INTRODUCTION

Referral of the Inquiry

On 13 May 1999 the Senate referred to the Legal and Constitutional References Committee an inquiry into the operation of Australia's Refugee and Humanitarian Program. The inquiry was to report by 18 October 1999. On 30 September 1999 and 7 December 1999 the Committee sought and received further extensions to 9 December 1999 and 29 June 2000 respectively. These extensions arose for a number of reasons – the considerable amount of material to be considered by the Committee; and several administrative and procedural matters which diverted the Committee's time and attention. The issues are referred to briefly below.

Background to the inquiry

Legislative change and departmental practices

There had been for some time a concern in the legal profession and other bodies such as Amnesty International and the Human Rights and Equal Opportunity Commission that changes to migration law, and the ways in which these were applied to persons claiming asylum onshore, resulted in an inequitable and sometimes inefficient process.[1] The Government had also been seen as seeking to limit the opportunity for judicial appeal on migration matters, through the introduction of a privative clause.[2] The purpose of this was seen variously as limiting the perceived overuse or abuse of the courts by persons who had no valid case, or who, it is alleged, sought to prolong their stay in Australia. In addition, funding for various other services seen as essential, such as legal aid, and legal assistance for applications, was seen as having been drastically reduced.

The legal profession in particular expressed concern at a perceived limited access by asylum seekers to appropriate services, including assistance before the Refugee Review Tribunal; increased pressure on the profession especially to provide *pro bono* legal services, and possible breaches by Australia of our international obligations.

Individual cases

The disadvantages of the system were perceived as being manifest in two cases which became specific terms of reference in the inquiry. These were the removal in July 1997 of a woman, originally from the People's Republic of China, and detained at the Port Hedland Immigration Detention Centre**.** At the time of removal she was at least 8

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1 Some of these issues were raised in submissions to the inquiry into the *Migration Legislation Amendment Bill (No. 2) 1998*, which was reported on by the Senate Legal and Constitutional Legislation Committee in April 1999

2 See report by the Senate Legal and Constitutional Legislation Committee into the *Migration Legislation Amendment (Judicial Review) Bil1 1998 (1999)*

months pregnant, and allegations were made that she was forcibly aborted shortly after her return to the PRC. The major issue of concern here was the extent to which humanitarian considerations, including relevant international conventions, were taken into account, and whether departmental processes militated against any proper consideration of the woman's claim that she would face abortion if returned to PRC. This woman is described in the report as 'Ms Z', or 'the Chinese woman', as she has made a further application for a visa.

The second individual case concerned two issues: the first is the use of the removal process, whereby persons not found to have established a claim that engages Australia's protection obligations, are returned to their country of origin or some other place in which they are considered to have protection. In an instance concerning a Somali national (described in this report as Mr SE because he has an application for protection being considered), it is claimed that the department sought to have the individual removed, in spite of knowledge that an application had been made in respect of his claims under the Convention Against Torture (CAT) to the United Nations.

A sub-theme of the case of Mr SE is the quality of the primary and secondary decision-making processes and whether these were sufficient to allow the full expression of material relevant to his claims.

Safe haven policy

A further issue that prompted the inquiry was the use of the temporary safe haven process in response to the refugee problem arising from the civil war in the Former Republic of Yugoslavia. Presented on the one hand as a means of dealing rapidly with an immediate humanitarian crisis, the approach was also criticised as entrenching the exclusion of some from benefits allowed other 'refugees'. During the Committee's inquiry, a similar issue arose in respect of the temporary safe haven visa granted to East Timorese refugees in late 1999.

Further changes to policy

Although not part of the specific terms of reference, further legislative changes came into effect in late October 1999. These grant temporary protection to those who are entitled to protection, but who arrive in Australia illegally. These are considered briefly in Chapter 1.

Scope of the Inquiry

Onshore program emphasis

The Committee's terms of reference are therefore primarily concerned with an assessment of the effectiveness, efficiency and equity of the existing onshore refugee program and so-called 'humanitarian program', and of the provisions (including removal and monitoring) for those who fail to obtain a visa. Thus, there is no

consideration of the substantial offshore, or overseas-based, refugee and humanitarian program.[3]

Individual cases

The Committee received submissions and heard evidence from individuals affected by departmental or Refugee Review Tribunal (RRT) decisions, and Federal and High Court decisions, many of whom had made requests to the Minister under s417 of the *Migration Act 1958.* Although the Committee found many of these individual cases raised questions about access to appropriate services, it had resolved that it would be inappropriate for a Parliamentary Committee to intervene in any individual case. Instead, where matters raised were within the terms of reference, they were taken into account in formulating our conclusions and recommendations.

