CHAPTER 1

THE REFUGEE ISSUE

Introduction

1.1 While the primary responsibility for the protection of an individual rests with that person's country of nationality, the United Nations' system of international protection has been developed to apply where that protection cannot or will not be provided. The Office of the United Nations High Commissioner for Refugees (UNHCR) was established as of 1 January 1951, pursuant to a decision of the General Assembly, and is responsible for working with States to provide international protection to refugees under the auspices of the UN.[1]

1.2 As a member of the international community and a signatory to the 1951 Convention Relating to Refugees and the 1967 Protocol on the Status of Refugees, Australia has acknowledged that it shares the responsibility for providing protection to refugees. Australia's approach is multifaceted, and incorporates not only specific programs to resettle refugees in Australia, but also the provision of overseas aid and diplomatic and peacekeeping initiatives.[2] In addition, Australia makes monetary contributions to the UNHCR and, as a participant in its Executive Committee, assists in the development of international refugee policy and practice.[3]

1.3 Australia's Refugee and Humanitarian Program constitutes an important part of Australia's international commitment to provide protection to refugees. The Program comprises arrangements to determine the eligibility of refugees and people in humanitarian need wanting to settle or remain in Australia. In addition to that Program, the Government has introduced a new initiative whereby it can provide temporary safe haven to people in need of emergency accommodation on a large scale.

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1 The Statute of the Office is annexed to Resolution 428(v) adopted by the General Assembly on 14 December 1950: United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, United Nations High Commissioner for Refugees, 1979, Re-edited Geneva, January 1992, Introduction, p. 2: Obtained from the United Nations High Commissioner for Refugees web site http://www.unhcr.ch/refworld/legal/handbook/handeng/intro.htm on 15 March 2000. See also Department of Immigration and Multicultural Affairs Fact Sheet No.46, *Australia's International Protection Obligations*, p.1

2 Department of Immigration and Multicultural Affairs, Fact Sheet No. 40, *Australia's Offshore Humanitarian Resettlement Program*, p. 1

3 Department of Immigration and Multicultural Affairs, Fact Sheet No. 46, *Australia's International Protection Obligations*, p.1: Australia contributes US$12.663 million to the United Nations High Commissioner for Refugees

1.4 This chapter provides a brief overview of the framework of the Refugee and Humanitarian Program and the new safe haven policy, for the purpose of placing in context the Onshore Protection Program which is the primary focus of this inquiry.

What is a 'refugee'

United Nations Convention meaning

1.5 Under international law, the term 'refugee' has a specific meaning as defined by the Convention relating to the Status of Refugees of 28 July 1951 (the 'Refugee Convention'). The 1951 Convention was adopted by a Conference of Plenipotentiaries[4] of the United Nations in response to the refugee situation facing the world following the Second World War. The Convention specifically referred to events which had occurred prior to 1 January 1951 and defined a refugee as being a person who:

> As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[5]

1.6 As new refugee situations continued to emerge in the 1950s and 1960s, it was considered necessary to extend the provisions of the 1951 Convention to cover these later refugees. Following consideration by the General Assembly, the Protocol relating to the Status of Refugees of 31 January 1967 (the '1967 Protocol') was agreed to. Effectively, the 1967 Protocol removed the restriction of the definition of refugee from events occurring prior to 1 January 1951, and extended the provisions of the Convention to events that have taken place since that time.[6]

1.7 The UNHCR's responsibility to provide international protection extends to those persons defined in the Statute of Office as falling within the competence of that Office. The definitions are similar but not identical to the 1951 Convention definition of 'refugee'.[7] The High Commissioner's competence extends to persons regardless of

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4 Diplomats or other appropriate government representatives

5 *1951 Convention Relating to the Status of Refugees*, see Appendix 3

6 United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, United Nations High Commissioner for Refugees, 1979, Re-edited Geneva, January 1992, Introduction, pp. 1-2: Obtained from the United Nations High Commissioner for Refugees web site http://www.unhcr.ch./refworld on 15 March 2000

7 The High Commissioner's competence is not subject to either the dateline or geographic limitation that is in the 1951 Convention. The dateline referred to is that which restricts the definition of 'refugee' to

whether they are from a country that is a party to the Convention and regardless of whether the person's host country recognises that person as a refugee under the 1951 Convention.[8] Although individual countries establish their own refugee-status determination procedures, the UNHCR may herself make that determination for example in cases where she has been requested to do so by the national authorities or where the host country is not a party to any international refugee covenant.[9] Where circumstances allow, the UNHCR conducts a registration process[10] but this is not always possible:

> In recent emergencies, the UNHCR dealt with extremely large movements of people in some of the most remote and weakly administered territories on earth. In such circumstances, UNHCR and host governments simply did not always have the resources to conduct individual registration or detailed population surveys.[11]

1.8 The UNHCR's functions in relation to refugees are prescribed under the Statute of Office and article 2 provides that the work of the UNHCR shall be non-political, humanitarian and social and 'shall relate, as a rule, to groups and categories of refugees'.[12]

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persons affected by 'events occurring before 1 January 1951' (which now only has significance for the small number of States who are parties to the 1951 Convention but not the 1967 protocol). The geographic limitation referred to is that contained in article 1B of the 1951 Convention that enables States to limit the application of the definition of 'refugee' to persons affected by 'events occurring in Europe before 1 January 1951'. Of the States parties to the Convention, only 9 States remain committed to that geographic limitation: United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, United Nations High Commissioner for Refugees, 1979, Re-edited Geneva, January 1992, Introduction p. 2 and Part One pp. 2 and 11: Obtained from the United Nations High Commissioner for Refugees web site http://www.unhcr.ch./refworld on 15 March 2000

8 United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, United Nations High Commissioner for Refugees, 1979, Re-edited Geneva, January 1992, Introduction, p. 2: Obtained from the United Nations High Commissioner for Refugees web site http://www.unhcr.ch./refworld on 15 March 2000

9 United Nations High Commissioner for Refugees, *United Nations High Commissioner for Refugees and Refugees*, http://www.unhcr.ch/un&ref/who/whois.htm

10 The United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1979, Re-edited Geneva, 1992 sets out United Nations High Commissioner for Refugees approved procedures for the determination of refugee status in accordance with the 1951 Convention definition. In general terms, the procedures deal with the meaning of the words in the definition, the documentation (such as passports) that can be used as evidence, and the responsibilities and the obligations of the applicant and the 'examiner' during the inquiry process

11 United Nations High Commissioner for Refugees, *United Nations High Commissioner for Refugees & Refugees, United Nations High Commissioner for Refugees by numbers*, p.2, http://www.unhcr.ch/un&ref/numbers/numbers

12 Statute of the Office of the United Nations High Commissioner for Refugees, Adopted by General Assembly resolution 428(V) of 14 December 1950, A2

1.9 In Australia, the Convention definition is the cornerstone for the provision of protection for refugees under Australia's Onshore Protection Program. Thus, for a person to engage protection under the Onshore Program, he or she must be a person who has been determined to be a refugee in accordance with the 1951 Convention and 1967 Protocol[13].

1.10 All persons who meet the 1951 Convention definition are internationally recognised as refugees. The use of the term 'refugee' in this circumstance must be distinguished from the colloquial use of the term which is used to refer to any displaced person, for example those seeking a better quality of life (commonly referred to as 'economic refugees').

1.11 However, it is necessary to recognise, that while all persons coming legally to Australia as part of a re-settlement program are accepted as 'refugees', persons who arrive illegally, and persons who arrive on some other visa and then seek refugee status, are not 'refugees' until it is decided that they meet the Convention definition *as it is understood in Australia.*

1.12 Although all refugee-accepting countries who are party to the Convention may have a similar understanding of what a refugee is, the meaning of the term varies over time, with new groups being admitted, and new assessments of 'political' or other belief being made. Factors which allow for acceptance in one country may not be seen as adequate in another. For example, it was suggested that Australia took a rather limited approach in its understanding of a Convention 'refugee', and provided no straightforward means by which the effects of other natural and man-made disasters were recognised in the re-settlement of people:

> Unlike most other Western countries, Australia makes no provision in law for those who fall outside the narrow Convention definition of a Refugee. There is no "humanitarian" visa or other classification for those who for one reason or other are not "convention refugees" but who nonetheless have strong reasons for wishing to remain in Australia.[14]

1.13 The process in Australia for determining whether a person meets the Convention definition is undertaken in the first instance by a case officer of DIMA (acting as the Minister's delegate).[15] The case officer's task is to assess the applicant's claim for refugee status against the Convention definition. During this

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13 Later references to the 1951 Convention in this report refer to the 1951 Convention as amended by the 1967 Protocol

14 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 317. In oral evidence, representatives from the Legal Centre advised the Committee that Germany and Norway were two examples of countries that provide protection for people who come within a humanitarian stream as well as those who come within the definition of refugee: *Transcript of evidence*, Refugee and Immigration Legal Centre, p. 367. See also discussion in *Submission No. 69*, Department of Immigration and Multicultural Affairs, Attachment, *Overview of refugee determination systems*, pp. 915–936 noting particularly the humanitarian stay provisions in the USA, Canada, Germany, and Sweden

15 See also the discussion in paragraphs 1.36-1.38 below

process, the case officer may have regard to a range of information including information provided by the applicant, a database of information pertaining to the human rights situation in the applicant's home country[16] and submissions made by migration agents on the applicant's behalf.[17] The case officer determines the application taking account of judicial interpretation of the words in the Convention definition. Where appeal is made to the RRT, the RRT is bound by the decisions of the Federal and High Court as to the interpretation of the Convention definition.[18]

Judicial interpretation of Convention definition of 'refugee'

1.14 In Australia judicial review of refugee status decisions is undertaken primarily by the Federal court, although there have been several important decisions from the High Court. Judicial scrutiny of some application determinations has resulted in a body of judicial authority as to the meaning of the Convention definition. This scrutiny is selective insofar as decisions may only be appealed on a point of law, but judicial pronouncements indicate that the scope of the definition is narrower than the ordinary meaning of 'refugee':

> It does not extend to persons whose only grounds are fleeing from natural disasters, persons caught up in the cross fire of international or civil war the violence of which is not targeted for a Convention reason at them, persons fleeing economic misfortune, persons fleeing from justice (or even injustice), or from the general laws of application in a given country. … The violation of human rights, including torture and the imposition of the death penalty will not of themselves result in an applicant being recognised as a refugee unless the Convention definition is satisfied.[19]

'Well-founded fear'

1.15 The words 'well-founded fear' in the Convention definition were first considered by the High Court in *Chan* (1989) 169 CLR 379.[20] The pronouncements

