the straits above Australia with

Indonesian soldiers, it is akin to the West Germans putting snipers on the Berlin Wall to catch the East German fugitives. So I cannot express strongly enough my resistance to this measure, both in principle and in terms of the practical impact it is going to have.

I also notice that we have been discussing the issue of whether the process is to happen under Australian law. Again, Senator Brandis was at great pains to say, 'They will be processed under Australian law.' The plain truth is that the Migration Act will not apply out there. It is going to be done sublegislatively under policy arrangements. We do not know what these policy arrangements are. It would appear that government senators do not really know what they are either. If you can perhaps clarify things for us, that would be great.

Senator MASON—It will be done administratively, not legislatively.

Prof. Crock—That is right. What is clear is that the Migration Act has not applied to date in the processing offshore. Anyway, this is another issue I would like to flag with you for discussion—in particular this notion of processing. 'Levelling the playing field' is the other catchcry that comes up all the time—that we are really just bringing ourselves to the standard, I will say non-emotively, used by UNHCR. This is another issue that I have great concerns about. However, I highlight two other issues that I would like to particularly focus on today. One is the position of vulnerable applicants, because it seems to me that when we start talking about process and the same as this, the same as that, you get this discourse as though process is something that applies across the board to everybody equally—so, if you set one process up, it is going to be fine; one size fits all. I have just come off doing a project that has taken me three years. We think it is now due to be released on 10 August. It is looking at unaccompanied children and refugee protection around the world. I have done a big project in Australia looking at what happens to children who travel completely by themselves, either smuggled or trafficked, into a country and how they fare when it comes to seeking protection from the country.

I can tell you that I have studied the children who made it to Australia. According to government statistics there were about 290 between 1999 and 2003. I have also had a look at and managed to interview and speak with some of the unaccompanied minors who were sent to Nauru. I can tell you that the experiences and outcomes for those two groups were dramatically different. According to the statistics that I received in January this year from the International Organisation for Migration, which finally gave me statistics after three years, 55 children—that is, individuals who were under the age of 18—who had no apparent family with them were registered coming onto Nauru. This is a global phenomenon. It is not particular to Australia. There were 55 children on Nauru. IOM's statistics also showed me that, of those 55, 32 were returned to Afghanistan in 2002 and 2003. That suggests that they were either rejected as refugees or it got to the point where they could not stand it any longer. IOM made it clear that only nine of those 32 were still children when they left. They were also at pains to tell me that they followed all the usual procedures in making sure that the child was met at the other end by a responsible adult. Not a single child in Australia was returned. There is your difference. It is day and night.

Senator MASON—Between the onshore and offshore processes?

Prof. Crock—Between the onshore and offshore processing. It is day and night. We are talking as though one processing size fits all. Vulnerable people need assistance. They cannot be expected to express perfectly a fear in terms of the refugee convention. You guys know all about the refugee convention and the definition now. You cannot expect vulnerable people to be able to do that.

Children are the most extreme example. I have focused on this because it has been my research. It is a passion for me now because I have become very conscious of the fact that we do not notice migrant children in this country. The Migration Act itself, until we finally put in provisions last year about the detention of children, is silent on children as migrants. They are just subsumed and treated as little miniature adults. That does not work very well at all. I have brought with me—and I am really reluctant to put it on the public record—the executive summary of my report and also the chapter from my report on the processing in Nauru. I am happy to make that available to the committee.

CHAIR—On a confidential basis?

Prof. Crock—Is it possible to do it on a confidential basis?

CHAIR—Yes. Do not table it now.

Prof. Crock—Okay. It is not particularly confidential but I want it to be—

CHAIR—Yes, I understand that it is a report in development so it would not be appropriate, then, if that is your wish, to put it on the table as a document, but the committee can receive it confidentially.

Prof. Crock—I am certainly very happy for it to be made public when the report is released.

CHAIR—Certainly. I understand the time constraint.

Prof. Crock—The only other matter that I would flag for discussion is that I notice your discussion was focused very much on foreign policy and the issue of relations with Indonesia. Certainly this program that will be screening tonight suggests very firmly that Indonesia is looking very closely at this and is expecting this to be a measure that does meet its concerns. What concerns me in this whole discourse is that we need to separate the issue of human rights from questions of Indonesian sovereignty. They have to be different.

My major concern, in fact, with this measure is that it does not do that. It plainly puts the two in the same basket. It sends a message to Indonesia that we are doing this because we respect their sovereignty. It should be absolutely the opposite. Countries have a right and a duty to grant asylum to whoever they want. We have signed the refugee convention. It is terrible politics and terrible law to politicise asylum. The very essence of asylum is that it is a humanitarian gesture that is supposed to be above politics. Sure—it is not. I understand that it is very offensive for a country to be told, ‘You are abusing human rights,’ particularly when a country like Indonesia wants a clean human rights record because it has just signed on to the International Covenant on Civil and Political Rights. It has to put in a report within a year. It does not need this. That report is then tied to its funding. That is the politics behind all of this.

It is bad politics for us as a neighbour to say to our good Christian neighbours in West Papua: ‘Sorry, buddies, the shop is closed. We are not interested in helping you.’ They helped

us during the war. They were the fuzzy-wuzzy angels. I think this is really bad politics in terms of neighbourhood politics, human rights respect in Australia and the message that we give the world. It is hugely embarrassing internationally, not that this government seems to care about that. Anyway, at this point I should perhaps let you ask some questions.

CHAIR—I might just say that, in relation to the evidence with which you began—that is, on a program in which you participated that has as yet not screened and on which the committee can make no deliberation—you would understand that the committee must draw the attention of Senator Brandis to the statements that you made and the committee must also reflect on those with the opportunity to view the material that goes to air this evening.

Senator KIRK—Thank you for your submission and your comments. I want to go to the issue that you have touched upon of accountability mechanisms and what might be put into place to ensure that what does go on on Nauru has some kind of oversight of some description. You mentioned here in your materials that:

... there are no proposals to involve the federal ombudsman in overseeing detention and processing arrangements.

I wonder if perhaps you could elaborate on what you think might be appropriate—the Ombudsman, for example, or perhaps HREOC having some kind of role in overseeing what is actually occurring on Nauru with the detention and processing process.

Prof. Crock—I have been thinking very hard about where we go from here, because it is clear to me that the Prime Minister is deadset on getting this through. What can we do to make this into something that is remotely acceptable? For me, the absolute bottom line has to be access to legal advice for the people in detention and to some form of oversight of the decision-making process in terms of a real appeal system, and that is not just a reconsideration by the same people, as has occurred in the past. If we are interested in complying with the rule of law, please, Senators, do something to make sure that the minima that are used in Australia are also used offshore. Somebody has to be allowed in to give these people assistance. You cannot expect a system to operate without the need of lawyers. I have heard this for years and years now; it is just not true. You know it is not true. Please do something about it. Yes, let the Ombudsman in; let Professor McMillan go out there. That would be very good for him.

Senator MASON—I bet he can hardly wait to get there!

Prof. Crock—The whole point is that I have seen what it is like offshore. With the best will in the world, if you isolate people and if you leave them without any form of oversight from anybody, abuses occur with the type of people who end up making the decisions, who are dealing with the people on a day-to-day basis. It is quite awful really when you see what happens. I could tell you my stories of visits and so on, but I will not do that.

Senator KIRK—You have said in your submission that the experience of processing on Nauru was that it became almost impossible to get any information at all about what was going on. Did you attempt to find out what was going on? In your research, for example, did you try to get information and how difficult did you find that?

Prof. Crock—It has been almost impossible. The technological remove of these countries makes it very difficult to communicate. Interestingly, however, it is not impossible, because people eventually were able to bypass officialdom and communicate directly with people on

Nauru because they got onto the internet. So people did correspond with people out there. My concern is that you need the oversight. But, at the same time, I am also aware that, given the realities of modern technology, it is not impossible to find out what is going on, and for that reason the government should be concerned. There is no way that you can hide what does go on, eventually. But you do need to set up mechanisms that are going to provide for proper oversight of the process, in the first instance, and then appeals and also the way people are being handled from a humanitarian perspective.

Senator KIRK—You talked about the minima that are available here. Would you be proposing that there be RRT reviews, for example, of the decisions that are made?

Prof. Crock—Ideally, yes.

Senator KIRK—And then, as a step up from that or down from that, however you look at it, Ombudsman or HREOC oversight?

Prof. Crock—Absolutely.

Senator KIRK—And parliamentary oversight?

Prof. Crock—If Australian law is truly to apply up there, these measures should be extended out there. Why not?

Senator LUDWIG—You said that we can amend it. But what worries and concerns me is that, if I look at that statement and try to ameliorate the harsh effects—I can understand where you are coming from; of course, if you cannot throw it out perhaps you should try to ameliorate the harsh effects of it—how do you have an oversight, how do you have a procedure, how do you have an appeal mechanism? It would have to be, in your words, ‘an amendment to the legislation’. Anything short of that would mean that we would still be relying on the department’s rules and procedures. As we know from Comrie and Palmer, they make mistakes. It would still be open to another organisation to enforce or run those rules. So there are other avenues for mistakes to creep in. How do you then amend this legislation to give effect to what might happen in Nauru or Manus Island—in other words, to pick up Australian law and import it into Nauru? I do not think that that is possible.

Prof. Crock—It is not going to happen.

Senator LUDWIG—No, I did not say that it is not going to happen; I said that I do not think it is possible. I would like you to tell me how. If you say that you want to amend this law, how do you amend it to give effect to the RRT, the MRT and the procedures and rules that in Australia we are so familiar with in Nauru—in other words, in a foreign country, where we do not own that land?

Prof. Crock—One section. As long as Australian officials are acting in making these decisions, you just need a section in the act which says: ‘Procedures on Nauru will be made in accordance with the Migration Act.’ It is very easy to do that. I am not suggesting—

Senator LUDWIG—But doing that in Nauru—you say that extraterritorial operation of the migration legislation in Nauru would give effect to it?

Prof. Crock—It would be possible to do it. I do not think I would like to be read as suggesting that this be amended. I am actually here to put on the record my absolute opposition to this measure, period.

Senator LUDWIG—I think I have garnered that premise: your preferred position would be to throw it out.

Prof. Crock—Absolutely, yes.

CHAIR—Are there further questions? Senator Brown and Senator Nettle, you might want to fight it out amongst yourselves in terms of the time!

Senator BOB BROWN—No, we will share it. We do not fight with each other, Chair.

CHAIR—I withdraw the word ‘fight’ and insert the word ‘negotiate’, Senator Brown.

Senator BOB BROWN—Thank you. Professor Crock, I am horrified by the statistics you give us about children being returned to Afghanistan. What has happened to them?

Prof. Crock—At least one, I understand, was killed. Look, I have heard things. Through my extensive network of young Afghan friends which I now enjoy, I have heard all sorts of stories. Most of the young people ended up back in Qatar straightaway. They made their way back out of the country.

Senator BOB BROWN—Into Pakistan?

Prof. Crock—Into Pakistan. I was told that a number of them received letters of invitation from the Australian government inviting them to apply to migrate to Australia, which I thought was curious. Most of them rejected that advance. Again, the problem with this whole regime is a lack of accountability. Who knows what happens to people? That is the way the system works. That is the way it is designed to work too.

Senator BOB BROWN—Do you know how many children during that period came into Australia? You said that none of those went back.

Prof. Crock—No. Two went back to Pakistan under a negotiated arrangement—I think it was negotiated through Father Frank Brennan—to go back to Pakistan and come back as students but, as far as I am aware, no other children were sent back.

Senator BOB BROWN—Do you know how many such children came onto mainland Australia?

Prof. Crock—According to the statistics provided—again, this has been very hard. If you have a look at chapter 2, I think it is, of my report, getting data on exactly how many people came out here was extraordinarily difficult, and the figures I got were radically unreliable. The best figures I got were about 290. These are children aged between about eight and 17 who came completely by themselves, without responsible family members.