Issues outside the terms of reference

A number of submissions and discussions referred to matters which were primarily outside of the terms of reference of the inquiry, and are not discussed in the report. These include:

- the legitimacy or otherwise of the policy of detaining illegal arrivals;
- the conditions in detention centres (except insofar as these had a direct bearing on the Committee's ability to obtain evidence or a detainee's ability to maintain contact with legal or other representatives);
- the extent of powers to transfer persons to detention centres from the community, from detention centres to prisons or other institutions, and the withholding of information about such transfer (except insofar as this may be relevant to particular cases or general processes); and
- allegations made about treatment of detainees including assault or threats of assault and threats of transfer to other institutions; abuse and intimidation. With some exceptions, these matters are not within the terms of reference of this inquiry.

The Committee records that all appropriate action was taken in respect of certain of the above allegations. It also notes that the issue of transferring people from detention centres to gaols and other institutions has been considered by the Commonwealth Ombudsman,[4] and that another Parliamentary Committee, the Joint Standing Committee on Migration, has inspected and previously reported on the detention centres.[5]

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3 However, this is referred to briefly in Chapter 1

4 See Commonwealth Ombudsman, *Annual Report 1998-1999*, p. 54

5 *Immigration Detention Centres Inspection Report*, April 1998

Conduct of the Inquiry

Submissions

The Committee advertised the inquiry in major national and state/territory newspapers on 22 May 1999, as well as writing directly to a large number of individuals and groups including non-government organisations, law associations, academic and specialist lawyers, community legal groups, and groups with a special interest in refugee matters. The Committee received 146 submissions,[6] and a substantial number of exhibits. While most information received was in printed form, video and audio tapes were also provided from several sources.

Hearings

Between 5 July 1999 and 3 February 2000 the Committee held 17 public hearings in Canberra, Sydney, Melbourne and Perth,[7] amounting to 902 pages of transcript. It wishes to thank all those who provided written and oral evidence, and who have provided additional information and supplementary submissions.

The Committee would also like to thank the US State Department's US Information Service for its facilitation of a videoconference hearing with Dr John Aird in Washington D.C., on 21 October 1999.

The Committee had the benefit of making visits to Immigration Detention Centres (IDCs) in Sydney and Melbourne in order to take evidence. The Committee thanks the Department of Immigration and Multicultural Affairs and the contractor, Australasian Correctional Management for facilitating these visits. Although the Committee did not have the opportunity of visiting the Port Hedland Immigration Detention Centre, some Committee members had made several visits to that facility, including during the inquiry. The pressure placed on Port Hedland IDC towards the end of 1999 by an increasing number of boat arrivals, and also changes to policy, led Committee members to believe it would not benefit or advance the inquiry for the Committee to visit at that time. This decision was also made on the basis that information relating to the case of the Chinese woman (referred to above) who had been in detention there, was forthcoming from several other sources.

As well as the public hearings, the Committee also held nine *in camera* hearings, which amounted to a further 219 pages of transcript. It found that these hearings assisted it considerably in its understanding of general and specific issues. The issue of privacy and security of individuals was uppermost in Committee consideration during this inquiry, and the use of *in camera* hearings enabled free discussion on a number of matters.

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6 A list of submissions is at Appendix 1

7 A list of hearings and witnesses is at Appendix 2

Issues relating to confidentiality and restricted documentation

Departments, individuals and their representatives provided the Committee with substantial amounts of material, much of which was classified as confidential, or it was requested that publication be restricted. Late in 1999 and in February 2000, DIMA and DFAT provided lists of documents, which it believed, could be released from confidential status. Copies of these documents are therefore available to the public.

Although the Committee agrees that certain papers, including medical records of individuals should be protected on the grounds of privacy, it nonetheless notes that Parliamentary privilege can override such considerations.

The Committee considers that, where possible, evidence including documentation should be readily available. It sought the de-classification of some documentation provided both by the Department of Immigration and Multicultural Affairs and by the Department of Foreign Affairs and Trade. While some material from departments remains confidential for reasons the Committee accepts, the increasing tendency for claims of confidentiality, legal professional privilege and 'commercial in confidence' is of concern.

The Committee wishes to note three matters in particular that placed unnecessary limitations on its powers to obtain information and caused considerable delay in the collecting and assessing of evidence.

<u>Ministerial directions</u>

The first of these is the Ministerial orders issued by the Minister for Immigration and Multicultural Affairs and the Minister for Foreign Affairs to their departments, ordering that information relevant to some issues about the case of the Chinese woman not be provided to the Committee.

The Committee notes that the basis of these orders was primarily that the Minister for Immigration and Multicultural Affairs had established a separate inquiry into aspects of the case of the Chinese woman, the reporting date for which had not been determined. Such an argument was not an acceptable reason for withholding information, and the Committee considered the Minister's orders interfered with the Senate's powers and that it limited the Committee's ability to undertake its duty as required by the Senate. Following considerable discussion the Committee decided to issue orders for Departmental officers to attend Committee hearings and provide documents at a time when the Committee sought to concentrate on its task of obtaining evidence.

The Committee appreciates the eventual cooperation received from both Ministers and their Departments, although it still considers that the Ministerial directions were inappropriate and indeed unnecessary. The report emanating from the Ministerial inquiry (Ayers Report) was made available to the Committee, as were some of the documents created.