16 The Country Information Service. See discussion in paragraph 1.36 and footnote 56 and criticisms of this service in Chapter 2

17 Department of Immigration and Multicultural Affairs, Factsheet 41, *Seeking Asylum within Australia*, pp. 1-2. It should also be noted that the case officer is required to observe procedural fairness under the Code of Procedures in the *Migration Act 1958.* For example, applicants must be given the opportunity to respond to adverse information specific to them

18 *Submission No. 62*, Refugee Review Tribunal, p. 679

19 *Submission No. 62*, Refugee Review Tribunal, p. 678. As an example of a law of general application, the Refugee Review Tribunal referred to Iranian law where the death penalty is imposed on women found guilty of adultery. Even in those circumstances "it is still necessary to identify a Convention reason in order for such a woman to be found a refugee under the Convention"

20 The judgment was handed down shortly after the tragic events in Tiannenmen Square. The facts of that case were that a citizen of the PRC who had been imprisoned and exiled within the PRC for being an 'anti revolutionary' entered Australia illegally in 1980. His application for refugee status was rejected on the grounds that the treatment to which he was subjected was not 'persecution' within the meaning of the Convention and that there was not sufficient reason to ground a "well-founded fear of persecution" should he be returned to the PRC

in *Chan* and subsequent cases have provided guidance to decision-makers about refugee status determinations. Relevant judicial opinion includes that:

- there is both an objective and a subjective component of the phrase 'well-founded fear'. The objective assessment does not require proof that the applicant would, in fact, be persecuted if returned to his country of nationality; [21]
- the standard to be applied to assess the applicant's fear is the 'real chance' test - there must be a 'real chance' that the applicant would be persecuted on one of the five grounds set out in the Convention. That fear, however, could be justified in cases where it was unlikely that persecution would occur on the persons' return;[22]
- the 'real chance test' should not involve the process of weighing up evidence to determine the likelihood of future persecution;[23]
- in applying the 'real chance' test, the applicant's fear must be justified at the time the claim for refugee status is considered because the primary purpose of the Refugee Convention is to offer protection as and when it is needed. An applicant's circumstances in his country of nationality, however, are critical to a claim for refugee status;[24] and
- once a well-founded fear is established, the onus is on the Government to show that events subsequent to the applicant's departure are sufficient to remove any plausible basis for fear or concern – the 'changed circumstances' test.[25]

Onus of proof in determinations of refugee status

1.16 Different approaches have developed as to where the onus of proof lies in determinations of refugee status. One view is that as States have the primary responsibility to protect their own nationals, the onus is on applicants to prove that their home State will not or cannot offer them protection against persecution.[26] On the other hand, it has been held that no one bears a conventional onus of proof in refugee

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21 *Chan* (1989) 169 CLR at 423-429. Therefore, as well as requiring that the applicant must genuinely fear persecution, the phrase also requires an objective examination of all the facts to assess whether the fear is well founded

22 *Chan* (1989) 169 CLR at 423-429. And at p.429: "… an applicant for status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be shot, tortured or otherwise persecuted"

23 *Mok* (1993) 47 FCR 1. See also Guo Wei Rong (1996) 135 ALR 421 where it was held that the 'real chance' test should involve a five stage process of consideration

24 *Chan* (1989) 169 CLR at 399 per Dawson J: a reference to a determination of refugee status is a reference to a 'contemporaneous determination'

25 *Chan* (1989) 169 CLR at 391 per Mason CJ

26 See for example *Ratnum* (unreported, Federal Court, Emmett J, 6 May 1997)

cases but that the Minister's delegate has a duty to investigate the existence of evidence in support of an application.[27]

1.17 In the *Chan* case, however, the High Court unanimously applied the 'changed circumstances' test holding that, where a person is seen as meeting the various criteria of a refugee, the onus is then on the Government to prove that circumstances have changed in the applicant's country of nationality so that the applicant's fear is no longer plausible.[28]

'Persecution'

1.18 Judicial pronouncements in relation to the meaning of 'persecution' have included the following

- the word 'persecution' should be given its ordinary meaning so that persecutory behaviour may be any 'serious punishment or penalty or some significant detriment or disadvantage'[29], or 'selective harassment' directed against a person;[30]
- a person may be 'persecuted' as an individual or as a member of a group which is the subject of systemic harassment;[31]
- a single incident will be sufficient to constitute persecution;[32]
- the threat of persecution need not emanate from a government so long as that government is unwilling or unable to offer protection;[33] and
- the fact that a policy is one of general application will not of itself prevent the courts from finding the results persecutory in nature. [34]

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27 *Magyari* (unreported, Federal Court, O'Loughlin J, 22 May 1997)

28 *Chan* (1989) 169 CLR at 390, 398-9, 408, 413-5 and 432-3

29 *Chan* (1989) 169 CLR 379 at 388

30 *Chan* (1989) 169 CLR 379 at 429-31

31 *Chan* (1989) 169 at 430

32 *Chan* (1989) 169 at 430

33 *Chan* (1989) 169 at 430. See also *Dogra* (unreported, Federal Court, Madgwick J, 28 April 1997): To fall within the ambit of the Refugee Convention, persecution must have an official quality, in the sense that it originates from, is tolerated or cannot be controlled by the government of the country of nationality. For conflicting judicial opinion as to when the denial of working rights can amount to state sanctioned persecution, see discussion and comparison of *Thalary* (unreported, Federal Court, Mansfield J, 4 April 1997) and *Prahastano* (unreported, Federal Court, Hill J, 8 July 1997) in Dr Mary Crock, *Immigration and Refugee Law in Australia*, The Federation Press 1998, p.141

34 *Applicant A and Another v Minister for Immigration and Ethnic Affairs and Another* (1997) 142 ALR 331. In that case the court held that the enforcement of the PRC 'one child' policy through coerced abortion and mandatory sterilisation did constitute persecution. The applicants in that case failed, however, because they could not link their fear of persecution to one of the Convention's specific grounds

Nexus between 'fear' and the five Convention grounds

1.19 In order to establish that an applicant is a 'refugee' within the meaning of the Convention definition, it is critical to demonstrate that there is a nexus between the persecution feared by the applicant and one of the five grounds in the Convention.[35] The five grounds are race, nationality, religion, membership of a particular social group, and political opinion.[36]

1.20 In the case of *Applicant A and Another v Minister for Immigration and Ethnic Affairs and Another* (1997) 142 ALR 331[37] the applicants sought to establish that they were members of a 'particular social group' and therefore apprehended forcible sterilisation under the 'one child policy' of PRC.[38] The majority decision of the High Court was that they failed to gain refugee status because they were unable to demonstrate a nexus between their fear of persecution and a Convention ground. The majority view was that rather than being members of a 'particular social group' they were, instead, simply any one of a number of:

> … disparate couples from all walks of life who do not know each other and may have nothing in common save for the fact that they are parents of one child who do not wish to be forcibly prevented from having more.[39]

1.21 It was held that for a group to be cognisable the group must share immutable characteristics apart from any common fears - that is, it is not permissible to define a 'particular social group' by reference to the act that gave rise to the well-founded fear of persecution.[40]

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35 *Applicant A and Another v Minister for Immigration and Ethnic Affairs and Another* (1997) 142 ALR 331

36 For a discussion of the judicial authority on these five grounds see Dr Mary Crock, *Immigration and Refugee Law in Australia,* The Federation Press 1998, pp.143-153

37 Hereinafter referred to as the case of *Applicant A and Another*

38 In the first instance, the Minister for Immigration and Ethnic Affairs (through his delegate) had refused the applications for refugee status. The Refugee Review Tribunal, however, reversed that decision and found that the applicants were members of a 'particular social group' comprised of 'those who having only one child do not accept the limitations placed on them or who are coerced or forced into being sterilised as such'. See case note in *Applicant A and Another v Minister for Immigration and Ethnic Affairs and Another* (1997) 142 ALR 331. On appeal to the Federal Court, Sackville J affirmed the decision of the Refugee Review Tribunal but the Full Court of the Federal Court later unanimously reversed this decision. As noted in paragraph 2.20, the applicants appeal to the High Court also failed. The decision of the High Court was split 3:2, with Dawson, McHugh and Gummow JJ in the majority and Brennan CJ and Kirby J dissenting

39 *Applicant A and Another v Minister for Immigration and Ethnic Affairs and Another* (1997) 142 ALR 331 at 345 per Dawson J

40 See case note *Applicant A and Another v Minister for Immigration and Ethnic Affairs and Another* (1997) 142 ALR 331 for summary of opinion of Dawson, McHugh and Gummow JJ as to the meaning of 'particular social group'. Gummow J also held that there must be a common unifying element binding individuals with similar characteristics or aspirations. (For further discussion of this Convention ground see also *Morato* (1992) 39 FCR 401 and *Ram* (1995) 57 FCR 565.) In the case of *Applicant A and Another* (1997) 142 ALR 331 it was also briefly considered whether opposition to the 'one child policy'

Australia's involvement in refugee matters

1.22 Australia's policy on refugees has emerged from a background of colonial settlement and immigration policies characterised by racial intolerance to one of shared international responsibility for the protection of displaced persons regulated by legislative controls. Initially, Australia's reluctant acceptance of people from countries other than in the 'white empire' was limited to those it considered could contribute to the labour force.[41] This early sentiment eventually evolved into the White Australia Policy which dominated much of Australia's attitude to immigration in the early decades of the twentieth century.[42]

1.23 During the 1930's Australia accepted about 15,000 refugees from Europe seeking to avoid persecution by the Nazis. Although Australia's attitude to immigration changed as a result of events that unfolded during World War II, it remained centred on European immigrants who were expected to assimilate easily into Australian society and again, contribute to the labour force.[43] In addition, Australia's geographic isolation, vulnerable coastline and unpopulated landmass coupled with concern about the adequacy of Australia's border defences, perpetuated a Euro-centric immigration policy.

1.24 Australia moved into the sphere of international protection for refugees by becoming a founding member of the United Nations in 1945 and later, in 1947 by joining the International Refugee Organisation.[44] During the negotiation of the Convention on Refugees, participating States asserted that while they would share the burden of protecting refugees, they reserved the right to decide which refugees should be allowed to settle in their country.