Senator BOB BROWN—You say under ‘Nondiscrimination and the prohibition on penalising asylum seekers’ that it is fundamental to the refugee convention that there is not discrimination on the basis of race, religion and country. You then indicate that these laws might cross the line as far as that is concerned. Do you have any further comment on that?

Prof. Crock—I think the best that can be said there is that, in their operation, they could be discriminatory, in that they would have a more adverse impact on people coming directly from a particular country.

Senator BOB BROWN—We are told that the saving grace of the new Nauru solution is that children will be allowed out during the daytime from the confines of the compound. Do you have any comment on that?

Prof. Crock—I think many other people have made submissions on this point. Nauru itself is the prison. The concern is the general standard of human rights that would apply to these children and indeed to everybody on Nauru. It is effectively a bankrupt country. It is really the most appalling place for anyone to stay for any length of time, particularly if we begin to use it again to warehouse refugees, because, if it becomes too embarrassing to allow these people to come back into Australia, that is where they will be left.

Senator MASON—I have a very quick question. Professor, I am interested in your report. When will that be published?

Prof. Crock—On 10 August.

Senator MASON—And is the report—or book—funded by the ARC?

Prof. Crock—There were three sources of funding. It is a report of about 250 pages. It was funded by the MacArthur Foundation in Chicago, by the ARC through the Linkage grants program in Australia and also by the Myer Foundation in Melbourne.

Senator MASON—We can look forward to having a look at it in August.

Prof. Crock—Yes.

Senator NETTLE—You were talking about the differences in the way the children were treated offshore and onshore. I do not know if you looked into why there were those different outcomes for people, but I wanted to ask you whether access to legal representation had any impact on the differing outcomes between those two groups of people.

Prof. Crock—The basis of the submission I made earlier is that I think that people need assistance in order to articulate a refugee claim. You will be aware that no process actually creates refugees; you either are a refugee or you are not a refugee. This is why it is so essential. If you have such a degraded process that people are not able to articulate their claims and so are not able to show that they are refugees then you are failing in your international legal obligations. That is why I think it is critical to make sure that people are given the assistance that they need to show who they are as a matter of fact.

Senator NETTLE—So it is possible that you would not see that discrepancy amongst the two groups if those unaccompanied minors had been able to have access to legal assistance in making their claims.

Prof. Crock—Absolutely. In fact, one of the enduring problems that I see with our whole refugee status determination system now, notwithstanding the fact that children are now released from detention, is that to gain access to our refugee determination system you are still interviewed blind without any form of assistance or advice being given to you. What I show in the study is that children really suffer from that because often they are not able to

articulate independently that they have genuine fear. For starters, often children do not use language of fear. That is why we have child soldiers—often they do not experience fear like older people do. By the same token, to try and say, ‘This will happen to me because of one of the five grounds,’ religion, who they are and so on, is too hard.

I came across examples onshore within Australia of particularly vulnerable young ones. A young girl from Afghanistan, for example, was put into the screening process and said nothing at all that could meet the definition, so she was deemed not to attract Australia’s protection obligations. She spent six months in Woomera detention centre in the general rejected asylum population there, which is a pretty rough environment, before she was picked up, I think, by Julian Burnside and hauled back into the process. Within Australia we saw just how important it is to give people assistance so that they can make that first step and articulate their claim.

CHAIR—Thank you very much. As noted, if you would pass that document to the secretariat then we will receive it confidentially.

[10.43 am]

PEARCE, Ms Alicia Clare, Research Officer, UnitingJustice Australia

POULOS, Reverend Elenie, National Director, UnitingJustice Australia; and Representative, Refugee and Displaced Persons Program, National Council of Churches in Australia

CHAIR—Welcome. UnitingJustice Australia has lodged a submission with the committee which we have numbered 135. Is there a need for any amendments or alterations to that submission?

Rev. Poulos—No, there is not.

CHAIR—The National Council of Churches in Australia has lodged a submission with the committee which we have numbered 89. Can you advise whether that needs any adjustment or alteration?

Rev. Poulos—No, it does not.

CHAIR—As with other witnesses, I now invite you make an opening statement and then we will go to questions.

Rev. Poulos—Thank you for the opportunity to speak to you today on behalf of the Uniting Church and the National Council of Churches. The National Council of Churches, through its refugee and displaced persons program, is concerned with advocacy, education and community development in matters relating to refugees, asylum seekers, settlement and access and equity. It also works in these areas in partnership with state ecumenical councils, other national and regional councils and the World Council of Churches.

The Uniting Church has a longstanding interest in the status of welfare of people seeking our country's protection and has been engaged in advocacy and the provision of services to asylum seekers and refugees since the beginnings of the church. We maintain our commitment to advocating for an end to the mandatory detention of asylum seekers, the introduction of a system of complementary protection, the introduction of a complete and thorough case management system for all asylum sectors and an end to temporary protection visas and bridging visas with rights and entitlements. Both the NCCA and the Uniting Church have consistently and strongly opposed the Pacific solution, including the excision of areas from our migration zone, for many reasons, not the least of which is that it represents an immoral devolution of our responsibilities as a wealthy and stable country onto one of our poorest and most vulnerable neighbours.

It is fair to say that, in the light of the government's and the department's commitment to take seriously the recommendations of the Palmer report, and in the light of the positive 2005 amendments, the announcement of these measures and the legislation we now have before us came as a horrifying shock. Christian values teach that all people are created in the image of God and so have dignity and worth in the eyes of God. The Judaeo-Christian tradition has at its core an injunction to care for the stranger in need. Christians are called to care for and stand in solidarity with those suffering poverty, marginalisation and oppression. This bill is contrary to the most basic principles of humanity expressed in the Christian tradition. It

reflects an ideology that identifies people as commodities in the service of a bottom line. In this case, the persecuted and abused ones we are called to care for become commodities to be traded for a bottom line that relates to some aspect of our foreign policy. We believe that this is unacceptable.

The Uniting Church and the National Council of Churches share the opinion that it is unacceptable that people are harmed and abused because of poor practices, bad legislation and unnecessarily harsh and punitive policies. We are calling for fair, reliable and transparent systems and procedures that take seriously the needs and circumstances of people, our obligations under international human rights instruments and our responsibilities as a wealthy and decent democratic country. This is a devastatingly nasty piece of legislation. We ask that you recommend in one unanimous report that the bill be rejected.

Senator CROSSIN—Thank you very much for taking the time to come before us. I want to go to a pretty good quote from the President of the Uniting Church. In the context of the 2001 federal election campaign the government ran the idea, ‘We shall decide who will come to this country and the circumstances in which they come.’ Your president has now, quite dramatically, I think, determined that it is our foreign policy considerations and pressure from another country that is determining this. Would you like to make a comment about that, given the quote on page 4 of your submission?

Rev. Poulos—It certainly appears to be that way. Nothing we have heard since indicates that there is any reason, other than bowing to pressure from Indonesia, for this legislation. However, having said that, it is legislation that is in line with the general trend of the original amendments which enacted the Pacific solution. We believe this legislation shows that all the discussion around the fact that the original Pacific solution was intended to capture people making secondary and further movements was a furphy, because this legislation captures people who are making a first and original movement to a country of first asylum.

Senator CROSSIN—On behalf of the National Council of Churches in Australia you would maintain that our immigration policy should be very separate from our foreign policy?

Rev. Poulos—It should be separate. Certainly, we would echo the need to maintain our integrity in terms of our obligations to human rights and our commitment to see that human rights are upheld separately from any considerations of foreign policy, as has been presented in a number of the submissions.

Senator CROSSIN—I want to also give you an opportunity to comment on the fact that people caught up in this situation will not have any access to any reviewable decisions, any open and accountable transparency about the way they have been treated or case managed and there will be a lack of access to the Ombudsman. What do you believe the impact will be of us just monitoring their general wellbeing and circumstances in a place such as Nauru?

Rev. Poulos—We are concerned that it will be very difficult to monitor people’s wellbeing on Nauru. It has been proven to be so and there is nothing in here that indicates that that would change. We are appalled that we will be placing people in situations where they do not have proper access to legal services, interpretive services and community services. It is just a nightmare, to be honest with you. It is staggering and distressing that we would do this to people who come seeking our protection and care. Nauru can barely look after its own

citizens, let alone look after people who we actually have responsibility to care for. Even our systems are not perfect—we have well and truly learnt that—so to put them on Nauru, where systems and processes do not even exist, is just horrifying.

Senator CROSSIN—Finally, on page 6 of your submission you raise the issue of the Henry VIII clause. Senator Mason is an eminent member of the Scrutiny of Bills Committee, as I was in time past. The Henry VIII clause is something that another committee of the federal parliament also raises concern about, where, as you say, the delegation of legislative power goes to a non-legislative body. What impact will that also have on the future outcome for these refugees?

Rev. Poulos—Again, it removes longstanding systems of accountability and transparency. It is an attack on our parliamentary sovereignty and it actually places more power for discretionary decision making on a department that is already struggling to do that in a decent and just way and to meet its responsibilities.

Ms Pearce—I think another issue is that it removes transparency from the departmental process. Instead of the parliament dictating to the parliament what it should or should not be doing, it turns it into a situation where, by formulating—

Senator MASON—The regulations.

Ms Pearce—the regulations to the legislation, it is dictating what the parliament will do.

Senator CROSSIN—Given this department's track record in recent years, it is not something you would hold up as exemplary practice. I would have thought that this would incur even more doubt about why there would need to be intense scrutiny, particularly if it is now at arm's length—that is, in another country and offshore?

Rev. Poulos—We would agree with you completely.

Senator NETTLE—Thank you for pointing out in your submission that there is a lack of access of entitlement to gainful employment for people on Nauru who are found to be refugees, because we have not had that pointed out by other people in the process.

I want to ask you about the impact of this legislation on family unity. We have heard some evidence this morning of people for whom some family members have arrived in Australia and are subject to the temporary protection regime. What do you think this legislation will do in terms of the capacity of families to be reunited, particularly those for whom some members are here and some are elsewhere?

Rev. Poulos—I cannot imagine that it would make it anything other than almost impossible for families. If a member of a family is here on a visa and other members of the family end up on Nauru being processed and waiting for who knows how long to get resettlement to a third country—and who knows where that will be?—the chances of reuniting that family, I would have to say, are really slim at best.

Senator NETTLE—We have had some submissions this morning about the impact that this legislation, creating another group of refugees waiting in a camp, has on the existing millions of refugees who are waiting in camps elsewhere. What impact is the creation of this new group of refugees having on the capacity to resettle refugees who have been waiting, sometimes for decades, in refugee camps in Africa? We do not know whether the Australian

government, UNHCR or the department of foreign affairs will be involved in the process of finding a resettlement country for these people. What impact will that have on the already existing mechanisms, internationally, for resettlement?

Rev. Poulos—If there is any queue at all in relation to refugees and asylum seekers, it is the long queue of people in camps waiting for resettlement. This will add another lot of refugees into that mix. Australia is an example of a country that has the capacity to do better than reaching for the lowest common denominator in that process. I also struggle to imagine what country would take refugees who, they believed, were a responsibility for Australia. When you have people wasting away in camps in Kenya, surely there are more countries eager to take people from that situation because they know that that African country has struggled to care for huge populations of refugees. In Australia, we are talking about what is a relatively small handful of people; we are shifting our responsibilities. I think other countries like the US, Canada and New Zealand would be entirely within their rights to say, ‘Sorry, no thank you.’

Senator NETTLE—You talk about this legislation being about ‘moral abandonment’. By that do you mean that this legislation puts caring for the human rights of individuals below the considerations in foreign policy that you referred to? Is that the sense in which you mean ‘abandonment’?

Rev. Poulos—It is that as well as an abandonment, if I can flip it, of our moral obligations to care for people who come seeking protection.

Senator MASON—Could you argue that at the moment the situation is anomalous because people can arrive on an island offshore and not qualify for onshore processing, yet if they are literally, in some cases, a few hundred metres south, they, perhaps, qualify for onshore processing?