Restrictions on information provided by the Australian Government Solicitor

A further issue concerning the provision of information to Parliamentary Committees arose in the context of the Committee seeking assistance from the Australian Government Solicitor's Office (AGS) on the use of s417 of the *Migration Act 1958*. Senate Committees had not been made aware of the Attorney-General's advice of May 1999 that changes to the AGS would affect the extent to which information was provided by that agency to committees. The Committee itself did not accept the argument that neither free nor paid 'advice' would be available should one of AGS's 'client' departments have sought advice (or would be likely to seek further advice) on the same or a similar issue.

The Committee pursued this matter with the President of the Senate and the Attorney General and copies of the relevant correspondence, including that between the President of the Senate and the Chair of this Committee, had been circulated to Senate Committee Chairs. The Committee appreciates that representatives of the AGS did appear before the Committee and did respond to the Committee's questions, on 7 December 1999.

Allegations of intimidation/assault of witnesses

The Committee was also concerned with a number of allegations raised during the course of the inquiry about assault and intimidation of witnesses who sought access to the Committee. The Committee took action on certain of these matters for two reasons. Firstly, allegations of assault against detainees who themselves may have limited access to other sources of assistance, must necessarily be reported to the appropriate authorities in the same way as any such allegation would be reported by a citizen.

Secondly, the Committee emphasises that intimidation or assault of a witness in respect of evidence given, or believed to have been given, to the Committee is prohibited under the *Parliamentary Privileges Act 1987*, the principles of which are set out in the Standing and Other Orders of the Senate. The nature and extent of these powers are perhaps less well understood by departments than they should be.

Other complaints made by detainees and others about other forms of intimidation and harassment, are referred to as appropriate in the report.

Structure of the report

The terms of reference of the report could have been dealt with in several ways. However, a format was decided whereby certain of the terms of reference are discussed across several chapters (as, for instance, the issue of international obligations), and others are dealt with primarily in a single chapter – for example, the issues of removal and monitoring.

The benefits of this arrangement are that issues with common strands, which do not easily lend themselves to a single chapter, and are relevant to a number of the terms of reference, can be discussed in more than one chapter. For example, while the case of

the Chinese woman is examined mostly in terms of the Ministerial discretion, it is also relevant to the issue of international obligations, decision-making, and removal and monitoring. There is also a separate chapter on the case.

Furthermore, there are several administrative issues, including fragmentation of responsibilities, which appear to have an impact on the quality of services for asylum seekers. Such matters were considered to be best dealt with by being referred to, or discussed, in several sections of the report, rather than one.

The following chart will clarify the relationships between the (simplified) terms of reference and the report contents:

Terms of Reference	**Chapter**
(a) Adequacy of legal assistance available to asylum seekers and (k) can asylum seekers get access to legal aid funding where this is necessary for judicial review	Chapters 4 and 5, which examine the primary and secondary decision making process; Chapter 3 which looks at legal and other assistance to asylum seekers, including assistance for judicial review
(b) If Ministerial discretion, and (c) other legislation and legislative principles meet the requirements of International conventions such as the Convention Against Torture and ICCPR; and does the case of the Chinese woman (g) and (h) show that Australian does not meet all international obligations?	Ministerial discretion is considered at Chapter 8. The case of Ms Z is at Chapter 9, and International Obligations are considered at Chapter 2. Chapters 4 and 5 also look at the decision-making process
(e) Is there sufficient oversight of administrative decisions by the judiciary to ensure that relevant international obligations are met	Judicial oversight is considered at Chapter 6
(d) Does the refugee determination process, including the Refugee Review Tribunal, work properly; and (j) are there problems with the department and the RRT that prevent them from recognising major human rights cases; and (l) and (m) are the removal and monitoring of failed asylum seekers adequate and appropriate	See Chapter 4 and 5; see also Chapters 7 and 9, in respect of individual cases; and Chapters 10 and 11 for the issues of removal and monitoring
(f) What are the implications of the refugee safe-haven policy and legislation	Chapter 1
(h) and (i) – the case of Mr SE, and did Australia ignore relevant international conventions in this case; are there faults with the process which prevent such cases being identified earlier (j)	Chapter 7; removals is also at Chapter 10; issues of decision-making are considered at Chapters 4 and 5 in general; international obligations are considered at Chapter 2
(l) and (m) removal and monitoring	Although relevant in both of the individual cases, these issues are primarily discussed at Chapters 10 and 11

References

All references to submission page numbers are to the page numbers as they appear in printed volumes of submissions. References to *Hansard* transcripts of evidence are generally to the final versions of transcripts. However, where page numbers towards the end of 1999 and in the only hearing in 2000 are referred to, the date is also included to distinguish these from earlier similar page numbers.

Some references have been made in footnotes to *in-camera* evidence or to documents provided by departments or from other sources, which is considered confidential. The references have been made to note for the record the location of the source. However, this evidence is not publicly available.

Senator Jim McKiernan

CHAIR

June 2000