1.25 By 1963, 2 million post war immigrants had arrived in Australia, largely from Europe.[45] Australia's attitude to immigration continued to change in the late 1960's and 1970's to reflect the new policy of multiculturalism. The trend was followed by

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in PRC constituted the ground of 'political opinion', the fifth Convention ground. The Court held that such opposition could only constitute 'political opinion' if their opposition was given public expression. For example, if the applicants had participated in public demonstrations: See McHugh J at 363

41 For example, the German Lutherans in South Australia and Indians to serve in the colonist's households in the 1830's; the influx of Chinese and Americans during the 1850's goldrush; and the 60,000 Melanesians "brought" to Australia to work on Queensland plantations during 1860-1890, many of whom were returned home when their usefulness was exhausted: Catholic Commission for Justice, Development and Peace, *Hordes or Human Beings?* Discussion Paper, 8 March 2000, p. 6

42 One of the first acts of the new Australian Parliament, post Federation, was to give legislative force to the White Australia Policy by passing the *Immigration Restriction Bill 1901* (C'th). The purpose of the policy was to secure 'unity of race' considered essential to the unity of Australia by prohibiting 'coloured' immigration: Alfred Deakin, House of Representatives Hansard, 12 September 1901, p. 4807

43 Catholic Commission for Justice, Development and Peace, *Hordes or Human Beings?* Discussion Paper, 8 March 2000, p. 7

44 Disbanded in 1953

45 Catholic Commission for Justice, Development and Peace, *Hordes or Human Beings?* Discussion Paper, 8 March 2000, p. 8

the introduction of anti-vilification legislation to prevent discrimination on the basis of race, colour or disadvantage.[46] Between 1975 and 1981, Australia responded to several calls to take refugees, especially from Vietnam (the first "boat people") and Cambodia.[47] In 1989, the UN devised a Comprehensive Plan of Action to deal with the large numbers of people who were leaving Vietnam and Laos for economic rather than political reasons. The plan gave a first stage of asylum in Indonesia, Malaysia, Hong Kong and Thailand to Laotian and Vietnamese claimants and then offered resettlement through the UNHCR in other countries such as Australia. Under that plan, more than 100,000 Vietnamese and Laotians were voluntarily returned to their home countries.[48] Many, however, remained in camps scattered throughout South-East Asia resisting repatriation in the hope of resettling in countries like Australia:

> The CPA concluded on 30 June 1996 with Australia having accepted some 19,500 asylum seekers from CPA camps for resettlement.[49]

1.26 Following the tragic events in Tiannenmen Square in 1989, Chinese students studying in Australia were granted four-year temporary entry permits. Later, in what became known as the '1 November' decision in 1993, the Australian Government announced that it would provide access to permanent residency under three categories[50]. The decision was primarily directed at the PRC nationals who had earlier been granted the temporary entry.

1.27 Since then refugee status has been granted to people from many countries including the Middle East and South West Asia (for example Iran, Iraq, and Afghanistan), the Americas, Africa (for example Sudan, Somalia, Ethiopia, Eritrea, Sierra Leone), Europe (including the former Yugoslavia) and the Balkans.

1.28 Changing global circumstances of the world's populations have helped shape Australia's responses to the needs of refugees. Australia's Refugee and Humanitarian Program provides for the orderly determination of applications for refugee status from people both within Australia and offshore. In addition, the recent initiative of the government to provide temporary safe haven to Kosovars and East Timorese has expanded the range of responses available to Australia to assist in refugee crises. In view of the fact that 60% of the world's population live in the Asia-Pacific region, it is

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46 For example, the *Racial Discrimination Act 1975* (C'th)

47 In 1981, 2,000 refugees reached Australia by sea and 43,000 by air from refugee camps: Catholic Commission for Justice, Development and Peace, *Hordes or Human Beings?* Discussion Paper, 8 March 2000, p. 8

48 The Hon. Philip Ruddock, Minister for Immigration and Multicultural Affairs, House of Representatives Hansard, 27 June 1996, p.3021

49 Department of Immigration and Multicultural Affairs, Annual Report 1996-97, p. 46

50 The three categories were PRC nationals who were in Australia at the time of the Tiannenmen Square uprising (Class 815 entry permits); better qualified asylum seekers and nationals of Sri Lanka and the former Yugoslavia temporarily in Australia (Class 816 - most of whom were from the PRC); and highly qualified students undertaking post-graduate study in Australia (Class 818): Department of Immigration and Multicultural Affairs Fact Sheet 38, *I November Decisions*, p. 1

inevitable that Australia will play a pivotal role in the resolution of global issues relating to international protection for refugees.

The Refugee and Humanitarian Program

1.29 The aim of the Refugee and Humanitarian program is to assist in alleviating the plight of refugees and others in humanitarian need in accordance with Australia's international obligations. The program seeks:

- to resettle refugees and others in humanitarian need who are outside Australia - the offshore component; and
- provide asylum for people in Australia who engage Australia's international protection obligations - the onshore component.

1.30 It should be noted that whereas Australia is required by its international obligations to provide protection to persons who are actually within the country and meet the various criteria, of a refugee,[51] Australia is under no such obligation to provide protection to people who are living overseas:

> The duties imposed by the Refugee Convention are of little consequence in the context of Australia's selection of people overseas for inclusion in its refugee and special humanitarian program. As a sovereign nation, Australia is free to offer protection to whoever it chooses, irrespective of their international legal status as refugees. Where people come to Australia and seek asylum upon or after arrival, however, it is a different story. Claims for refugee status must be determined, and recognised refugees must be afforded some kind of protection.[52]

Offshore Humanitarian Resettlement Program

1.31 As stated above, the objective of the Offshore Humanitarian Resettlement Program is to 'resettle refugees and others in humanitarian need who are outside Australia'.[53] The Program comprises the following categories:

- Refugees - that is, people who are 'subject to persecution' and who have been identified, in conjunction with the United Nations High Commissioner for Refugees (UNHCR), as requiring resettlement (this category includes the Woman at Risk Program);

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51 In particular, Article 33 of the Refugee Convention, the obligation of non-refoulement, that prohibits State Parties from returning or refouling refugees to a country where they face persecution on any of the five grounds set out in the Convention definition of 'refugee' in A1

52 Dr Mary crock, *Immigration and Refugee Law in Australia*, Federation Press, 1998, p. 123. See also *Transcript of evidence*, Senator McKiernan, p. 248

53 Department of Immigration and Multicultural Affairs, *1998-99 Annual Report*, p. 78

- Special Humanitarian Program (SHP) - that is, those people who have 'suffered discrimination amounting to gross violation of human rights, and who have strong support from an Australian citizen or resident or community group in Australia'; and
- Special Assistance Category (SAC) - that is, people who, 'while not meeting the refugee or Special Humanitarian criteria, are nonetheless in situations of discrimination, displacement or hardship'. In most cases, SACs require proposers of applicants to be 'close family members resident in Australia'.[54]

1.32 The importance of having support from family or community in order to meet the criteria for two out of three above categories emphasises the value given to an existing connection with Australia. Although there are good reasons for the requirement for such support, it is possible that certain groups with limited, if any, connection see this criterion as a way of excluding them or limiting their access. It would be difficult for people from many countries to establish such a connection, unless a 'refugee' community had become established.

The Onshore Protection Program

1.33 The second component of the Refugee and Humanitarian Program Program, is the Onshore Protection Program for people already in Australia, who claim to be refugees. As a signatory to the 1951 UN Convention on Refugees, Australia is obliged to provide protection to refugees already within Australia (obliged to consider their case; and then obliged to provide protection if they pass the test). The basis for that obligation is in Article 33 wherein states are required not to return or refoule refugees to countries where they have a valid fear of persecution on account of their race, nationality, religion, membership of a particular social group or political opinion.

1.34 In order to engage Australia's protection under the Onshore Protection Program, a person must establish that he or she is a 'refugee' within the Convention definition as it is understood in Australia.[55] People seeking refugee status under the Onshore Protection Program do so by applying for a Protection Visa.

Process: Application for a Protection Visa

1.35 A detailed analysis of the application and determination process for refugee status under the Onshore Protection Program is set out in Chapters 3,4,5 and 6. It is

54 Department of Immigration and Multicultural Affairs, Fact Sheet 40, *Australia's Offshore Humanitarian Resettlement Program*, 16 November 1999

55 There is no onshore humanitarian program comparable to the offshore humanitarian component of Australia's Refugee and Humanitarian Program. Persons who do not meet the 1951 Convention definition of refugee, may only be granted a visa to stay in Australia on humanitarian grounds at the discretion of the Minister pursuant to s417 of the Migration Act. A humanitarian case may include a person covered by Australia's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) or the United Nations International Covenant on Civil and Political Rights (ICCPR)

appropriate at this point, however, to refer briefly to the main stages and to their relevance in terms of Australia's international obligations.

1.36 A person applies for a Protection Visa in the first instance to the Department of Immigration and Multicultural Affairs (DIMA) – (the primary stage). DIMA assesses the applicant's claims against the 1951 Convention definition of a 'refugee' and may accept or reject the application. In considering the application, the DIMA decision-maker has access to the Country Information Service, a data system operated by DIMA and containing a range of information. The decision-maker can assess the applicant's claims against this and other information.[56]

1.37 If the application is rejected at the primary stage, an applicant may appeal to the Refugee Review Tribunal (RRT) which is responsible for re-assessing an applicant's claims for refugee status. The RRT may affirm the primary decision, that is, agree with the decision to reject the application, or may set aside the decision, that is, determine that the applicant is a refugee in accordance with the 1951 Convention definition.