Senator CROSSIN—Only if you come by boat.

Senator MASON—Yes. So, in a sense, this legislation clears up that anomaly because everyone goes to offshore processing. What do you say to that argument?

Rev. Poulos—That is a clearing up of the anomaly which we would prefer done in exactly the opposite way—that is, that everyone who arrives here is processed onshore.

Senator MASON—Okay; you would simply say that. That might be one argument. Some of us have sat in committees looking at similar legislation in the past; you mentioned the Pacific solution. The other argument used there—and if you do not agree with this, please tell me—was that people went from first to second countries, where they may have been safe, and then on to Australia. Is your argument that if that was the case it is certainly no longer the case with the most recent refugees?

Rev. Poulos—That is right. In the case of the West Papuans, for example, Australia is a country of first asylum. They were not engaging the services of people smugglers. They had put themselves on a boat and had come to the nearest country to seek protection.

Senator MASON—You would say that the anomaly should be handled in the opposite fashion and that, even if it was relevant in the past, it no longer is.

Rev. Poulos—Yes. There are problems with secondary movement, but there are also problems with what in fact is a safe country. In previous submissions made by the Uniting Church, we have raised questions about whether countries like Indonesia are safe.

Senator MASON—This committee has heard a lot of evidence about that in previous inquiries looking at similar legislation.

Senator LUDWIG—I want to talk about more practical issues. Your church does a lot of good work, as I understand it, in assisting humanitarian refugees and entrants to Australia. Your work might start when they have been approved a TPV, a temporary protection visa, or right from the outset when they end up in a detention centre in Australia, where you visit them and provide services to them. You undertake not only care but a range of other activities, which I am happy for you to describe.

Rev. Poulos—Yes.

Senator LUDWIG—How will you go in Nauru?

Rev. Poulos—We do not know. It has been impossible for us to get to Nauru.

CHAIR—Just to clarify: have you previously tried?

Rev. Poulos—Members of our church have tried, yes.

CHAIR—And were rejected for a visa application?

Rev. Poulos—Yes. We were told that the government could not do anything about that, because it was a matter for the Nauruan government.

Senator LUDWIG—You take issues like mental health very seriously. You try to help those people in detention and provide a range of services to assist them. The Palmer the Comrie inquiries looked at these issues in particular. I am sure that you were one of the movers and shakers, if not out front then behind the scenes, in seeking to change the way the immigration department deals with its detainees. That is all now lost with what will happen in Nauru or other offshore processing facilities, as far as you are aware.

Rev. Poulos—Yes, it is.

Senator LUDWIG—Is that disappointing?

Rev. Poulos—It is extremely disappointing. We were shocked. We have been working both with the department and with the minister's office for a long time to improve, as best we could, the situation for people in detention and in the community on bridging visas, for example. So this seems like a huge backward step.

Senator LUDWIG—Did it come as a bolt out of the blue? As I understand it, you were working—I would not use the word 'cooperatively'; you might use the phrase 'to better'—to move the debate along constructively.

Rev. Poulos—Constructively, yes.

Senator LUDWIG—The difficulty is that it requires the department to be more open to work 'constructively'. I am not sure whether I would subscribe to using that term just yet.

Rev. Poulos—We have been working cooperatively with the department on a particular issue—that is, the development of a series of protocols for chaplaincy to officially recognise

chaplaincy into the detention centres. So we have been working for cooperatively and constructively, I think, on this.

CHAIR—Thank you for your support, Reverend Poulos. Senator Ludwig deserted me in my moment of need, as ever!

Rev. Poulos—The processing of the West Papuans happened in a timely manner, which we were very pleased about. It appeared that the improvements that were being made for the processing of asylum seekers and refugees were starting to take effect on the ground and that people were not waiting for horrendous periods of time for their determination. At that point we were thinking: ‘This is good. It’s starting to get better and improve.’ Then this announcement came, apparently in response to pressure from the Indonesian government, and we were surprised.

Senator LUDWIG—In your work in finding durable solutions, avoiding the warehousing of asylum seekers and thereby ensuring their mental health and other issues that detainees suffer from is addressed productively rather than constructively, what are you going to do if this bill becomes law and the government opens up an offshore processing centre again with an outside provider in places like Nauru?

Rev. Poulos—We will do whatever we can to support any provision of services.

Senator LUDWIG—It is a huge backwards step.

Rev. Poulos—It is a huge backwards step.

CHAIR—If there are no further questions, Reverend Poulos and Ms Pearce, thank you both very much for appearing today and for the submissions of both the organisations you have represented here today.

Rev. Poulos—Thank you.

Proceedings suspended from 11.05 am to 11.15 am

CHAN, Ms Angela, Member, Migration Institute of Australia

VIDLER, Ms Jill, Member and Committee Member, Migration Institute of Australia

CHAIR—Welcome. The MIA has lodged a submission with the committee which we have numbered 103. Do you need to make any amendments or alterations to that submission?

Ms Chan—No.

CHAIR—I am going to invite you to make a brief opening statement and then we will go to questions from senators after that.

Ms Chan—Thank you for the opportunity of addressing this hearing today on behalf of the Migration Institute of Australia. The Migration Institute of Australia represents 1,500 registered migration agents throughout Australia, and we provide assistance to refugees on both a paid and a pro bono basis. Our members are from private practice as well as from community organisations and NGOs. We are opposed to the introduction of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006. We are concerned that this bill will lead to Australia breaching its international obligations in regard to the refugee convention, the Convention on the Rights of the Child and the International Covenant of Civil and Political Rights. We could go into the reasons for that during the questions, if you like, afterwards.

We are also concerned that the regime of assessment is not subject to domestic law, scrutiny or review. There are no rights of representation or review for the people who will be sent to Nauru, whether they be funded or unfunded. We believe this legislation has been rushed and that the guidelines are not clear as to how the system will work. We believe that applications must always be subject to independent review and that the decision-making process must be open to public scrutiny. I have actually read the 136 submissions on the internet. I thought No. 1: 136 submissions is a lot of submissions for any Senate Legal and Constitutional Affairs Committee hearing.

CHAIR—We are very popular.

Ms Chan—Apparently. Of those submissions, I found only one that supported the bill, and that was from the department of immigration. I did read their submission and I do hope that you question them about some of the reports on the mental health issues of people who were detained in Nauru. I think that the committee has to take very seriously the public criticism and reaction towards this bill and the fact that 30,000 signatures were collected in a very short period of time. I actually got that petition over the internet from a person who I did not think would have been interested in this particular piece of legislation. It is impacting on people from all areas of the community and from all over Australia.

The publicity that the government got over *Tampa* and over children in detention has been very damaging for Australia as a whole in the international community. I think that people are tired of hearing about more legislation and more restrictions that are basically trampling on the human rights of people who are trying to seek refuge in Australia. I do not know how far this excision can go or how many times we can keep excising a bit of Australia for the purposes of the Migration Act to stop people from coming and claiming refugee status.

I do not know how we can even say we would be happy to have people placed in Nauru, based on the past experience of the people who have been in Nauru and even on the information provided by the department about the effects on the mental health of the detainees in Nauru. It has almost become laughable. I fail to see the difference between sending people to Nauru and sending them to another part of the world. They will not have access to legal representation, they will not have access to community support and they will not have access to review. Australia obviously needs to have an ordered system for people coming in as refugees, but we as Australian citizens have to be satisfied that people are being treated in accordance with Australian law on Australian land. We cannot just give our rights away to another country to take on those responsibilities, as we have responsibilities under the international covenants. As far as the refugee convention is concerned, the very fact that we will not have control over refugees not being refouled to other countries is a damning indictment of the proposal to have people processed offshore.

CHAIR—Ms Vidler, do you wish to add anything?

Ms Vidler—I have been working in the area since 1996. A witness who appeared earlier talked about a ‘bolt out of the blue’, which I think is a really nice way of describing this legislation. To me, it did seem like a bolt out of the blue. I would like to make some comments about Nauru. I never got there. My application for a visa was rejected.

Senator CROSSIN—Let me ask you about that. Had your organisation previously made representations to go to Nauru? I noticed that in your submission you talk about only one migration agent being allowed a visit. I think that was Ms Marion Le, wasn't it?

Ms Vidler—That is right.

Senator CROSSIN—That is the evidence she gave at the inquiry into the Migration Act. Apart from that, your organisation or members of your organisation have been denied access, is that right?

Ms Chan—As I understand it, there were individual members who did apply, and they were denied access. I could not give you the names of those members.

Senator CROSSIN—These are people who will be found to be genuine refugees. Will the need for a migration agent diminish by the time they get to Nauru or will they still need assistance to eventually get off the island?

Ms Chan—No. I think you have to go back to taws. If someone is making a refugee claim, they need assistance in how to present their case in the best possible light—the best possible manner. Bear in mind that, if you are in Nauru and you have very little access to any assistance and very little understanding of Australian law, your chances of success in being found to be a refugee may be limited.

Senator CROSSIN—Aren't these people going to be processed on Christmas Island? Even that has logistical problems, but I thought the intent of this legislation was to repatriate those who were found to be refugees to Nauru rather than bring them to the mainland.

CHAIR—No. My understanding—and I stand to be corrected—is that individuals will be taken to Nauru, where they will be processed and found to be refugees or not to be refugees.

Senator CROSSIN—They are not going anywhere near Christmas Island?

CHAIR—No, not to the best of the committee’s knowledge.

Ms Chan—They will be processed in Nauru. As far as our members being registered migration agents is concerned, they do come from a very wide range of organisations, as I said in my opening statement.

Ms Vidler—One of the problems that can occur with processing in a place like Nauru, as happened with the Afghan group, is that the interpreters provided are not even from the same ethnic group. I know there are professional standards of interpreting, and a lot of people abide by those, but I have been in detention centres so often that I also know that things are said to the applicants which are not helpful to their case. In Pakistan I saw some young people who had been returned from Nauru. It was interesting to see what had happened to them. They had found their way back to Pakistan and were living there illegally, as they probably had been before they ever got to Nauru. That was interesting. It is something over which you have no control. People have no control; we have no control. For a lawyer in this area it makes a huge difference if you are there doing people’s applications.

Senator CROSSIN—You talk in your submission about the rights and safety of children taking precedence in the recent changes to the Migration Act. No doubt you believe that this legislation almost rescinds that progressive move—if you could say DIMA did anything progressive.

Ms Chan—It effectively would. If people are just simply going to be sent to Nauru for processing, that will also include children. As you would have heard this morning, Nauru is not a very large place. In itself it is a large detention centre by another name. The Australian community as a whole are pretty horrified at the images of children being held in detention, being behind razor wire. Whether they be behind razor wire or whether they be on a remote island, it is just as repugnant. It has become very offensive to many people who really did not understand a lot of what was happening in the refugee area. Then you get additional images of children who suffer mental illnesses because of the detention. We as a community cannot keep allowing the government to introduce bills every time they think we might get an influx of people. The government does have a system in place—they do have the DIMA officers who look at applications, then the Refugee Review Tribunal if it goes to appeal and all the other triggers that break in—but when we seem to have a political problem the government seems to want to either excise part of Australia or introduce a new bill. That is not the way to deal with these issues.

Senator NETTLE—I want to go to the issue of migration agents being able to get access to Nauru. You talk in your submission about Marion Le and her experience. As I understand it, she paid for herself to get to Nauru.

Ms Vidler—I do not know. I would be really interested to know how she was chosen, other than being in Canberra.

CHAIR—I am not sure these witnesses can comment on that business or the method of approach as to who was chosen to go.

Senator NETTLE—That issue was raised. Can you tell us about your experience trying to get to Nauru? I do not know whether you were here when Associate Professor Mary Crock was giving evidence in relation to the discrepancies in decision making for people making

onshore and offshore applications and whether you have had any experience in seeing those discrepancies yourselves and what impact access to legal representation has on that.

Ms Vidler—Absolutely. I have seen discrepancies the whole time. When I started, it was always people arriving by plane to Australia and then we saw changes as they went to the detention centres up north. There were discrepancies almost between one detention centre and another, but there were certainly discrepancies in the decision making between being in a detention centre and being out in the community. It has never been easy but it has obviously got a lot more difficult. Later, going to Baxter was dreadful. My relationship with people in Nauru has been by post, which is very unsatisfactory. The people from Nauru who arrived in Australia—and some in Pakistan—have very sad stories about the way the interviews were done, the interpreting and the lack of information that was given to them. There were huge discrepancies. I am dealing now with a few people who arrive in Sydney and it is quite different to the people who are in Baxter. There is no level playing field.

Senator NETTLE—Do you think the difference in how people are treated onshore, offshore—in Nauru; not all offshore—and here is an issue with regard to what level of access they have to lawyers or are there others? I do not know.

Ms Vidler—I think that is probably the main difference. There is no doubt that the tribunal and DIMA are different when there is a lawyer or agent present. They behave differently—they just do. They are more careful.

Senator MASON—You can say nice things about lawyers—it is very rare.

Ms Vidler—In this area of law, most lawyers think you are a fool. People look at you like you are a complete idiot for doing it.

Ms Chan—It is a very difficult area. It is very draining. It is very emotional.

Ms Vidler—And it is rewarding.

Ms Chan—The reward is that you are there to help someone.

Senator BOB BROWN—I have a question about the people you met in Quetta. What was their story after going back, presumably, to Afghanistan?

Ms Vidler—They went back to Afghanistan and then they went back to Pakistan because, as we all know, like the Bakhtiaris—I will not go there—they go back and live preferably illegally in Pakistan. These guys were young and, after four years on Nauru, they felt enough was enough, so they went back. They had learnt English with a bit of an Australian accent, which was how I picked them up in the beginning. They were probably more or less okay. They did not have the outcome they wanted but they were living on the fringe. Their experiences were that they could not stand it any longer. They did not know what was going to happen.

As it happened, if they had hung on longer they would have got to Australia. As we know, all the people eventually got to Australia. What is the point? I sit in interviews, sit in hearings and think: why are we going through this? I must have been to hundreds of DIMA interviews and thought: ‘Why are we sitting here? You will reject them. In the end, most people get a permanent visa. What is the point of this?’ That is what I feel about this legislation.

Senator LUDWIG—I was interested to hear that you were denied a visa to go to Nauru. Have you polled your members who deal in this area on this? Do you have any figures as to who has applied and who has or has not been able to obtain a visa?

Ms Chan—I do not believe that we have, but it is probably not a difficult thing to do. We have all our members on electronic email, so it would be an interesting exercise.

Senator LUDWIG—It would be helpful to understand this. I think we have heard a range of evidence that people have applied and not been successful in obtaining visas. That is one of the issues which means that contact and representation, whether it be for a range of services, is effectively denied. That is certainly a concern to this committee.

Ms Vidler—Father Frank Brennan should probably put in a submission. He is a person who did get a visa. He was at the airport and was then stopped, or maybe he did not even take off.

Senator LUDWIG—I understand. Some people have obviously travelled to Nauru but we are not sure of the number who have not—in other words, those who have applied and have been denied.

CHAIR—We have had some evidence in that regard from a succession of witnesses.

Senator LUDWIG—Yes, I should reflect upon that. We have heard the evidence of some who have put in submissions, and they have anecdotal evidence of themselves or others being denied. But, in terms of the lawyers who represent people in this area, yours would be a more definitive answer.

Ms Chan—Yes, because of the base of the members. Is it the wish of the committee that we do that?

Senator LUDWIG—If it does not put you to too much trouble. I think it would be helpful to understand how hard it is.

Ms Chan—Yes, I will take that back to them.

CHAIR—Ms Chan, I think you said in your opening that it is the view of the institute that the legislation was rushed and that this is not a good thing. Therefore, it is not clear—for example, through guidelines—as to how the system will work and so on. I am just paraphrasing your comments there. What difference do you think it would have made if the legislation had been planned over an extended period of time?

Ms Chan—Probably not much difference, except that we at least could have had more input into how it would even work. I am not really sure how in international law the Australian government can basically go to another country and try to use their own jurisdiction, the domestic law in Australia, to apply in an overseas country.

CHAIR—Do you mean in terms of processing?

Ms Chan—In terms of processing and—

CHAIR—That is not how DIMA describes it. In answer to a question from a previous hearing, they say: ‘Australia is prepared to undertake refugee status determination in the offshore processing centres. The existing assessment process, which was developed in 2001-02, in consultation with UNHCR, would be the basis for processing any refugee claims.’

However, these arrangements are currently under review to identify any measures which could be taken to strengthen the process.’ One imagines that the section 198A(3) declaration that the minister makes would be the basis.

Ms Chan—How do we as Australians feel confident that people who are being assessed in a country other than Australia, in a place where Australian jurisdiction is not the law, will receive a fair hearing? They will not be receiving any rights of review, whereas in Australia you do have rights of review. That is the point: how can you feel confident that people in offshore places will receive a just and fair hearing? I do not know how we can do that.

CHAIR—As there are no further questions, I thank you, Ms Chan and Ms Vidler, for representing the Migration Institute of Australia today.

Ms Chan—Thank you, Senators.

Ms Vidler—Thank you.

[11.39 am]

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

CORRELL, Mr Bob, Deputy Secretary, 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 Laurence Mark, Assistant Secretary, Onshore Protection Branch; Refugee, Humanitarian and International Division, Department of Immigration and Multicultural Affairs

OKELY, Mr John Cameron, Assistant Secretary, Offshore Asylum Seeker Management Branch, 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. As I have noted previously, the department has lodged a submission, numbered 118 by the committee, and a number of supplementary submissions in the form of answers to questions on notice and material that the committee had requested. We thank you for those. Do you need to make any amendments or alterations to the supplementary submissions?

Mr Correll—Yes. There are a couple of amendments and alterations or comments I would like to make, if I could.

CHAIR—Do you mean as an opening statement?

Mr Correll—No, more to (1) make a correction of the record from the previous hearing and (2) provide additional information in relation to questions from the earlier hearing.

CHAIR—Thank you very much. Please go on.

Mr Correll—The first is in relation to a question I was asked by Senator Bartlett at the previous hearing in relation to the jurisdiction of the Commonwealth Ombudsman, concerning the decisions of Commonwealth officers in making assessments on Nauru. My answer was: ‘At this stage my understanding is that the Commonwealth Ombudsman would not have jurisdiction.’ That is in fact wrong. The Commonwealth Ombudsman does have jurisdiction over the decisions of Commonwealth officials, irrespective of whether or not those decisions are made on Nauru. That is the first point I would like to correct. The second point is that, in response to question 3 from the last hearing, we made reference to an attachment which does not appear to have actually been attached to that question, so we would like to table a document which is the attachment to that.

CHAIR—Thank you very much. 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. Do you have an opening statement, Mr Correll, or shall we just go to questions?

Mr Correll—I am happy to go straight to questions.

CHAIR—Was the department monitoring the proceedings of this morning's hearing?

Mr Correll—Not as well as we would have liked, because we were in the air at the time, so, no, we have not got a monitoring picture of this morning's proceedings.

CHAIR—So how does the department expect to be able to assist senators with answers to matters that were raised in this morning's proceedings?

Mr Correll—We are happy to respond to questions you might raise, but this group, I regret, was in the air, travelling from Canberra, whilst your proceedings were on this morning.

CHAIR—Not nearly as much as I regret that, actually, Mr Correll. I think it is most unfortunate that, given the time frame within which the committee is working and the number of issues which have been raised in this process—of which the department would be well aware in relation to submissions made—it was not seen fit to ensure that an officer was here during this morning's proceedings. I think, as do some of my colleagues, that that is verging on being contemptuous of the committee's proceedings—in the non-parliamentary sense of the word 'contemptuous', I might say.

Mr Correll—Certainly there was no intent of that. We would be very happy to attempt to answer any questions on any issues that emerged from your discussions this morning.

CHAIR—I understand that, but the committee is constrained by the fact that the transcript of the *Hansard*, to which you will inevitably have to refer, will not be available, because of the very nature of taking a transcript, until approximately, give or take, the close of business tomorrow. That is with the special assistance of the Hansard system in the parliament, having agreed to do that for the committee. We have a tabling date of next Tuesday, 13 June. The committee obviously has to make available to members a draft report as soon as possible, and most definitely before Friday. With the best intention in the world, it is very difficult, I might say, with respect, for the department to turn around answers overnight. I think it places the committee in a very difficult position. I have considered making these remarks this morning because I understand that it would not often be the case, but I do take it very seriously.

Senator LUDWIG—Chair, that is not the only problem. There is also a practical issue in that I do not want them to take questions on notice because of that issue that has been raised today, that I might not be able to get a response. That indeed creates a problem. Therefore, I would formally be requesting an alternative or an additional date with the department after the transcript is available, if that is required. I will put it no higher than that, as it depends on the proceedings today and the responses that they provide. Otherwise, I have lost the opportunity I thought I had, which is what the department offered last time. We arranged to have them appear after the other evidence today to follow up on questions.

CHAIR—The committee will consider that, Senator Ludwig. Let me ask one other set of questions before I go to my colleagues, on a matter which was raised most latterly with the Migration Institute, our last witnesses. It relates to access to those persons detained on Nauru by a range of representatives. They may be those who wish to provide assistance on migration

issues who are not lawyers. They may be interpreters. They may be legal professionals who wish to provide assistance. They may be from the welfare and community organisations who wish to do the same. We have received evidence from churches, including the National Council of Churches and the Uniting Church in Australia, from human rights organisations, from a range of eminent and highly regarded legal professionals and from those who work within the Migration Institute. They have overwhelmingly, under the previous incarnation of this policy, been refused visas to go to Nauru to assist those detained in offshore processing centres, as you call them. There are people who will now, by this legislative mechanism, be placed on Nauru for what may be a period of indefinite detention. What guarantee can the department offer the committee that access to those sorts of individuals will be available?

Mr Correll—I do not think that we can give the committee a guarantee in that area. I think those are issues that go to the overall construct of the policy that would apply in this area and would be influenced by key government decisions in relation to the operation of that policy.

CHAIR—If I am not mistaken, I think you just said to me that it would be governed by the overall construct of the policy that will apply and government decisions in relation to that. Can you advise the committee how we can make decisions on the legislation when we cannot get guidance on basic issues like that?

Mr Correll—I think those would be key aspects in determining how the policy would be administered and would be subject to those policy considerations. So I do think they are key aspects for consideration by the government.

CHAIR—I think Mr Okely is keen to add to your remarks. But do go on.

Mr Correll—I will pass to Mr Hughes.

Mr Hughes—Perhaps I could say, Senator, that I thought the answer to your question had two different dimensions. One is whether, as a matter of routine, there would be provision for professional advice such as is available to some asylum seekers in onshore detention as part of the process of refugee status determination claims. That is something the government could choose to provide, as that is a matter of government policy. So the issue of whether people would be automatically provided with assistance in presenting refugee status determination claims for assessment—and that would be publicly funded—I saw as one dimension of the question. The other dimension, which I think perhaps Mr Okely would be in a better position to answer, is whether anyone who just wanted to voluntarily offer some sort of help or assistance, or to have contact with people, would be able to gain access to Nauru, and I think perhaps that was what Mr—

Mr Okely—Madam Chair, you alluded to the past and the fact that a number of people have been refused visas in the past to go to Nauru to assist people who were in the process of seeking determinations or reviews of decisions. We have been very careful in dealing with another sovereign country not to influence the decision-making processes that they embark upon in terms of visa consideration and visa issue. In fact I would say that we have been assiduous in not doing that either positively or negatively. What you are talking about in the future is really in the context of what Mr Correll was mentioning. The implementation of the policy may involve perhaps some discussions with the government of Nauru about the committee and the parliament's view in terms of saying to the government, 'This is the

climate within which we are operating now.’ They may then decide that their own view may change towards the question of visa issue. But we have not in the past sought to influence that at all.