1.38 Applicants whose applications have been rejected by the RRT may appeal to the Federal Court on a point of law only. Such applicants may also request that the Minister exercise his discretionary and non-compellable power under s417 of the *Migration Act 1958* and substitute a decision more favourable to the applicant. It should be noted, however, that the convention is that the Minister will not intervene until the avenues of judicial appeal have been exhausted. Further, the Minister's decision is non-reviewable. The *Migration Act 1958* requires unsuccessful asylum seekers to be removed from Australia as soon as is reasonably practicable, usually within 72 hours. The interpretation of this phrase appears to be within the discretion of DIMA, and this is an issue which is considered in further detail later.[57]

Compliance of process with international standards

1.39 Although the 1951 Convention on Refugees did not specify the procedure for the determination of refugee status, the UNHCR has recommended that the procedures adopted by individual States should contain seven basic requirements to ensure that asylum seekers are provided certain essential guarantees.[58] It was submitted by the relevant department that Australia's Onshore Protection Program complies with the UNHCR's basic requirements as follows:

- *Article 1: The border official should act in accordance with the principle of non-refoulement and refer the case to a higher authority:* Under the

56 There has been considerable criticism of the quality of the information and the range of opinions which it covers. This matter is discussed further in Chapters 4 and 5

57 See below, Chapter 10

58 The Executive Committee of the (United Nations) High Commissioner's Programme, 28th Session. See *Submission No. 69*, Department of Immigration and Multicultural Affairs, Annexure 2, pp. 848-849

Onshore Protection Program, all unauthorised arrivals at Australian borders can apply for a Protection Visa and DIMA officers conduct interviews to assess whether they are 'refugees'. Applicants are not removed prior to assessment.[59]

- *Article 2: Applicant should receive guidance on procedure to be followed:* Under the Onshore Protection Program, protection visa application forms and information are available within the community.[60]
- *Article 3: An identifiable authority to decide initial refugee status claims:* Applications for protection are assessed by DIMA case officers who are delegates of the Minister.[61]
- *Article 4: Assistance for applicants, including interpreters and UNHCR contact:* Applicants have access to application assistance (under the Immigration and Advice Application Scheme) and interpreters are provided during primary determination interviews (and RRT hearings) and applicants are at liberty to contact the UNHCR.[62]
- *Article 5: Applicant to be advised if accorded refugee status and given relevant documentation identifying that status:* Persons granted a protection visa may become permanent residents of Australia.[63]
- *Article 6: Applicant to have reasonable time to appeal if refugee status is rejected, either administrative or judicial depending on the system:* The RRT provides review of rejected protection visa applications and there is limited judicial review.[64]
- *Article 7: Applicant to remain in country pending determination of refugee status claim:* Applicants remain in Australia pending review determinations.[65]

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59 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 824

60 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 824

61 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 824

62 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 824. The provision of application assistance under the IAAAS is dealt with in detail in Chapter 3

63 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 824. It should be noted that amendments to the Migration Regulations came into operation on 20 October 1999. The amendments apply to unauthorised arrivals. Under the new arrangements there are two subclasses of Protection Visas, a Permanent Protection Visa (subclass 866) for lawful arrivals, and a Temporary Protection Visa (subclass 785) for unlawful arrivals. The Temporary Visa is valid for three years. Although Temporary Visa holders may apply for a Permanent Protection Visa, a positive determination can only be made after the applicant has held a Temporary Visa for 30 months: See Department of Immigration and Multicultural Affairs Factsheet 41, *Seeking Asylum in Australia*, p. 2. The new arrangements are contained in Migration Amendment Regulations 1999 (No. 12), Statutory Rules 1999 No. 243

64 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 825

65 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 825

1.40 However, a number of individuals and organisations have stated that the Department does not meet the required standards[66] and these issues are considered in further detail below.

Relevant statistics: Places available under the Refugee and Humanitarian Program

1.41 In 1998-99, 12,000 places were notionally allocated to the Refugee and Humanitarian Program.[67] Of those, 11,360 visas were granted of which 1, 834 visas were granted to onshore refugee applicants, 3,988 to offshore refugees, 4,348 under the offshore SHP and 1,190 under the offshore SAC.[68]

1.42 The following diagram provides an overview of the allocation of different kinds of visas issued under the Refugee and Humanitarian Program between 1993-94 and 1998-99. The diagram has been compiled from data in the respective annual reports of DIMA.

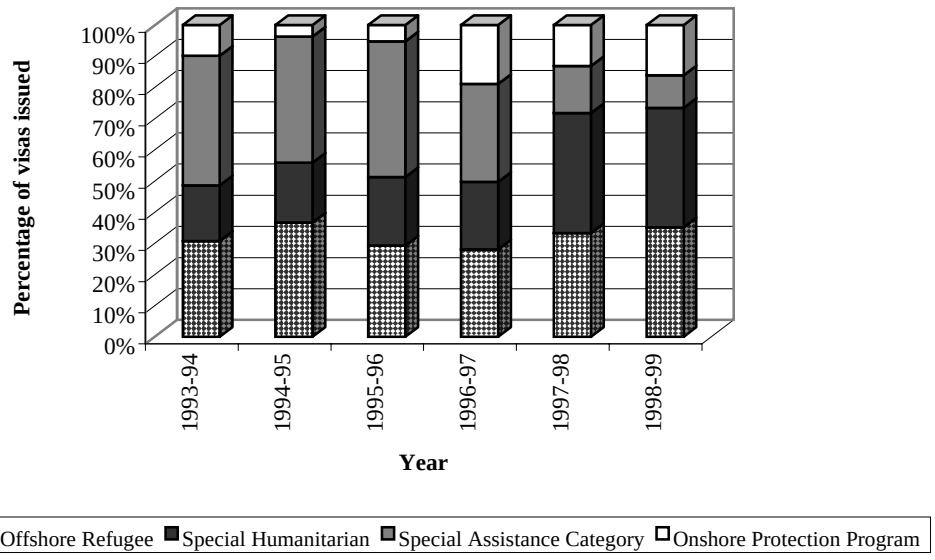

Figure 1. Percentages of visas issued under the refugee and humanitarian program, 1993-94 to 1998-99.

66 See for example *Submission No. 24*, Refugee Council of Australia, pp. 126-127; *Submission No. 7*, Tribal Refugee Welfare of Western Australia Inc, pp. 30-31 claiming that asylum seekers are not sufficiently provided with information and assistance; *Submission No. 15*, Springvale Community Aid and Advice Bureau, pp. 70-71; and *Submission No. 16*, Dr Rory Hudson, p. 77 criticising present arrangements for review of applications by the Refugee Review Tribunal. See other relevant comments in the submission volumes for example *Submission No. 33*, Australian Council of Social Service, pp. 220-223; *Submission No. 59*, Society of St. Vincent De Paul, pp. 594-597; *Submission No. 48*, Red Cross, p. 453; *Submission No. 50*, Amnesty International, p. 476, 508 and pp. 504-506; and *Submission No. 14*, Deakin University, pp 60-61

67 Minister for Immigration and Multicultural Affairs Media Release MPS 110/98, *Minister announces details of 1998-99 Humanitarian Program*, 25 August 1998

68 Department of Immigration and Multicultural Affairs, *1998-99 Annual Report*, p. 79

1.43 For 1999-2000, 4,000 places have been set aside for the offshore refugee category, 4,300 places for the SHP and 900 places for the SAC. Two thousand places have been set aside for the Onshore Protection Program. An additional 800 places have been left unallocated for contingencies during the year.[69] Unused places may be moved, according to need, between the onshore and offshore programs, or rolled into the allocation for the following financial year.[70] The strategy of linking the offshore and onshore programs apparently arose from the increase in illegal arrivals. Referring to the 2,000 places set aside for the Onshore Program, the Minister for Immigration and Multicultural Affairs advised:

> However, because that number is likely to be exceeded by recent illegal arrivals and other onshore applicants making refugee claims, it will reduce the number of places available to people identified off-shore by Australian and UNHCR, as being in urgent need of resettlement. As a result, off-shore visa grants have been suspended.[71]

Growth of the onshore refugee determination program

1.44 As noted above,[72] the onshore refugee determination program comprises both authorised and unauthorised arrivals.

Unauthorised arrivals by sea and air

1.45 While unauthorised arrivals by air and boat comprise a relatively small proportion of the total number of people seeking protection under Australia's Onshore Protection Program, there has been an upward trend in unauthorised arrivals over the last decade both in Australia and in other parts of the world.

> 'Illegal' or 'undocumented' international population movements have escalated dramatically over the last ten years, as levels of desire and need to move have increased, while opportunities for legal entry have decreased. One in three people who have moved to Western Europe, and one in four who have moved to the USA in recent years, have done so as undocumented migrants. The UN has estimated that there were 120 million people living and working outside their country of nationality, up from 50 million in 1989. Irregular migration has emerged as a major international challenge, as has the refugee situation. The United Nations High Commissioner for

69 Minister for Immigration and Multicultural Affairs, Media Release MPS 63/99, *Minister announces 1999-2000 Humanitarian Program*, 29 April 1999

70 Department of Immigration and Multicultural Affairs, *1998-99 Annual Report*, p. 79

71 Minister for Immigration and Multicultural Affairs, Media Release MPS 024/2000, *Minister in Sydney for Consultations on Migration Intake*, 1 March 2000

72 See above, Paragraph 1.29

Refugees (UNHCR) 1998 estimate of world refugee numbers was 11.5 million, within a 'population of concern' of 21.5 million.[73]

1.46 Persons who have arrived in Australia unlawfully are referred to as 'unlawful non-citizens'. The category of unlawful non-citizen comprises unauthorised arrivals by sea and air and 'overstayers', that is, persons who arrived with a valid visa that has since expired. At 30 June 1999, DIMA estimated that Australia had 53,143 overstayers.[74] Figure 2 shows that at 31 December 1998, overstayers constituted 94 per cent of all unlawful non-citizens in Australia. This number does not include all those who may have arrived on a valid visa, but have not met the conditions of that visa (such as those working instead of studying). Some may be included, but others may not be picked up until later assessments.

The following diagram illustrates the quantitative differences between the categories of unlawful citizens in Australia. The diagram has been compiled from information provided by DIMA.[75]

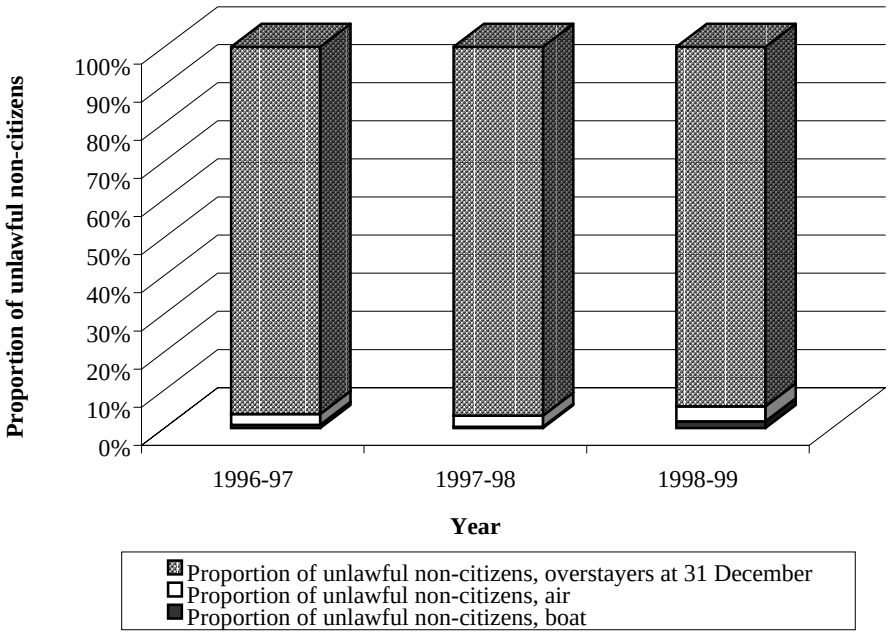

Figure 2. Unlawful non-citizens in Australia, 1996-97 to 1998-99.