Senator CROSSIN—So you are saying that you do not know what the government’s policy is in relation to this question that Senator Payne asked, or are you say that you clearly do know what the policy is and that it will be up to the Nauru government to determine who goes there?

Mr Correll—I think that what Mr Okely has indicated is that decisions about who visits Nauru have been undertaken to date through the normal issuing of visa arrangements by the Nauru government. We are also saying that, in terms of arrangements for the future, there is the potential for negotiations in that area with the Nauru government based on government policy considerations.

Senator CROSSIN—Is there a memorandum of understanding between the two countries that sets all that out, Mr Correll?

Mr Okely—There is a memorandum of understanding between Australia and Papua New Guinea on the question of the Manus site. There is a memorandum of understanding with Nauru in respect of the centres in Nauru. It does not go—

Senator CROSSIN—Could we have a copy of those?

Mr Okely—I will deal with that in one moment, if you do not mind. It does not set out in detail what you are alluding to in terms of access to asylum seekers in either country. That element is not dealt with in the memorandum of understanding. On your last question, the document is confidential between two governments and it would require the agreement of the Nauru government and the Papua New Guinea government to make that available. Those consultations have not been undertaken as far as I understand.

Senator LUDWIG—Whom would we ask for a copy of that document if not the immigration department? I take it that you have a copy and have seen it?

Mr Okely—Memoranda of understanding are negotiated by the Department of Foreign Affairs and Trade. The signatures on the document are those of the ministers for foreign affairs of both countries. It would probably be more appropriate to address that question to the Department of Foreign Affairs and Trade. We do have a copy of the memorandum but, as I said, it is a confidential document between two governments and, unless there is agreement on the part of both ministers who have signed it, we are not at liberty to share it.

Senator LUDWIG—The committee can ask the Department of Foreign Affairs and Trade or the minister whether he can obtain release of the document and make it public. Secondly, you can also do that too through your minister. You can ask whether the foreign affairs department can similarly seek to release a copy for this committee.

I asked a question last time about what the processing or modelling on the UNHCR status determination process would entail. I was more interested in the MSIs, the actual detail that you are going to utilise. The document you have provided to the committee is helpful in some respects, but it is the detail I am more interested in and the committee would be pleased to receive. Have you got those available?

Mr Illingworth—The document we have passed over is the core document for use by decision makers in conducting legal determination offshore. There are no more detailed, specific instructions that go into further levels of specificity about the process. The concept behind the process was that when we were looking at a situation where the UNHCR had agreed to the request from the government of Nauru to conduct refugee assessments for the first group taken to that location, and Australia was going to be conducting assessments for the subsequent groups, we attempted to model our process as close as possible on the UNHCR process so that, from the perceptions of the people who were in the processing centre there, there was no feeling that somebody was getting a different treatment from their neighbour. The process is one that is modelled on a UNHCR field determination process. It is very heavily orally based, face-to-face contact with individuals, and there is not a huge amount of specificity about the detail of the conduct of that process.

Senator LUDWIG—It is certainly not what you would do in Australia, nor would you then also support it, even if you had an overall framework with a similar number of MSIs—migration series instructions—as to how officers should carry out their functions. That is right, isn't it?

Mr Illingworth—It focuses on the protection obligations assessment element of our work, which is essentially the same judgment that has to be made offshore as onshore, whether a person is a refugee in terms of the refugees convention. To that extent, the principles and the training that apply to decision making onshore apply to the decision making offshore, and the officers who are doing the work offshore were people who had been trained and experienced in the onshore process. So, to that extent, the framework of instructions and training and law that go to that point of refugee decision making were applied offshore.

Senator LUDWIG—But not to the level of detail with which you would do it here.

Mr Illingworth—The level of detail in terms of the specificity of regulation—

Senator LUDWIG—Regulation and—

Mr Illingworth—It is a not statutory based process.

Senator LUDWIG—More broadly, you have provided answer No. 25 to the committee. The answer was: no asylum seeker will be detained in Nauru. Are they free to leave?

Mr Correll—The individuals are in Nauru under a visa arrangement subject to the conditions attached to that visa in Nauru.

Mr Okely—The short answer is that anyone lawfully in Nauru is free to leave. If they wish to return to their country of residence, they can.

Senator LUDWIG—Even if they have been assessed as having a well-founded fear of being persecuted should they return?

Mr Okely—Your question was: are they free to leave? Yes, they are free to leave.

CHAIR—But they do not have to return to their own country though, Mr Okely. I assume the second half of that answer is 'or somewhere else'.

Mr Okely—That is right. A country to which they have right of entry and/or residence. They could leave at any time.

Senator LUDWIG—How do they go about finding a country to which they might be able to go? Do you assist them in that?

Mr Okely—The International Organisation for Migration—

Senator LUDWIG—No, I asked whether you assist them in that.

Mr Okely—IOM will manage the process of them moving from Nauru to another country. They will assist individuals gaining entry to those countries if they do have a right of entry or a right of residence. There is assistance available to them if they wish to move from Nauru.

Senator LUDWIG—What is that?

Mr Okely—IOM will facilitate that movement. They will assist that process through their officers.

Senator LUDWIG—Do you check whether IOM are being particularly efficient? How many people are still left in Nauru?

Mr Okely—There are two.

Senator LUDWIG—How long have they been there?

Mr Okely—They have been there for around 4½ years.

Senator LUDWIG—Under what criteria would you say that that has been a successful operation?

Mr Okely—The measurement of success is the fact that there are only two people.

Senator LUDWIG—After four years! Do you want to claim that as a victory?

Mr Okely—That is right. There are two people who have had adverse security assessments and cannot be brought to Australia.

Mr Correll—We are not suggesting a victory there, but in our opening statement we gave some statistics that provided some comparison points with refugees in other circumstances which showed considerably longer periods.

CHAIR—Just before we go off the answer to question 25, Senator Ludwig, do you mind if I ask a further question? The answer says, ‘No asylum seeker will be detained in Nauru. They will be lawfully in Nauru with a Nauru visa and will be subject to visa conditions set down by the government of Nauru.’ Can you advise the committee what those visa conditions are?

Mr Okely—They are issued with special purpose visas, which are renewed periodically. The visas specify where they might live, the times at which they may move around the island and the circumstances in which they may move within the community around the island. They are the only conditions that are placed upon them.

CHAIR—The third item to which you referred, Mr Okely—after where they might live and the times designated for moving around the island—was the circumstances in which they may move around the community. Are they specified in the visa?

Mr Okely—If they are within a centre which is effectively a closed centre, they can move around—

CHAIR—What does ‘effectively a closed centre’ mean?

Mr Okely—It is a shorthand term. It effectively means that a person accommodated within an offshore processing centre is able to move outside the centre, provided they are escorted by an IOM official and transported around the island by the IOM.

Senator LUDWIG—Do you have a copy of these visas that you can provide to the committee? It seems to me that what you are saying is a shorthand way of saying, ‘You are still in detention.’ Would the person think that they are not? Is this a prisoner on release? Are they still prisoners?

Mr Okely—They have the capacity to move within the community, provided they are accompanied—

Senator LUDWIG—You would liken it to—

CHAIR—Let Mr Okely finish, please.

Mr Okely—They are free to move within the community, provided they are accompanied by an IOM official. They are not in detention as such.

Senator LUDWIG—That is even more harsh than a prisoner on day release, because even prisoners on day release do not have security personnel following them around, do they? How could you differentiate that from someone who is under guard? Is the guard armed?

Mr Okely—They are certainly not under guard. They are simply accompanied by an official. There is a bus that will take them down to the internet cafe, will take them swimming, will take them to educational institutions and will take children to school. It is simply facilitating movement around the island. The preference of the government of Nauru is that they be accompanied.

Senator LUDWIG—Are the accompanying people armed?

Mr Okely—Definitely not.

Senator LUDWIG—But they are not free to go anywhere in Nauru that they would like?

Mr Okely—Under what we would term ‘closed centre arrangements’, no. Under the open centre arrangements, which have applied since around mid-2004, the people in the centres were able to move around freely in the community between the hours of eight in the morning and seven at night. There were a couple of places that they were not able to go: the airport, and the presidential and government offices. That was pretty much the only restriction on them.

CHAIR—But they were still accompanied? They were not accompanied under the open centre arrangement.

Mr Okely—They were not accompanied under open centre arrangements, no.

CHAIR—Under the bill before us, is it envisaged that individuals will be dealt with under open centre or closed centre arrangements?

Mr Okely—That ultimately will be for the government of Nauru to decide in issuing visas, but my assessment would be that it would probably be a mixture of the two.

CHAIR—How is that determined?

Mr Okely—Initially women and children and families would be housed under open centre arrangements, and single men, at least in the initial stages, would be subject to slightly more restrictive conditions.

Senator LUDWIG—I think last time I asked whether there were any reports of mental health issues in particular that had been provided to or assessed or undertaken by the department, whether directly or under contract. Are they available to the committee? How many are there in total that have been done on Nauru?

Mr Okely—Effectively two reports have been prepared—one in 2004 and the other in 2005. I understand the one in 2004 is available to the committee.

CHAIR—That has been provided, thank you.

Mr Okely—The one from 2005 was a report to the minister and we would need to check with the minister that she is happy for that to be made available to the committee.

Senator LUDWIG—That went directly to the minister?

Mr Okely—That is correct.

Senator LUDWIG—Yes, I did want that. I just wanted to clarify whether the minister had seen it. Is it a matter that calls for a 417 determination in respect of Nauru? What was the purpose of the report?

Mr Okely—The purpose of the report at that time was that there were indications of some mental health issues on Nauru amongst a group of people who had been found not to be refugees. It was decided that an independent assessment of those issues was required. An independent group was sent to Nauru to make that judgment and it reported directly to the minister. Subsequent to that—and I think at that time there were 27 residents in the centre—25 were brought to Australia on a mixture of refugee and humanitarian concern visas. So those people are in the community in Australia now.

Senator LUDWIG—That report was then provided to the minister before the 25 had returned to Australia?

Mr Okely—That is correct.

Senator LUDWIG—And on what date?

Mr Okely—It was Melbourne Cup day, 2 November 2005.

Senator LUDWIG—Then after that the 25 were subsequently returned?

Mr Okely—I beg your pardon, Senator, the group arrived in Melbourne on 2 November.

Senator LUDWIG—What was the actual date that the report was presented to the minister?

Mr Okely—I do not recall the exact date. I will have to get that for you. It would have been in October.

Senator LUDWIG—And who was the report from?

Mr Okely—It was a group report. The Hon. John Hodges led the group. It also included Mr Paris Aristotle and Dr Ida Kaplan.

Senator LUDWIG—Who commissioned that report?

Mr Okely—It was commissioned by the minister.

Senator LUDWIG—And when was it commissioned by the minister?

Mr Okely—Again, I would have to established that specific date.

Senator LUDWIG—At the time it was commissioned by the minister, how many people were detained on Nauru?

Mr Okely—There were 27 residents in the offshore processing centre at that time.

Senator LUDWIG—Are you able to say what the import of the report was or what its nature was? Was it about mental health issues that people on Nauru were suffering at the time?

Mr Okely—The main thrust of the report was that these people had been on Nauru for a long time. They were, at that point, refused asylum seekers. They were effectively suffering from long-term residence and lack of certainty about their future. That was really the major psychological issue.

Senator LUDWIG—Did it also go to the issue of whether Nauru itself was an appropriate place for people to be detained in—even in the various ways that you have described?

Mr Okely—My recollection is that it did not. There was no criticism of Nauru, nor of the centre or IOM's management. In fact, my recollection is that the report was complimentary of IOM's professional management of these people. It was more a question of them not being somewhere else rather than of their having been on Nauru.

Mr Correll—This was a report commissioned by the minister that went to the minister. I would feel much more comfortable if we sought the agreement of the minister before going into detailed comment about what was in the report.

CHAIR—Thank you, Mr Correll. The committee understands that.

Senator NETTLE—Mr Correll, when you were saying before that whether or not people had access to lawyers depended on government decisions, did you mean government decisions that have been made at this stage or decisions that have not yet been made at this stage?

Mr Correll—I guess that would be in relation to potential calls on policy by the government, and the application of arrangements under the proposed bill. So they are potential calls in the future and are not detailed at present.

Senator NETTLE—So there is no decision yet from the government about whether people will have access to lawyers?

Mr Correll—At present, the arrangements that would apply would be consistent with existing practice, which has been outlined by Mr Okely. It would be basically a matter of normal provisions and of seeking access to visit through a visa with the Nauruan government.

Senator NETTLE—If and when a decision is made about whether or not people have access to lawyers, will that be made public? And how would the detainees be informed of any decision by the government about whether or not they have access to lawyers?

Mr Correll—If a decision were made in that area, the department would be guided in any policy decision on the way it went forward. It would basically involve a process of dialogue with the Nauruan government. The fundamental issue is that Nauru is a sovereign country, and entry into that country would be determined by the Nauruan government. So it could not be achieved without a level of agreement with the Nauruan government.

Senator NETTLE—So we will wait and see if they get access to lawyers, and then we will wait and see if they are told whether they have access to lawyers. That is fine. Moving on now to the responsibilities of the Ombudsman, will the Ombudsman have automatic access to detainees held on Nauru who have been held there for more than two years, as currently occurs on the Australian mainland?

Mr Correll—As I understand the framing of the bill, the Ombudsman would have jurisdiction over decision making by Commonwealth officers, but not the same provisions that would apply in terms of processing onshore.

Senator NETTLE—So would the Ombudsman have access to Nauru and to the detainees held there?

Mr Correll—Again, access to Nauru for the Ombudsman would be subject to a call from the Nauruan government to gain access to the sovereign country of Nauru. But certainly the Ombudsman would have jurisdiction over decision making and processes applied by Commonwealth officers on Nauru.

Senator NETTLE—So would the Australian government or the Department of Immigration and Multicultural Affairs seek to facilitate the Ombudsman having access to detainees held on Nauru?

CHAIR—You can ask Mr Correll about the actions of the department but not the actions of the government.

Mr Correll—In terms of the department facilitating that, to establish such an arrangement would involve a level of dialogue and agreement being reached with the Nauruan government to that provision. If government policy were for that to be the case, the department could enter into dialogue with the Nauruan government to attempt to achieve that type of agreement with the government, but fundamentally it would be a call for the government from a policy perspective as to whether it wished to pursue that.

Senator NETTLE—Who requested that the current memorandum of understanding with Nauru be a confidential document—the Australian government or the Nauruan government?

Mr Okely—It is normal practice for memoranda of understanding between governments to be confidential to those governments unless both governments agree that the memorandum can be released.

Senator NETTLE—Do you mean that it is normal practice of the Australian government or that it is normal practice of the Nauruan government?

Mr Okely—It is normal practice for bilateral memoranda of such a sort to be confidential.

Senator NETTLE—Normal practice for the Australian government?

Mr Okely—I think for all governments.

Senator NETTLE—Presumably you would give me the same answer if I asked you about PNG?

Mr Okely—Yes.

Senator NETTLE—I will move on to the question of the explanatory memorandum for this bill, I think it is, in which it speaks about there being no financial impact of this bill. I note your answer to question No. 9, which I asked at the last hearing, in which you indicate that the range of costs would be between \$20,000 and \$100,000 for medical evacuations from Nauru. Is that not considered to be a financial impact of the bill?

Mr Correll—The question would be what the alternative arrangement would be for handling it. If there were an individual with a medical condition requiring a medivac from, say, Christmas Island, there would be medivac costs associated there that would be of a similar scale.

CHAIR—Mr Okely, did you want to add something?

Mr Okely—If I could just clarify a little further: the budget allocations for offshore processing have factored into them the issue of medical evacuations, and they always have had, so there is no new impact on the budget from the question of medical evacuation.

Senator NETTLE—So there is a financial impact to the bill?

Mr Okely—There is a continuing impact. Allocations already take into account the fact that we would have medical evacuations from Nauru if we had a caseload there.

Senator NETTLE—Currently the legislation says that there is no financial impact. So, if there is a financial impact and it is budgeted and ongoing, is it possible to provide the committee and senators being asked to vote on the legislation with an indication of what the financial impact of the bill is?

CHAIR—Do you mean: what are the budgetary arrangements for the bill in the context of Mr Okely's response?

Senator NETTLE—I understood Mr Okely's response to be that there is an impact, but it is already costed, so I am asking, 'Can you give us what that existing costing is?' So, yes, that is in the budget.

CHAIR—If you could extract that information for the committee, that would be helpful, Mr Correll. Thank you.

Senator NETTLE—Currently, all we have is, 'There is no financial impact,' and it is hard to fathom why there is no financial impact from keeping people on Nauru.

Mr Okely—I can see what you are getting at. There is no new financial impact. It is a difficult figure to extract because it is effectively demand driven. If you have a case load in Nauru which, say, numbers 150 and there are some difficult health and medical problems amongst that 150, and if medical evacuation is required for, say, 15 of them and we have only budgeted for 10, we are certainly not going to leave five on Nauru. Whatever the cost of medical evacuation is for those who require it, that cost would be met from the budget allocation. So it is demand driven.

Senator NETTLE—Would you be able to break that down to show the care and maintenance cost if there is no-one there? There are currently still two there. I do not know if the figure will be per detainee, in which case you are not telling us the number of detainees in total. Per detainee might be a helpful way to provide that information. In relation to the compensation claim by Shayan Badraie for the psychological damage from his ongoing detention, would there be an avenue of legal redress for compensation for somebody held in Nauru under this legislation?

Ms Bicket—Just a couple of points on the Badraie matter, the Badraie matter was quite complex and it was settled on the basis of agreement between the parties. There was no finding, in fact, in that matter that there had actually been psychological injury. In relation to a person who was on Nauru, there would be a range of possible avenues that may be available. The most immediate of course would be through the Nauruan legal system, because they are within Nauru and therefore subject to the constitution and other arrangements in relation to Nauru. You do not bring compensation under our legislative framework. That is for tort law and is an area about whether there has been a foreseeable damage caused to the particular circumstances to warrant an action. I know that is not a terribly satisfactory answer, but it does turn very much on what the individual circumstances are under tort law and the sorts of claims that are being brought.

Senator NETTLE—Your first answer was that they would have redress under Nauruan law.

Ms Bicket—I would assume so. I am not an expert in Nauruan law, of course, but for a person in Nauru there would be access to the Nauruan legal system.

CHAIR—I find that an interesting proposition. To mount an action against whom, do you suggest, Ms Bicket?

Ms Bicket—It might depend on what the circumstances are. I cannot give a concrete answer. It might be in relation to the contractor, it might be in relation to actions of the Nauruan government. It depends very much on the circumstances that are being alleged.

CHAIR—Do you mean the Nauruan government acting under a declaration agreed with the Australian government?

Ms Bicket—It is simply by having the presence in their country and what the actions might pertain to. It is a hypothetical situation, if you like, so it is quite difficult to be definitive.

CHAIR—It is, but matters of legal recourse are pertinent to the committee's consideration, given the difficulty that legal representatives have had in providing assistance to those previously held on Nauru. Just let me clarify: are you seriously putting forward the proposition that an individual held under this legislation on Nauru wishing to seek compensation may explore doing that under the Nauruan legal system as an appropriate course of action?

Ms Bicket—I think the important thing is they are not being held under this legislation in Nauru. They are being taken to Nauru under this legislation under our law, and while they are in Nauru they are within, if you like, the control of the Nauruan government as visa holders in Nauru.

CHAIR—I think I would have to say it is an extraordinarily fine line between ‘held’ and ‘under control of’. It is one which I would be interested in expanding on if we had more time. I think you have answered my question with a yes, effectively. That is your suggestion, so that clarifies it for me.

Senator NETTLE—Would they have access to the Australian legal system for making a compensation claim against the actions of the Australian government?

Ms Bicket—I would believe so. If the allegations or the alleged claim was in relation to the actions of Commonwealth officers then I would think that there would be the capacity to found an action in tort. But, as I said, it is an action in tort, it is not an action in relation to the legislation per se.

Senator NETTLE—What entity would be responsible, under this legislation, for finding a third country? Would it be the Department of Immigration and Multicultural Affairs, the Department of Foreign Affairs and Trade, IOM, UNHCR—

Mr Hughes—With those people who were resettled from Nauru—if we are speaking about people found to be refugees and being resettled in other countries—that was done by the Australian government. It was also done by UNHCR. When I say the Australian government, it could be the department of immigration or it could be the department of foreign affairs; it is the whole Australian government. But if we look at the 1,000 people who were resettled under the arrangements to date—there are figures in the submission that we discussed at the last hearing—that involved UNHCR and it involved the Australian government in obtaining resettlement places for the people.

Senator NETTLE—Would it be the department of immigration and the department of foreign affairs or just one of them?

Mr Hughes—It has been primarily the department of immigration, but the department of foreign affairs has also been involved.

CHAIR—That was the 33 people who went other than to Australia or New Zealand, Mr Hughes.

Mr Hughes—New Zealand, of course, was one of the locations where the Australian government and the department had to negotiate with the government of New Zealand.

Senator MASON—Mr Correll and officers, you are going to have to help me here. Our job, as a Senate committee, is to make recommendations to the Australian Senate about whether this legislation should pass. With the evidence we have taken over the last day and a half, one of the principal problems—putting aside all the foreign policy issues that we have discussed—is about accountability and the transparency of the process, particularly on Nauru. Mr Correll, in response to questions from Senator Nettle and my colleagues, you say that the issue of access to lawyers is yet to be determined and ‘calls on government policy in the future’. Let me get this right. This committee has to make a decision about whether this legislation should or should not pass the Senate, when perhaps the most critical issue with respect to accountability is yet to be determined. Is that right?

Mr Correll—Based on the way practice has operated to date, unless there was a change of position the existing practice would continue to operate. That is, access would be via an

approach to the Nauruan government. The way such access could be changed would be potentially via a process of negotiation with the Nauruan government, and one could not foretell the outcome of such a negotiation. But that essentially is the answer to your question. Without a change, the existing arrangements would continue to apply, in which case it would be based on the existing memorandum of understanding arrangements, and an approach would need to be made to that government.

Senator MASON—Let me just get this right. At present, access to lawyers is dictated by the Nauruan government's right, as a sovereign country, to grant visas. That is the current situation, and that would continue. If, however, the Australian government decided that it would be a good idea for these asylum seekers to have access to lawyers, it would then do what? Enter into negotiations with the Nauruan government?

Mr Correll—Correct.

Senator CROSSIN—What happens if the Nauruan government didn't agree?

Mr Correll—My colleague has mentioned to me that a potential other dimension there is whether there is access to publicly funded assistance. Again, that does not apply at the present stage.

Senator MASON—Let us leave that aside for a second. I do not want to complicate things. So whether lawyers had access to the people on Nauru would depend upon the Australian government's negotiations with Nauru. Correct?

Mr Correll—In an attempt to influence the Nauruan government's decision making in that area, yes.

Senator MASON—Correct. You took the words right out of my mouth. In the end it would come down to the Australian government wanting to influence the Nauruan government to grant visas to lawyers?

Mr Correll—Correct.

Senator MASON—So can the Australian government wash its hands of this? You have just said we have influence. Sure, they are a sovereign government, but—

Mr Okely—Senator, could I just—

Senator MASON—Can you resurrect the case?

Senator CROSSIN—What happens if the Nauruan government does not agree?

CHAIR—Just let Mr Okely answer that question, please, and I will come to you in a moment, Senator Crossin.