73 Department of the Parliamentary Library, Current Issues Brief No. 13, 1999-2000, *Boat People, Illegal Migration and Asylum Seekers: in Perspective*, p.7

74 *Submission No. 69H*, Department of Immigration and Multicultural Affairs, p. 1953

75 See Department of Immigration and Multicultural Affairs Factsheets Numbers 80, *Locating Overstayers in Australia* and 81, *Unauthorised Arrivals by Air and Sea*

1.47 The Committee was told that recent figures indicated arrivals of unlawful non-citizens by sea had reached record levels in recent times:

> In the calendar year to November 1999, 2,631 people have arrived in Australia illegally by boat, along with 179 crew. This compares with 200 in the whole of 1998. In the short period 1 November to 19 November, 872 people arrived in 10 boats. Last week four boats arrived in three days carrying 155 persons. More boat people have arrived this calendar year than did for the entire six-year period of Vietnamese boat arrivals from 1975 to 1981.[76]

Perceptions

1.48 The Refugee Council of Australia told the Committee that there is a perception of asylum seekers as illegal immigrants rather than as people seeking protection under an international obligation by which Australia is bound. The Refugee Council is concerned to protect the interests of those who are refugees within the meaning of the Convention definition and those who have valid humanitarian reasons not to return to their country of origin. It does not support those who apply for non-humanitarian reasons such as economic or lifestyle choices.[77]

1.49 In recent years, major concerns have been expressed in relation to Australia's Onshore Protection Program. Reduced to a simple statement, the most pervasive perception is that Australia should 'stop illegal entrants' and only assist 'genuine refugees'. [78]

1.50 It was also submitted that, contrary to some perceptions in the community, most refugees who come to Australia in search of asylum arrive in a traumatised and frightened state with limited financial resources and few friends or family members on whom they can rely for support. Some refugees are unable to call on support from within their own national community either because they are fearful of the consequences and/or their community is new and under-resourced and thus cannot offer practical or financial support. Many refugees have little or no ability in English. Some refugees are unfamiliar with dealing with bureaucracy and/or find such dealings very threatening because of their past experiences.[79]

1.51 Some of the concerns about onshore asylum seekers are discussed below.

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76 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, pp. 778-779

77 *Submission No. 24*, Refugee Council of Australia, p. 121

78 Catholic Commission for Justice, Development and Peace, *Hordes or Human Beings?* Discussion Paper, 8 March 2000, p. 5

79 *Submission No. 22*, Australian Democrats ACT Division, p. 121

'Queue jumpers'

1.52 There is a perception that many people claiming refugee status are simply rorting the system of orderly migration. James Hathaway described refugee status as "an immigration trump card" by which you can jump over everyone else and get straight into the country.[80]

1.53 A representative from DIMA said that the issue is fundamentally about protection versus migration:

> If someone, for example, has effective protection in Germany, or wherever, and decides that they do not like Germany, that they would like to come to Australia, then they should apply for migration just as anyone else who wants to come and live in Australia has to apply for migration. There is no onus on us, just because we are a signatory to the refugee convention, to allow somebody to jump the queue in migration terms just because they are a refugee.[81]

1.54 There is a perception that the Onshore Protection Program enables people with access to sufficient money to enable them to come to Australia by whatever means to jump the queue ahead of those waiting in refugee camps and that they are less deserving than people who are in the camps. By contrast however, it was suggested that the people who arrive in Australia by their own means may be "more desperate", having taken great risks to get here, particularly by boat.[82]

'Forum shopping'

1.55 Under the Convention on Refugees, refugees do not have the right to decide which country they would prefer to have offer them protection. There is a strong perception however, that many illegal arrivals are forum shoppers, that is, they are seeking to obtain not only protection but a particular quality of life. Further, it has been claimed, many of these forum shoppers have determined that Australia is a desirable destination, perhaps because of its past reputation as a country relatively receptive to hardship claims.[83] It is not clear, however, that there are substantial numbers of forum shoppers. It is also important to distinguish between forum shopping – which implies an element of choice – and the loss of refuge in another country.[84]

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80 *Transcript of evidence*, Mr Nicholas Poynder, p. 243

81 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 791

82 *Transcript of evidence*, Mr Nicholas Poynder, pp. 246-248

83 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, pp. 778-780

84 Available information indicates that many of the recent boat people have come from countries where they have been taking refuge for many years. Those countries include Jordan, Pakistan, Syria, Iran, and Turkey which together shelter millions of refugees: Minister for Immigration and Multicultural Affairs, Media Release MPS 183/99, *International Measures to Stem People Smuggling*, 23 December 1999 and

1.56 DIMA representatives advised that the Minister had announced measures to prevent forum shopping on 13 October 1999. The changes were made in response to the growing number of boat arrivals which had reached record levels.[85] The initiatives to be introduced to combat illegal arrivals include:[86]

- Excluding unauthorised arrivals from accessing permanent residence by giving genuine refugees a three-year Temporary Protection Vsa or a short-term safe haven visa.
- Stopping people who have effective protection overseas from gaining onshore protection in Australia.
- Using fingerprinting and other biometric tests such as DNA testing, face, palm and retinal recognition and voice testing to help ascertain the true identity of asylum seekers to ensure where possible, they do not already have protection elsewhere or have been refused refugee status overseas.

Temporary Protection Visa

1.57 On 20 October 1999, amendments to the Migration Regulations came into operation. Under these new arrangements, there are two subclasses of Protection Visas: a Permanent Visa, subclass 866, and Temporary Visa, subclass 785. These arrangements state[87]:

- Applicants who are lawfully in Australia are eligible for the Permanent Visa and are not eligible for the Temporary Visa;
- Unauthorised arrivals seeking the protection of Australia have access to the Temporary Protection Visa and are not eligible for the Permanent Visa in the first instance. The Temporary Protection Visa is valid for three years; and
- A decision on a Temporary Protection Visa will follow the standard Protection Visa process.

Minister for Immigration and Multicultural Affairs, Media Release MPS 008/2000, *Minister's Anti-People Smuggling Campaign Brings Increased Cooperation*, 26 January 2000. See also *Transcript of evidence*, Department of Immigration and Multicultural Affairs, pp. 778-779 and 790.

85 See paragraphs 1.46-1.47 above

86 Phillip Ruddock MP, "Ruddock Announces Tough New Initiatives", *Media Release*, (13 October 1999)

87 Department of Immigration and Multicultural Affairs, "Seeking Asylum Within Australia", *Fact Sheet 41*, (12 November 1999) p. 2

1.58 The holder of a Temporary Protection Visa will not have access to family reunion. They will have work rights and access to special benefit as needed and will be able to gain access to Medicare. However, certain other conditions apply, including;[88]

- If the holder of a Temporary Protection Visa chooses to leave Australia, the Temporary Visa will cease and they will have no automatic right of return to Australia;
- Temporary Protection Visa holders may apply for a permanent Protection Visa but this is a separate application and each case will be decided as a new application;
- A positive determination can be made only if the Temporary Protection Visa has been held by the applicant for at least 30 months (or shorter period specified in writing by the Minister); and
- The Temporary Protection Visa conditions do not apply to unauthorised arrivals who applied for protection before the new regulations came into effect. Such asylum seekers retain access to the Permanent Visa.

1.59 UNHCR issued a statement on 19 November 1999 that confirms the Temporary Protection Visa arrangements are consistent with Australia's international obligations under the Refugees Convention.[89]

1.60 Referring to the statistics of boat arrivals, a DIMA representative asserted that if the rate of arrivals for the 1998-99 financial year of 400 a month were to continue there would be close to 5,000 illegal boat arrivals per year. If the November 1999 rate continued, then the figure could be as high as 15,000 persons per year – that is, around 42 arrivals per day.[90]

1.61 DIMA stated that available information indicated that the current arrivals are predominantly Iraqis and Afghans smuggled to Australia by highly organised criminal elements. Further information suggested that there could be up to 10,000 more people

88 Department of Immigration and Multicultural Affairs, "Seeking Asylum Within Australia", *Fact Sheet 41*, (12 November 1999) p. 2

89 Department of Immigration and Multicultural Affairs, *External Reference Group on People Smuggling*, (December 1999) p. 22

90 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 778. Compare the figures provided by *Transcript of evidence*, Jesuit Refugee Service, p.504: "I think that for too long in Australia there has been a strong public perception that that we are being inundated by thousands of people in boats, whereas most of the time it is about one person per day. It has gone up in recent times, but it is still nothing like the sorts of floods that came"

preparing to travel to Australia without authorisation.[91] The view of DIMA is that the bulk of these people are 'forum shoppers':

> If you look at the most recent boat and air arrivals who are predominantly Iraqi, Afghan et cetera, they are people who are forum shopping. They are seeking Australia as their preferred country of protection, sometimes leaving behind permanent residency and effective protection in their own countries.[92]

Bypassing offshore program

1.62 Concern was also expressed that increased numbers of successful Onshore Protection applications would mean a reduction in offshore visas granted.[93] The Committee was told that while theoretically there is no limit to the number who can seek asylum as refugees under the Onshore Protection Program, the Government had ruled that the offshore places will be reduced by successful onshore cases.[94] This was put into practice in early 2000 when Offshore Program processing was suspended.[95]

1.63 The Committee was told that making Australia a less attractive destination is part of Australia's response to people trying to bypass the orderly processes put in place under the management of UNHCR.[96] A representative from DIMA also argued that the ultimate consequence of people successfully using the Onshore Program for non-bona fide reasons will be the erosion of public confidence in the refugee program.[97]

1.64 There have been suggestions that although people may be bypassing an orderly process, they are doing so either in ignorance of such a process, or because they are excluded from that process. Measuring the accuracy of such statements is extremely difficult, and it was not the Committee's task to evaluate access to United Nations programs or other components of Australia's offshore services. However, if the majority of claimants have been forced to leave their first place of refuge, had nowhere else to go, and are accepted as refugees, arguments about their being less deserving seem irrelevant.

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91 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, pp. 778-779. According to Department of Immigration and Multicultural Affairs, information from the Australian Embassy in Jakarta indicated that up to 2000 people in Indonesia were seeking to travel to Australia illegally. Advice from other Australian overseas missions confirmed that many other people were en route to Indonesia.

92 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 790

93 See for example *Transcript of evidence*, Chair, p. 247

94 *Transcript of evidence*, Mr Nicholas Poynder, pp. 246-248

95 Minister for Immigration and Multicultural Affairs, Hon. Philip Ruddock MP, Media Release MPS 024/2000, *Minister in Sydney for Consultations on Migration Intake*, 1 March 2000

96 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 784

97 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, pp. 3-4

Comment

1.65 The issue of refugee status is clearly a complex one. Not surprisingly, certain aspects of it are prone to subjective analysis and community perceptions and sensitivities. It is important, however, to ensure that the process of determining refugee status remains focused on the principal objective of the Onshore Program, that is, to provide asylum to those who properly engage Australia's international protection obligations. To this end, the Committee believes that it would be undesirable to have a determination process that is unduly influenced by mere perceptions. This is particularly so given the grave consequences of erroneously refouling people with genuine protection concerns.

Temporary Safe Haven

1.66 In 1999, the conflicts in Kosovo and East Timor, prompted a new response to the refugee problem by Australia - the policy of temporary safe haven. The Committee examined that policy in terms of concerns expressed during the inquiry and possible implications for the future operation of Australia's Refugee and Humanitarian Program. Importantly, it should be noted that the safe haven policy does not seek to replace or detract from Australia's Onshore and Offshore Refugee Programs. Rather, it seeks to be a means of responding to a humanitarian crisis on a large scale without the need for the determination of refugee status on a case by case basis. One analysis is that:

> For government "safe havens" are one means of stemming the flow of refugees in the long term whilst enabling Australia to respond to an immediate need to grant a haven and thus serves the dual purpose of appeasing the calls for humanitarian response by the electorate whilst limiting the degree to which those who hold safe haven status can apply for some longer term protection.[98]

Background

1.67 Following a request from the United Nations High Commissioner for Refugees, the Australian Government announced on 6 April 1999, that it would provide safe haven for up to 4000 Kosovars from the refugee camps in the Former Yugoslav Republic of Macedonia, for an initial period of three months. On 1 May, the Minister announced that the Government had activated the plans, following an overnight request from the UNHCR. [99]

1.68 Immigration officials in Macedonia were responsible for the selection process, based on fitness to travel and willingness to be evacuated to Australia. Keeping

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98 Catholic Comission for Justice, Development and Peace, *Hordes or Human Beings?* Discussion Paper 8, March 2000, p. 10

99 Department of Immigration and Multicultural Affairs, Fact Sheet No. 62 – *Operation Safe Haven*

family units together was also a central criteria. Those selected were subsequently brought to Australia by chartered flights and accommodated at Department of Defence bases throughout Australia. Upon arrival in Australia, processing proceeded quickly to establish the refugees in their accommodation. Although they were free to move in and out of the facilities, services were only available within the camps. [100]

1.69 With the emergence of the humanitarian crisis in East Timor, Minister Ruddock announced the extension of the safe haven program to 1,450 East Timorese evacuated from the UN Compound as well as a further 350 UNAMET locally engaged staff and their families.[101]

1.70 The operation to provide safe haven for both Kosovar and East Timorese refugees was the result of a strong working partnership between Federal and State government agencies, non-government sectors including the Australia Red Cross and the Refugee Council of Australia and State welfare agencies.[102] The Refugee Council of Australia commented:

> This is a response never before undertaken by Australia, and as such, it has been a massive learning experience for all involved. It also came about very suddenly, leaving government and non-government agencies alike very little time in which to make the necessary arrangements.[103]

Location of the safe havens

1.71 There was concern as to where the safe havens should be located. Certain defence facilities, such as those at Woomera and Curtin in Western Australia, were inappropriate because of their extreme isolation and hot climate which would be significantly different to the conditions of a cold European winter that the refugees had come from.[104] In the end, the Department of Defence provided havens at locations in New South Wales, Victoria, South Australia, Western Australia and Tasmania.[105]

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100 Department of Immigration and Multicultural Affairs, Fact Sheet No. 62 – *Operation Safe Haven*

101 The Hon Philip Ruddock MP, Minister for Immigration and Multicultural Affairs, Press Release, MPS 135/99, 14 September 1999

102 Department of Immigration and Multicultural Affairs, Fact Sheet No. 62 – *Operation Safe Haven*. See also *Transcript of evidence*, 16 September 1999, Department of Immigration and Multicultural Affairs, p. 593

103 *Submission No. 24*, Refugee Council of Australia, p. 22

104 Senate Hansard, 29 April, p. 4562

105 The bases were at Puckapunyal, Bandiana and Portsea in Victoria, Singleton in NSW, Hampstead in South Australia, Brighton in Tasmania and Leeuwin in Western Australia. East Hills, Sydney was the on-arrival reception facility: Department of Immigration and Multicultural Affairs, Fact Sheet No. 62 – *Operation Safe Haven*

Conditions and services in safe havens

1.72 The safe haven arrangements for the Kosovars and the East Timorese were the same:

> The accommodation is the same; the food will be culturally appropriate; they will receive torture and trauma counselling; they will be given suitable clothing for our climate; they will have access to medical, dental and nursing facilities; children will receive basic education; adults will receive an allowance of $27 and children will receive $10 for personal items; they will have access to phone cards; they will be given English language classes; there will be translators to assist them; and there will be appropriate religious services.[106]

1.73 In May 1999, DIMA officers estimated that the cost of accommodating the Kosovars, including transport to and from Australia was expected to be in the order of $70 million.[107] The Minister for Immigration and Multicultural Affairs updated this figure in March 2000, asserting that the cost to Australia of assisting the Kosovar evacuees had been about $100 million.[108] In addition, DIMA representatives provided the Committee with an update on the Department's costs for the Kosovo Operation Safe Haven from May 1999 to January 2000, such costs were estimated to be $43.1 million.[109]

Problems with the repatriation of Kosovar and East Timorese 'refugees'

1.74 In July 1999, the UNHCR declared that it considered conditions in Kosovo sufficiently secure for the voluntary return of evacuees from countries like Australia.[110] The repatriation of the Kosovars, however, met with some resistance. One of the reasons for the Kosovars' reluctance was that they would be returning to a bitter winter season with little or no means of accommodating themselves. A number of initiatives were instigated aimed at resolving the situation, including the offering of a winter resettlement grant of $3000 per adult and $500 per child,[111] the temporary extension of visas and the commitment by the Minister to consider further month-by-

106 The Hon Phillip Ruddock MP, Minister, House Hansard, 21 September 1999, p. 10063

107 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 237

108 Minister for Immigration and Multicultural Affairs, Media Release MPS 028/2000, *Kosovars to Leave Australia Next Month*, 15 March 2000

109 *Transcript of evidence*, Senate Legal and Constitutional Affairs Legislation Committee, per Department of Immigration and Multicultural Affairs, Answer to Question on Notice, p. 23

110 Senator Kay Patterson, Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs, Media Release, *Return to Kosovo*, 14 July 1999

111 Minister for Immigration and Multicultural Affairs, Media Release MPS 121/99, *Winter Reconstruction Allowance for Kosovars*, 24 August 1999. The Minister stated that the winter resettlement allowance would help restock businesses, buy seeds for farms, building materials, or furniture and personal effects, that is, it would be used wherever it was most needed

month extensions in consultation with the UNHCR.[112] The majority of the Kosovars were returned to their home country by 27 October 1999.[113]

1.75 In hindsight, it is not surprising that there were problems with repatriation. No doubt the prospect of returning to harsh climatic conditions reinforced fears of dislocation and uncertain resettlement. Of the Kosovars who remained in Australia post October 1999, it was said that many had had their homes and personal possessions looted and destroyed and that they had little or no family support in Kosovo.[114]

1.76 Similarly, some East Timorese resisted returning on the basis that it was the wet season and as their homes had been razed during the conflict, they would be left without shelter and proper means of survival. In addition, many had medical conditions or an immediate family member with a medical condition that prevented travel.[115]

Migration Legislation Amendment (Temporary Safe Haven Visas) Act 1999

1.77 A key plank in the government's temporary safe haven policy was the enactment of the *Migration Legislation Amendment (Temporary Safe Haven Visas) Act 1999*[116] which amended the *Migration Act 1958* to establish a framework to provide persons with temporary safe haven in Australia. As DIMA officials noted, there was a requirement for the act to not only provide for the temporary stay of the Kosovars, but also the wider requirement to set up the legislative framework for other similar situations:

> Internationally, the feeling is that, for future situations, that may need to happen again. The decision to put in the general provisions—which would enable us to pick up a similar situation occurring in a different country, in that region again or whatever—is a sensible thing to do, because it appears as though it may be something that the international protection community has to face in the future.[117]

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112 Minister for Immigration and Multicultural Affairs, Media Release MPS 151/99, *Minister Announces Closure of Brighton and Portsea Safe Havens,* dated 27 October 1999

113 Approximately 3,500 Kosovars were returned to their home country by 27 October 1999: Australian General News Story No. 5934, 25 October 99

114 Minister for Immigration and Multicultural Affairs, Media Release MPS 121/99, *Winter Reconstruction Allowance for Kosovars,* 24 August 1999

115 See Minister for Immigration and Multicultural Affairs, Media Release MPS 172/99, *East Timorese Evacuees Opt to Go Home,* 6 December 1999

116 *Migration Legislation Amendment (Temporary Safe Haven Visas) Act 1999,* No. 34 of 1999 received the Royal Assent on 20 May 1999

117 *Transcript of evidence,* Department of Immigration and Multicultural Affairs, p. 62. This view has been quickly proved accurate with the arrival of the East Timorese

1.78 The amending Act established a class of visas known as temporary safe haven visas. The Minister may, by notice in the *Gazette*, extend or shorten the temporary safe haven visa period and that decision is not judicially reviewable. Persons holding a Temporary Safe Haven Visa are not allowed to apply for any other type of visa, including permanent residency. The Minister however, has the discretion to allow such people to apply for another type of visa and that decision is not judicially reviewable.

1.79 The amending Act also provides for a power of removal in relation to certain non-citizens. The Minister has a special power to refuse to grant or to cancel a person's Temporary Safe Haven Visa on character grounds and without reference to the rules of natural justice. That decision can be extended to each member of the immediate family of that person. The Minister's decision to refuse to grant or to cancel a temporary safe haven visa is not reviewable under Part 5 of the *Migration Act*.[118]

1.80 The Act therefore creates the new *Temporary Safe Haven (Class UJ)* visas, and so far, the government has created two subclasses of the visa:

> Subclass 448 – Kosovar Safe Haven (Temporary) visa was created specifically for the Kosovars participating in 'Safe Haven'.
>
> Humanitarian Stay (Temporary) visa, Subclass 449, commenced on 1 June 1999. This subclass is not country specific.