Mr Okely—Can I try to be helpful at this juncture? There was a change of government in Nauru about 18 months ago. At that time we had very few residents in the offshore processing centres. The issue of access to lawyers had arisen in the past in relation to the previous government, which had taken a fairly tough line towards the granting of visas. What we have seen since then has been a much more facilitative approach on the part of the new government to the granting of visas for refugee advocates for migration agents to go to Nauru in respect of the smaller number that were in—

Senator MASON—I do not mean to be rude, but that is not really my point. My point is that in the end it is a bit of a fraud to say that it is just a matter for the Nauruan government. Sure, in one sense it is—they are a sovereign state—but the bottom line is that Australia has enormous diplomatic influence in Nauru and, Mr Correll, if the Australian government decides that these people on Nauru should have access to lawyers, I bet my bottom dollar, Mr Okely, that the Nauruans will grant those visas, wouldn't you say?

Mr Okely—I would be very reticent to prejudge the view of the government of Nauru.

CHAIR—And whilst I would be very keen to hear an answer, I am not sure that the officers can answer.

Senator MASON—I understand. You understand the point I am trying to make. I sometimes find it a bit of a fraud. One last thing: Mr Murphy from the Australian Lawyers for Human Rights spoke about procedures for offshore processing. Again, fleshed out in the legislation are the procedures that will be used for offshore processing. Again, this goes to the accountability and the transparency of the process, just as the lawyer question does. So, ladies and gentlemen, I put this to you: some of the most critical questions with respect to the operations of this legislation are, firstly, access to lawyers and, secondly, the fact that the offshore processing procedures are not covered by the legislation. It is very difficult for this committee to make a sensible recommendation to the Australian Senate without that information.

Mr Illingworth—Perhaps I might contribute on that point, just to expand on some of the advice I provided earlier. The offshore process deals with elements, as it were, of the entire onshore protection visa decision. We are not deciding visas; we are deciding one component—is a person a refugee or not? At that level of specificity, there is nothing in domestic legislation that I can recall that goes to that—apart from definitional issues which were addressed in the act—about what constitutes essentially a refugee and some issues about processing at a very high level. There is no minute documentation in legislative processes.

CHAIR—But you understand where that leaves the committee?

Mr Illingworth—I do.

Senator MASON—It has to make an assessment.

Senator CROSSIN—Mr Correll, I was not around on 26 May for the previous hearing into this legislation, but can you clearly articulate for me why it is we would treat someone who arrives at an airport with forged documents, seeking the same grant for refugee status, more favourably than somebody who arrives on our coastline by boat?

Mr Correll—I think we did comment on this issue at the last hearing. If I recall, those comments went to the fact that in our airports there is quite an extensive layered border control system in place that allows for advanced passenger processing, with a number of initiatives, which has much greater levels of control than apply to unauthorised boat arrivals. That is the essential difference: there are very strong border control provisions in place in those locations.

Senator CROSSIN—Our border control on the coastline is an abysmal failure then?

Mr Correll—I did not say that.

CHAIR—I think you are putting a proposition, Senator Crossin. I do not think you can expect the officers to—

Senator CROSSIN—Are you saying it is better at an airport than it is on the coastline?

Mr Correll—Australia has what is regarded as some of the world-leading advanced passenger processing systems in its airports. Indeed, many countries are modelling their border entry arrangements on those procedures.

Senator CROSSIN—But, in relation to our coastline, though, you are saying that the scrutiny is not up to scratch; it is not at the same level of scrutiny for someone who arrives through the airports, so our border security on the coastline is a failure?

CHAIR—Senator Crossin, I urge you not to put words in Mr Correll's mouth.

Senator CROSSIN—We have been putting words in other witness's mouths all morning, with due respect.

CHAIR—I think it is unfortunate if you think that is the case, and perhaps I should be sent to chair school to be re-educated.

Senator CROSSIN—If someone comes into this country through an airport then our scrutiny is at a very high level. If someone arrives at Nightcliff Beach in Darwin, it is not as good; therefore, we will treat those people wanting refugee status in a much more detrimental way than those who come through our airports. I do not see the rationale for that. I want you to explain it better for me because I see there is quite a clear anomaly here.

Senator LUDWIG—And then there is penalty entry.

Senator CROSSIN—That is right. Why are refugees coming off Nightcliff Beach in Darwin penalised more severely than those who jump off a Qantas plane at Brisbane Airport?

Mr Correll—I can only repeat the earlier responses to questions: we have a very sophisticated system of border entry controls located at airports in Australia that are world class, and that is the key difference in the nature of the type of arrival.

Senator LUDWIG—How many penetrated our borders through that process in the last 18 months to two years?

CHAIR—By air, are you asking, Senator Ludwig?

Senator LUDWIG—Yes.

CHAIR—It is an answer to a question on notice.

Senator LUDWIG—I was not sure. You can compare that to sea arrivals. Let me see who wins—is it air arrivals or sea arrivals?

Mr Correll—The answer to question No. 7 documents the number of air arrivals during both 2004-05 and 2005-06.

Senator LUDWIG—That is only in relation to those who have engaged the protection obligations, isn't it? Is there a total?

Mr Correll—I will check.

Senator LUDWIG—We can come back to that after some other questions.

Senator CROSSIN—Mr Correll, is the clear message we are sending to the international refugee community: ‘Get yourself some forged documents, find your way to an international airport, arrive here by plane and you will be treated better than if you get here by boat’?

Mr Correll—No, I think the message is that, if you get yourself some forged documents and try and come in through an airport, you are unlikely to get through the border control systems in Australia.

Senator CROSSIN—I have been talking to a number of lawyers in South Australia who are acting for people who, in fact, have got through the border control systems at airports and are sitting in Villawood detention centre awaiting their determination.

Mr Correll—I think that means the system has worked.

Senator CROSSIN—But they are being treated far better than being hived off to Nauru, surely. They have access to lawyers and the Ombudsman at Villawood.

Mr Correll—In Villawood those individuals are in detention.

Senator LUDWIG—Not if they are children.

Senator CROSSIN—In Nauru you have to be behind your door at 7 o’clock at night. If it is not a detention centre, what is it? What is the creative phrase you have come up with?

Mr Correll—It is called an offshore processing centre.

Senator CROSSIN—So offshore processing centres shut the gates at 7 o’clock at night and that is not detention?

Mr Correll—That is the condition of the visa, as Mr Okely outlined.

Senator CROSSIN—In your opening statement you said that you had found that the Ombudsman does have jurisdiction on Nauru. In clarifying that through questioning by my colleagues, you have stated that the Ombudsman actually only has jurisdiction on Nauru in relation to a review of decisions by Commonwealth officers. Is that correct?

Mr Correll—That is correct.

Senator CROSSIN—So the Ombudsman does not have the same jurisdiction to review cases that are held in detention for two years or more, as currently exists on the mainland?

Mr Correll—No.

Senator CROSSIN—Can you explain to me the basis on which you have come to that distinction? Is it legal advice? Is it an interpretation of government policy?

Mr Correll—It is basically legal advice.

Ms Bicket—On the question about the Ombudsman and the two-year requirement, that obviously relates to requirements that are set down in the domestic legislation. There is no restriction on the period of time after which the Ombudsman can review a matter. He does have jurisdiction over the actions of Commonwealth officers in this situation. That is not limited.

Senator CROSSIN—I think you have missed the point of my question.

Ms Bicket—Perhaps I have; I am sorry.

Senator CROSSIN—There is a distinction around the Ombudsman’s jurisdiction here. Currently, if people are held in detention in this country, the minister has requested that the Ombudsman review those cases if they are held for two years or more, as distinct from reviewing the decision of a Commonwealth officer. On what basis was the distinction made in the way the Ombudsman can operate on Nauru? Is it government policy or is it legal advice?

Ms Bicket—It is just the nature of the particular jurisdiction that he has been given. He has been given a specific jurisdiction in relation to the two-year requirement in Australia, which, as I understand, was part of the amendments to the Ombudsman Act last year.

Senator CROSSIN—So there is a legislative difference? In other words, government policy is different.

Ms Bicket—Yes.

CHAIR—I believe Mr Correll has some material to add.

Mr Correll—In the financial year 2004-05, there were some 1,600 unauthorised air arrivals—that is, persons refused immigration clearance at airports.

Senator LUDWIG—In that same year, how many boat arrivals were there?

CHAIR—I think there have been only 200 since 2001.

Mr Okely—My recollection is that there were 53.

Senator LUDWIG—I am happy not to split hairs; it is roughly 50. On the statement—this is what concerns me—that it is about a ‘more robust regime’, protection and a range of other things, you are actually more porous at the airports.

Mr Correll—There is a vastly higher total traffic level coming through the airports than there would of course be through the unauthorised boat arrivals. I think our air arrival numbers—

Senator LUDWIG—It is only 1,600.

CHAIR—Please let Mr Correll finish.

Mr Correll—The air arrival numbers are in the order of, I believe, about 10 million per annum—very high levels. That needs to be understood in terms of the context of those numbers.

Senator LUDWIG—No. If you were trying to enter a country and you asked, ‘What is the best way to do it?’ you would go where there was mass transit movement so you could hide within that group. You would choose an airline as the appropriate place to pursue your end product. Isn’t that what you would do? It is a tough ask to try to get here on a boat. That is more difficult and much more fraught with danger. It is not a preferred method. The preferred method would be, I imagine, if you had the money, resources or knowledge, to try it by air, because that would be a more likely way to penetrate the border. We do not know how many of the 1,600 that are refused actually get through, do we? Do we have a snapshot of how many unlawful noncitizens have not been picked up and have got through?

Senator BOB BROWN—Sixty-thousand.

Senator LUDWIG—It would be.

Mr Correll—My understanding is that it is a lower figure than that. Mr Hughes has just commented that that figure would include overstayers. I understand the figure is closer to 50,000.

Senator CROSSIN—I have one last question. Mr Correll, what is the department's corporate slogan at the moment?

Mr Correll—'People: our business'.

Senator CROSSIN—So, if people seeking refugee status get dragged to Nauru, where they are not processed or administered by a government body, security is provided by a non-government body and the Ombudsman does not have a right to review their case after two years, is there some consideration of reviewing your corporate slogan?

Mr Correll—No. We would be always looking at our client-servicing standards. They are important to us.

Senator KIRK—I have some questions in relation to children, women and families. In your answer to question 26 you say:

Special measures for women, children and families are being reviewed in consultation with the Government of Nauru.

Can you give me some more detail in relation to that? It seems like a pretty important issue. It is really what Senator Mason was raising in relation to legal representation and legal advice. This committee has to make some kind of recommendation to the Senate as to whether or not this legislation should pass, and again it is something which is not contained in the legislation. Could you please give us an update on where that is at?

Mr Correll—We have had a team of people visit Nauru to look closely at facilities and potential facilities on Nauru and to contemplate what options might be available in the area of services and facilities for families and children. That is work in progress at the present stage.

Senator KIRK—Who visited Nauru? Were they DIMA officials?

Mr Correll—Yes, and representatives from other agencies as well.

Senator KIRK—And they were all granted visas?

Mr Correll—Yes, I certainly think they would have been.

Senator KIRK—How many officials visited?

Mr Correll—I am just doing a quick mental calculation.

Senator KIRK—Approximately.

Mr Okely—I will have to use my hands.

Senator KIRK—Five or 10?

Mr Okely—I think there were nine in total.

Senator KIRK—These were officials from DIMA and from other agencies. Which were the other agencies?

Mr Okely—The other agencies represented included the Department of Foreign Affairs and Trade and the Department of Transport and Regional Services. I am having trouble

envisioning them. The Department of Finance and Administration was represented by an official who is presently working as an online official in Nauru. The Department of the Prime Minister and Cabinet were involved in that trip. That was it.

Senator KIRK—These discussions were more broad ranging than simply covering the issue that I raised—that is, the treatment of women and children. This was a visit and obviously you had DFAT and Transport there. I am not quite sure what that would have to do with women and children, so was this just ongoing consultation and negotiation in relation to revising the MOU? I am trying to understand what this was all about.

Mr Correll—No, it was a visit aimed at exploring options available for services on Nauru. That would include services for families, women and children, health services, education services—the full range of services that would be available.