Endorsement of the safe haven policy

1.81 There was widespread support for the new policy both internationally and within Australia, having been hailed by many as a direct and appropriate response to global emergency and crisis situations.[119] While the policy is new in Australia, there is longstanding international experience in temporary protection. The Refugee Council of Australia point out:

> Whereas "temporary protection" has not until now been a topic of substantive consideration and debate in Australia, it has for some time been central to the thinking of European States, in large part because of the large outflow from Croatia and Bosnia …[120]

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118 See Migration Legislation Amendment (Temporary Safe Haven Visas) Bill, 1999, Explanatory Memorandum, p. 3

119 *Submission No. 58*, Australian Catholic Migrant and Refugee Office, p. 587

120 *Submission No. 24*, Refugee Council of Australia, p. 19. See also *Submission No. 58*, Australian Catholic Migrant and Refugee Office, p. 587

1.82 The UNHCR cites two major justifications for the temporary safe haven policy:

- There is the need to offer protection to refugees and displaced persons arriving in large-scale influxes, where safety and respect for the principle of *non-refoulement* are the predominant concerns:

  > This enables the protection, without discrimination, of those who, irrespective of whether they fall within the definition of the Convention, are forced to flee their countries of origin due to factors such as massive human rights violations, war, civil conflict, or generalised violence.[121]

- Voluntary repatriation of refugees to their country of origin is the preferred durable solution for refugees.[122] This is particularly important in situations of ethnic cleansing where permanent resettlement or relocation would meet the political objective of those who caused the crisis.[123]

Criticisms of the safe haven policy

1.83 Because the policy of temporary safe haven was introduced as a quick response to the humanitarian crises in Kosovo and East Timor, there was little or no time for public consultation and debate. This inquiry has provided an opportunity for closer scrutiny with the result that some possible deficiencies have been identified. The Committee notes however, that these issues have to be considered against the practical reality of providing an immediate solution to a large scale refugee crisis situation.

Appropriateness of the safe haven policy

1.84 It has been argued that the temporary safe haven policy is inappropriate in its application to refugees for the following reasons:

- Temporary haven to refugees may increase the trauma they have suffered. A major trauma that refugees suffer is the ongoing sense of displacement, uncertainty about their future, and loss of control about where they can call home.[124] It was argued that the same applies to victims of torture:

  > The experience of torture shatters basic assumptions about the individual's safety, sense of worth and predictability in the behaviour of others. The cornerstone of successful treatment is to rebuild a sense of safety in the individual, in order that they are able to integrate their past experiences and

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121 *Submission No. 83*, United Nations High Commissioner for Refugees, p. 1441

122 *Submission No. 83*, United Nations High Commissioner for Refugees, p. 1442

123 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 837

124 Senator Andrew Bartlett, Senate Hansard, 29 April, p. 4553. See also *Submission No. 16*, Rory Hudson, pp. 82-83; and *Submission No. 40*, Legal Aid Western Australia, p. 373

> so regain social functioning with minimal continuing symptoms. In our experience, clients who have spent periods in situations which they know are temporary have a limited ability to integrate their past experiences because a fundamental sense of safety cannot be established in this environment.[125]

- The passage of time inevitably makes return more difficult. The policy does not take into account that circumstances may change, relationships formed and links made which will reduce the desire to return home. Experience has shown that the longer the stay the less likely the desire to be repatriated at the end of the conflict.[126]

1.85 It is a requirement under the Temporary Safe Haven Visa regulations that applicants must sign a declaration prior to their departure for Australia to the effect that they understand and agree to the offer of temporary safe haven. Both the Kosovars and East Timorese were required to sign these declarations.[127] It was suggested that such efforts to explain the intended limited nature of their stay in Australia would go some way to reducing the policy's potential to exacerbate the refugees' trauma.[128]

Temporary safe haven breaches the principle of *non-refoulement*

1.86 Australia is required under the international obligation of *non-refoulement*[129] not to return a person to a country where he or she will face the risk of death, persecution or torture. It is claimed that the Temporary Safe Haven Policy in the *Migration Legislation Amendment (Temporary Safe Haven Visas) Act 1999* breaches that obligation because it prevents temporary safe haven visa holders from applying for permanent residency[130], except where the Minister has exercised his or her

125 *Submission No. 47*, Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, p. 446

126 *Submission No. 58*, Australian Catholic Migrant and Refugee Office, p. 587. Referring to the Bosnian experience in the UK

127 Department of Immigration and Multicultural Affairs Fact Sheet 62, *Operation Safe Haven – Kosovars and East Timorese*, p. 1. It should be noted however, that because of the extreme urgency of the operation to evacuate people from East Timor, some were unable to sign the declaration until after their arrival in Australia

128 *Submission No. 47*, Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, p. 447

129 The obligation of *non-refoulement* is contained in Article 33 of the Refugees Convention and Article 3 of the Convention against Torture. See also Dr Rory Hudson's comments in relation to international jurisprudence on Australia's obligations under the International Convention on Civil and Political Rights: *Submission No. 16*, Dr Rory Hudson, pp. 82-83

130 Section 91K

discretion to allow such an application to be made.[131] The Refugee Council of Australia noted:

> There is a question whether a country has a right to deny access to determination procedure outright. … status determination can be postponed but both the EC and the ECRE [European Council on Refugees and Exiles] are clear that, should an applicant want to go through a determination procedure, they should be allowed to do so, in particular before the person is returned to his/her country of origin.[132]

1.87 The RCOA also referred the Committee to Article 6 of the European Council on Refugees and Exiles Policy on Temporary Protection which states that persons under temporary protection should have access to individual refugee determination procedures as soon as it is practicable and certainly prior to any subsequent return.[133]

1.88 Amnesty International was concerned that the safe haven policy might bypass the Refugee Convention as to when refugee status can end.[134] The circumstances in which the status of 'refugee' under the Refugee Convention will cease to apply to a person are expounded in Article 1 (C) of the Refugee Convention. The UNHCR has elaborated upon those circumstances and concluded that refugee status may only end when there is:

> … a change of circumstances in a country [is] of such profound and enduring nature that refugees from that country no longer require international protection, and can no longer continue to refuse to avail themselves of the protection of their country, provided that it is recognized that compelling reasons, may for certain individuals, support the continuation of refugee status … the fundamental character of the changes in the country of nationality or origin, including the general human rights situation, as well as the particular cause of fear of persecution, in order to make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist…[135]

1.89 Amnesty International asserted that the conditions of stay for those under temporary arrangements must respect international law and the circumstances in

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131 See sections 91K and 91L. *Submission No. 16*, Dr Rory Hudson, pp. 82-83. See also *Submission No. 59*, St Vincent De Paul Society, pp. 596-597: The Society submitted that it would be concerned if any temporary protection arrangements diminished the international protection system for refugees as it would set a dangerous and undesirable precedent. In the Society's view, any policy of temporary protection would have to consider the status of refugees who are unable to return home after a short stay and avert a situation where such refugees are left without a chance for settlement. Such arrangements should provide for access to apply for refugee status under the 1951 Convention.

132 *Submission No. 24*, Refugee Council of Australia, p. 141

133 *Submission No. 24*, Refugee Council of Australia, p. 139

134 *Submission No. 50*, Amnesty International, pp. 501-502

135 Conclusion 69 of the Executive Committee (EXCOM) of the United Nations High Commissioner for Refugees (UNHCR) and quoted by *Submission No. 50*, Amnesty International, p. 502

which international protection can end must be clearly articulated in any domestic legislation. Otherwise the consequence is that refugee protection will be limited to political discretion and therefore lack a central human rights and legal component.[136]

> An independent examination of the security and human rights situation in the country of origin must form the basis of the assessment of when a change of circumstance of such a profound and enduring nature exists. It must not be made by individual governments for political reasons. It must always be remembered that those who have fled their homes, as in the case of Kosovo, are refugees and their status as such can only be rescinded by reference to international law and to human rights criteria. Even where it is sufficiently safe for refugees to return home, it should be recognised that there will be some persons, such as rape victims, members of mixed marriages, conscientious objectors to military service who may not be able to return at that time.[137]

1.90 It was contended that the use of Ministerial discretion as the only means by which people who are offered safe haven can remain in Australia is a dangerous precedent.[138] Further, insofar as the Minister's decision is non-reviewable, the arrangements might breach Article 32 of the Refugees Convention, by which States are required to allow refugees to appeal to a competent authority if expelled, and Article 16, by which States are bound to allow refugees free access to the courts.[139]

1.91 These arguments raise questions about the status of people who come to Australia under the policy of safe haven. The central tenet of the policy, however, is to provide temporary safe stay within the context of the preferred durable solutions of the UNHCR. The international protection framework envisages that once there is an outflow of people, the first option is to seek temporary protection for those people in nearby countries of first asylum pending the preferred solution of repatriation. Other options are brought into play only if the preferred durable solution of repatriation is assessed as not being a realistic option.[140]

1.92 Arguments concerning the rights of people brought to Australia under the safe haven policy, however, seem to counter the preferred durable solution of repatriation. For example, it is arguable that, although they are recognised as 'refugees' by the UN, they are not so recognised here because they may not come within the Convention definition as interpreted and applied in Australia. Questions about the entitlements of such people while in Australia, such as access to the courts and the right to appeal, carry an expectation that they are, in fact, 'refugees'. Australia grants refugee

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136 *Submission No. 50*, Amnesty International, p. 502

137 *Submission No. 50*, Amnesty International, p. 502

138 *Submission No. 15*, Springvale Community Aid and Service Bureau, pp. 72B-72C

139 *Submission No. 16*, Dr Rory Hudson, pp. 82-83

140 Department of Immigration and Multicultural Affairs, *The International Protection Framework and Australia's Refugee and Humanitarian Program*, 5 November 1999, p. 1

applicants these rights but this is more attributable to Australian principles of law than to the UN convention. Strictly speaking, people are not refugees until they have been so classified. It is debateable as to whether the UN classification can apply so as to require that any displaced person, classified by the UN as a refugee or displaced person for safe haven purposes, obtain access to the courts of a host country when that country has not itself classified him or her.