Senator KIRK—You said this is a work in progress, so that is where we are at. We have to make some sort of decision here, not necessarily today but in the next five or six days, and make a recommendation to the Senate on the basis of all of these matters which remain works in progress. When is this going to be concluded? Is it going to be concluded by the time we present our report or the next six months, 12 months? When is it going to be concluded?

Mr Correll—We would obviously be attempting to conclude those discussions as quickly as possible. Again, it represents a range of options for the nature of services that can and cannot be made available on Nauru that the department can advise the government on.

Senator KIRK—So once you do conclude your consultations and negotiations, however long that takes, will these matters then be contained within a revised MOU between Australia and Nauru? What is the basis for the agreement? What is the foundation for this? Where will it be contained?

Mr Okely—There would be no need to review the MOU. There may be some additional issues that need to be covered between the two governments that could quite easily be covered through an exchange of letters between respective ministers.

Senator KIRK—So this exchange of letters is going to be in addition to the MOU?

Mr Okely—That would be in addition to the MOU. The MOU lasts until June 2007. It would need to be renegotiated at that point and, as I pointed out earlier on, the Department of Foreign Affairs and Trade takes the lead on that. Could I just correct my earlier answer to you. I have done my maths and there were effectively nine people on the delegation, including the consul-general in Nauru. There were two people from Immigration, two people from Foreign Affairs and Trade, one from Prime Minister and Cabinet and one from Transport. The two agencies I neglected to mention were the Australian Federal Police, which had a member on the delegation, and AusAID, which had one also.

Senator KIRK—How quickly were the visa applications processed? When was the application made?

Mr Okely—They were processed reasonably quickly, but visa applications with Nauru are generally processed reasonably quickly.

Senator NETTLE—That was not my experience.

Senator KIRK—I was going to say that I do not think that has been the experience of lawyers.

CHAIR—It is an interesting observation to make in this context, Mr Okely, but there we are.

Senator KIRK—I want to conclude by getting this clear: the MOU between Nauru and Australia is a confidential document that is not available to the committee. The other matters that you are negotiating are going to be contained within an exchange of letters, you said, which again will not be available to the committee.

Mr Correll—Let us make that point clear. Because the MOU is a document involving Australia and another country, we would need to gain clearance from the parties.

Senator KIRK—I understand that, but we have to make some sort of recommendation in our report, really on the basis of information that goes to critical issues that we just do not have available to us.

Senator BOB BROWN—You will have read the other submissions to this committee. A recurrent theme—in fact I think it is universal, with the exception of yours—is that the legislation we are dealing with violates international law, is discriminatory and is, in some submissions, possibly racist. But you have submitted to us that Australia is proud of its refugee law and history. Is Australia proud of the treatment of refugees on Nauru, and will it be under this legislation? I am just taking this from your own submission here.

Mr Correll—I think the reference in our submission specifically related to the strong track record that Australia has relative to many other countries in the world in taking refugees into the country. Mr Hughes might want to comment further on that track record.

Mr Hughes—I guess there are two parts to your question. One part was about whether or not there were some aspects of international law that the bill infringes on, which—

Senator BOB BROWN—No, I was simply stating that all other submissions have indicated that it is a violation of international law.

CHAIR—Senator Brown, please let Mr Hughes finish. Thank you.

Senator BOB BROWN—Yes. I know time is short here.

Mr Hughes—My reading of them is that some said that; others said that they thought there were risks. I did not read them as all saying that in quite the way that you did. As far as the people who had been taken to Nauru, assessed and found to be refugees are concerned, I think the points worth making are that the proportion of people that our process and the UNHCR process found to be refugees was a very high rate by international standards, so the convention was applied very generously. Secondly, within a relatively short space of time by international standards, virtually all of those found to be refugees were given a durable solution in Australia, New Zealand or a selection of other countries.

Senator BOB BROWN—And the ‘proud’ factor?

Mr Hughes—I do not know that it is a question of being proud or not proud in that context.

Senator BOB BROWN—But your submission uses the word.

Mr Hughes—I am certainly very proud of Australia's record in resettling refugees internationally. We have resettled 660,000 since the Second World War, 100,000 over the last decade. I believe we have also met Australia's convention obligations in terms of non-refoulement, assessing people fairly and finding durable solutions for them.

Senator BOB BROWN—And you are proud of the treatment of people in Nauru?

Mr Hughes—I do not think it is appropriate for me to be making comments about whether I am proud or not proud. I am talking about the facts of what we have been able to achieve, and I believe we have met those obligations.

Senator BOB BROWN—I note that you make an exception for Nauru.

CHAIR—I do not think that is what Mr Hughes said, Senator Brown, but that is your view, of course; that is on the record.

Senator BOB BROWN—And proudly on the record, Chair.

CHAIR—Indeed, Senator Brown, I am sure.

Senator BOB BROWN—Mr Illingworth, you said that the same judgment has been made offshore as onshore. Are you sure of that?

Mr Illingworth—Sorry?

Senator BOB BROWN—The same judgments in assessing refugee applications have been made in Nauru as on continental Australia. Are you sure of that?

Mr Illingworth—The analyses of the decisions onshore and offshore that we have conducted indicate that—as I would expect, given that the same officers are doing both sets of work—the decisions fall within the same ranges of decisions that are made onshore and offshore. We were dealing through time with a case load from countries where there was quite a degree of volatility and change in the country background. The same tests and the same country information was available onshore and offshore at the same times. The decision approval rates, looking statistically, as Mr Hughes said, showed up a very close outcome between the UNHCR process and the Australian process. Comparing the offshore and onshore outcomes, again, there is a very high degree of comparability. Comparing the Nauru outcomes for those nationalities with the outcomes delivered by countries which in many other fora are held up as developed, advanced, refugee determination countries, we delivered outcomes that were remarkably generous.

Senator BOB BROWN—Really. We had evidence before us this morning that nine children were returned from Nauru to Afghanistan. These were unaccompanied children. How many unaccompanied children were returned from continental Australia to Afghanistan?

Mr Illingworth—I will have to ask others to assist with that question.

Senator BOB BROWN—Anybody?

Mr Illingworth—Nobody was forcibly removed from Nauru to my knowledge.

Mr Okely—A number of people returned voluntarily.

Senator BOB BROWN—How many unaccompanied children went back to Afghanistan from continental Australia?

Mr Okely—That I will have to take on notice. I know the overall numbers that went back. No-one was returned from Nauru. People did return voluntarily from Nauru.

Senator BOB BROWN—I am talking about children.

Mr Okely—The children who were unaccompanied in Nauru were generally in the company of a broader family. They may not have been the direct children of a particular group but they were children who were in the care of those people.

Senator BOB BROWN—If you are indicating that they had family with them, that is not true.

CHAIR—I think Mr Okely said that, in relation to the specifics of those children, he would take that on notice. I think it is important to get the details accurate.

Senator BOB BROWN—Chair, do you not think it remiss that under these circumstances this department cannot tell this committee how many unaccompanied children were returned from Nauru to Afghanistan?

CHAIR—Senator Brown, it goes to my earlier remarks about the helpfulness or otherwise of the department not being present during the morning's proceedings, but let us not go there again.

Senator BOB BROWN—It is appalling. I want to pursue this matter because it has been said by you to this committee that there is no difference in judgment. I am citing evidence this morning from Professor Crock of an appalling difference between children being returned to Afghanistan from Nauru and from Australia. She tells us that 32 who arrived as children in Nauru were returned to Afghanistan—nine of those were under the age of 18—but none from Australia. I cite this as direct evidence of discrimination in the way in which officers treat refugees—and the most vulnerable of refugees: children—on Nauru compared to Australia. What evidence can you bring to this committee to rebut the raw figures that came out of that evidence this morning?

Mr Correll—I do not know that the information raised this morning is accurate. We will take that on notice and attempt to respond as quickly as we are able to. We regret that we were unable to pick up that piece of information earlier this morning.

Senator BOB BROWN—Can you indicate to me how you get the will of a child expressed when it comes to returning them to a place from which they have fled persecution—like Afghanistan?

Mr Correll—I want to check the facts of those circumstances and we will do that immediately.

Senator BOB BROWN—I agree with the chair: it is a terrible situation for a committee to have that evidence before it and not be able to follow it up.

Senator LUDWIG—That was the point, Senator Brown.

Senator BOB BROWN—Yes, I know; it is the experience of the whole committee. I want to ask about your answer to question 21. The committee asked how persons from West Papua should apply for asylum in Australia. Your answer is that offshore people, regardless of their

nationality, can apply for a visa under Australia's humanitarian program. Where does a West Papuan make that application?

Mr Hughes—They could make it outside West Papua. They could make it in Papua New Guinea. In certain circumstances, although this has not operated in Papua, on occasion people do apply within the country they are in.

Senator BOB BROWN—So where would they make that application? If they are West Papuans and they are in West Papua, where is the nearest place they can make an application within Indonesia?

Mr Hughes—If there is a program within a country, in certain circumstances people can apply within their own country. So they could apply within Indonesia.

Senator BOB BROWN—Where?

Mr Hughes—If it were in person, it would be the embassy in Jakarta. It could be a consulate elsewhere.

Senator BOB BROWN—Presumably they could make a boat trip to Jakarta to make an application to get a humanitarian visa to come to Australia.

Mr Hughes—As you know, many thousands of Papuans have gone to PNG and have obtained residence there. PNG is a convention signatory country but a person could apply for resettlement under the humanitarian program from PNG.

Senator BOB BROWN—If you were advising a West Papuan escaping persecution to make an application under Australia's humanitarian program, would you advise them to head for Port Moresby or to Jakarta?

Mr Hughes—Clearly, Papua New Guinea is closer.

Senator BOB BROWN—So you would advise them to cross the border into Papua New Guinea and go to Port Moresby?

CHAIR—I am not sure that that is a question the officer is in a position to respond to but I will leave it in the hands of Mr Correll as to whether he wishes the officers to do so.

Mr Correll—I do not think it is appropriate for us to comment in response to that question, Senator.

Senator BOB BROWN—But it is a question I am likely to be asked, and I know that other people have been asked, by West Papuans. It is a reasonable question—

CHAIR—I was not suggesting for a moment that it was not a reasonable question. I am just not sure that the officers are in a position to respond to that to the extent of giving 'advice' in the context of this hearing—and I use the words 'give advice', to use your term.

Senator BOB BROWN—They have advised us that people should apply for a visa under this program and it is a reasonable question to ask where.

CHAIR—I did not say that it was not reasonable. I just said that I am not sure that the officers are in a position to give a response. I asked Mr Correll to address that matter, and he has.

Senator BOB BROWN—I do not think that there is any point to me asking any further questions, Chair.

CHAIR—If there are no further questions we will finish this session. Mr Correll, I thank you for the attendance of the department and your officers today. It will be a matter of determination for the committee as to how many of the issues we need to take up with the department subsequent to this morning's evidence.

Senator NETTLE—At the end of the Australian Lawyers for Human Rights submission there are four pages of an appendix which are questions to the department in relation to this bill. I was wondering whether I could put those on notice to the Department of Immigration and Multicultural Affairs.

CHAIR—Let us have a look at the questions and see which ones have already been dealt with and which ones have not and those that have not been addressed we can certainly take up.

Senator BOB BROWN—And if there are any other questions.

CHAIR—I am sure that there will be. Mr Correll, you must realise that the committee is in a position of needing to circulate a draft report to committee members by possibly close of business Thursday night, if not by opening of business Friday morning. That puts both the committee and the department under some significant pressure in terms of responses and we would appreciate the department's assistance. We have very much appreciated the responses we have already been provided with and the documents. There are a number of questions about documents also taken on notice and they are matters that the committee would wish to have a response on as well.

Mr Correll—Senator, we put every effort into ensuring that the responses from the first round were provided in due time and we will do our best to repeat that.

CHAIR—Thank you very much.

Committee adjourned at 1.09 pm