1.93 DIMA contended, however that the holders of temporary safe haven visas do not need to apply for protection as they already have protection under the temporary safe haven arrangements:

> Any return of the Kosovars will either be at their own request or under a planned repatriation program under the auspices of UNHCR. UNHCR will not be returning people to their homes, unless they are able to do it in safety and dignity. I think, in that sense, there is no need for them to be able to apply for protection - they already have it.[141]

A departure from the rule of law

1.94 The Senate Scrutiny of Bills Committee drew attention to proposed section 500A in the *Migration Legislation Amendment (Temporary Safe Haven Visas) Bill 1999* that the Minister is not bound by the rules of natural justice in deciding whether to refuse to grant or to cancel a safe haven visa. The Committee noted that the arrangements:

> … may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(I) of the Committee's terms of reference, and make rights liberties or obligations unduly dependent on non-reviewable decisions …[142]

1.95 At the same time, however, that Committee referred to information in the Second Reading Speech which advised that, as temporary safe haven is to be provided to persons at short notice and in situations where extensive character-checking is not possible:

> … it is necessary to have effective powers to withdraw temporary safe haven which has been provided to any person who represents a danger to the Australian community, or Australia's security or whose presence in Australia would be harmful to Australia's international relations.[143]

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141 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 62

142 Senate Scrutiny of Bills Committee, Alert Digest 7/99, p. 9. See also *Submission No. 24A*, Refugee Council of Australia, p. 274-275

143 Senate Scrutiny of Bills Committee, Alert Digest 7/99, p. 8

1.96 The Law Council of Australia described the visas as a gesture of Ministerial grace, warning that the visa holders will not have any legal rights with respect to either their legal status or their treatment while in Australia.[144]

Inconsistent policy making

1.97 Decisions to grant safe haven to refugees in large numbers from certain countries might be perceived as discriminatory or 'Eurocentric'[145] unless caution is taken to ensure that the policy is applied consistently to competing countries and ethnic groups. It was claimed, for example, that the decision to accept 4,000 Kosovars was resented by some communities of resettled people in Australia:

> Afghan refugees wonder why the same sympathy has not been extended to the victims of Taliban persecution who are still languishing in Iran, Pakistan and India. The East Timorese community consists mainly of permanent residents who were permitted to enter Australia till recently on various humanitarian and family visas. The 1,600 members of the comity who have been awaiting the outcome of the Australian Government's and Higher Courts' tussles, are nonplussed by the reception of the Kosovars and the protracted rejection of the East Timorese. Serb residents are bemused.[146]

1.98 Similarly, it was argued that the safe haven policy has the potential to create an 'underclass' of refugees in Australia because of the inferior rights attaching to the safe haven visas. For example, whereas those Kosovars who arrived in Australia on other visas are not precluded from applying for refugee status, those who arrived as safe haven visa holders are not eligible to apply for that status.[147]

1.99 It was suggested that in order to ensure that the policy is applied consistently and equitably, it 'cannot be left as an occasional appendage to core programs' and decisions made under the policy should be the subject of community consultation and public debate.[148]

Access to welfare support v work rights

1.100 The Refugee Council of Australia was concerned that the provision of services in safe havens might create an environment of dependency especially if work rights were denied:

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144 *Submission No. 36*, Law Council of Australia, p. 36

145 *Submission No. 14*, Deakin University, p. 64

146 *Submission No. 15*, Springvale Community Aid and Advice Bureau, p. 72C. See also *Submission No. 42*, Victorian Synod Uniting Church in Australia, p. 384; and *Submission No. 47*, Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, p. 447

147 *Submission No. 38*, The Refugee & Immigration Legal Centre, p. 336. See also p. 335 for reference to creation of an "underclass" of refugees

148 *Submission No. 15*, Springvale Community Aid and Advice Bureau, p. 72C

> …the Haven model on the one hand, facilitates the provision of services but on the other, creates an environment of dependency. One of the major effects of extreme trauma is to rob an individual of any sense of control over his/her life. Healing is about regaining control. Placing a person in a welfare dependent situation, without access to meaningful activities, can exacerbate trauma and delay recovery.[149]

1.101 The RCOA asserted that refugees' rights, including the right to gainful employment, are prescribed in Article 8 of the European Council on Refugees and Exiles, Policy on Temporary Protection. Article 8 states:

> 8. The rights afforded should include, as a minimum, the rights to: family unity, education, social assistance sufficient to cover basic needs, health care, engagement in gainful employment, identity documents, as well as an explanation from both refugees and citizens of the host state of how these rights might be exercised.[150]

1.102 The RCOA enumerated some of the benefits that would flow from the granting of limited work rights to the Kosovars:

- Their days would be occupied and they would have routine;
- Men, in particular, would regain some sense of self respect as breadwinners;[151]
- They could contribute to the cost of their keep (through taxes); and
- Purchasing power would restore some sense of control over their lives.[152]

1.103 It was also claimed that arrangements whereby refugees are not permitted to engage in employment may breach Article 17 of the Refugee Convention.[153]

1.104 It should be noted that during the Kosovar Safe Haven Operation, the Government changed its original decision not to grant work rights and announced that the Kosovars brought to Australia under the Operation would be able to work for up to 20 hours a week in either paid or unpaid unemployment.[154]

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149 *Submission No. 24*, Refugee Council of Australia, p. 141

150 European Council on Refugees and Exiles, Policy on Temporary Protection. *Submission No. 24*, Refugee Council of Australia, p. 139

151 This is important in the Kosovar culture

152 *Submission No. 24A*, Refugee Council of Australia, pp. 274-275. For example, cigarettes - Kosovar adults are typically heavy smokers

153 *Submission No. 16*, Dr Rory Hudson, pp. 82-83

154 Minister for Immigration and Multicultural Affairs, Hon. Philip Ruddock MP, Media Release MPS 105/99, 30 June 1999

Tertiary education

1.105 The temporary safe haven arrangements do not enable refugees to access tertiary education.[155] The Committee was told that there were a significant number of 17 - 25 year olds amongst the Kosovars who were very anxious about the effect of the disruption on their studies.[156]

Future implications for Australia's refugee and humanitarian program

1.106 The temporary safe haven policy represents a departure from Australia's approach to the provision of temporary protection. In the past, temporary protection was granted to people already present in Australia but who were unable to return to their country of origin.[157] The purpose of the temporary protection visas was to regularise their status and so reduce the pressure on refugee status determination procedures. Those covered by such temporary visas had work rights, family reunion rights and most other rights of permanent residents.[158] There have also been developments such as the Regularisation of Status visas which have enabled persons in Australia under long-term humanitarian protection to achieve permanent residence.

1.107 The creation of the visa class providing temporary protection to Kosovar refugees took the concept of temporary protection into a new league. The key differences are that: the visas were issued to people outside Australia; the Australian Government arranged for and fully funded their travel to Australia; all their basic needs were provided for if they resided in certain haven sites; the refugees were not permitted to access community services (such as Medicare – but they did have extensive access to medical services); and they were granted only a limited right to work.[159] The new arrangements are thus very different to anything undertaken by Australia before and as such warrant careful examination.[160]

1.108 The UNHCR asserted that the implications for the future operation of Australia's refugee policy and program include a broadening of policy and an increased flexibility in how Australia may respond to humanitarian crises. Most

155 *Submission No. 24*, Refugee Council of Australia, p. 142

156 *Submission No. 24*, Refugee Council of Australia, pp. 141-142

157 *Submission No. 24*, Refugee Council of Australia, p. 138: Past examples include temporary humanitarian visas granted to people in Australia unable to return to their country of origin, limited-duration (renewable) temporary visas for people from strife torn countries such as Lebanon, Sri Lanka, and the former Yugoslavia; and the granting of temporary visas following the tragic events in Tienanmen Square to people who had arrived lawfully in Australia before specified dates

158 They were however treated as foreign nationals with respect to tertiary studies

159 See Media Release or Regs: Kosovars were granted the right to work 20 hours per week

160 *Submission No. 24*, Refugee Council of Australia, p.138

importantly, the policy supplements rather than detracts from Australia's refugee protection provisions.[161]

1.109 It has been suggested that, as the first phase of the new policy is almost over, it is essential that the framework be re-examined.[162] One organisation submitted that if time-limited safe haven protection is to be extended to more and more evacuees from war zones, the policy should be incorporated into Australia's overall humanitarian aid, migration and population strategies.[163] This, however, would seem to contradict the primary objective of the strategy which is to provide temporary safe haven during a crisis. Incorporating the strategy into Australia's formalised migration and population plans implies a degree of permanency that runs counter to that objective.

1.110 It was claimed that there has been a substantial impact on other DIMA services. In particular, some major proposed settlement service reforms had to be abandoned in order to administer the safe haven program. If Australia is to agree to future requests to provide safe haven, strategies should be developed to ensure that other refugee programs are not disadvantaged.[164] The importance of strategic planning to properly administer such a program was emphasised:

> The Kosovar experience questioned the appropriateness of the process, unsatisfactory management and lack of proper planning. Traditionally Australia has always been a country of permanent settlement and as displacement of people and the reasons and need to migrate will continue to increase, Australia must ensure in the planning process a component in the Migration program to cater for temporary settlement. We could be confronted with an inflow of refugees at any time and therefore we must provide for this possibility in the formulation of policy and programs.[165]

1.111 Planning needs to consider a range of questions including: the delivery of consistent decisions to requests from different countries and ethnic groups; the possibility that the safe haven period could, by necessity, extend to a term of years; internal community relations; maintenance of all other immigration services during safe haven operations; budget considerations; and the impact of the natural integration of safe haven children with the wider Australian community.[166]

1.112 At the conceptual level, consideration should also be given to those legal and social issues identified as areas of concern in relation to the policy of temporary safe haven. Chief among those concerns is whether the temporary nature of safe haven

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161 *Submission No. 83*, United Nations High Commissioner for Refugees, p. 1441

162 *Submission No. 24*, Refugee Council of Australia, p. 142

163 *Submission No. 15*, Springvale Community Aid and Advice Bureau, pp.72B-72C

164 *Submission No. 15*, Springvale Community Aid and Advice Bureau, pp.72B-72C

165 *Submission No. 58*, Australian Catholic and Migrant Refugee Office, p. 587

166 *Submission No. 14*, Deakin University, p. 64

infringes Australia's international obligation of non-refoulement. In the implementation of any policy that seeks to provide international protection, the principle of non-refoulement should remain uppermost in the minds of decision makers. Consideration should also be given to the appropriateness of the non-reviewable and non-compellable ministerial discretion as part of the process to determine whether people brought to Australia under the safe haven policy can remain.

1.113 The Committee was concerned about suggestions that the safe haven policy might adversely affect the very people it was designed to assist. Although the policy aims to provide emergency relief to people in humanitarian need, consideration of their welfare should not be limited to the prevention of life threatening events. Concerns that the policy might actually increase their sense of dislocation and/or operate to intensify the disruption to their lives should be explored. Proper planning would enable the development of strategies to prevent or alleviate negative side effects of the safe haven policy.

1.114 As noted above, the anticipated repatriation of people in Australia under the safe haven policy caused some anxiety. Although Australia could provide safe haven in a variety of different situations, there should be some provision within the planning of such operations to enable decision makers to take account of the circumstances of return of people to their home countries. Again, this might help limit the trauma of those depending on safe haven.

1.115 The Committee is of the view that further work should be done to properly assess the viability of safe haven operations in terms of their appropriateness as a response to international crises. In this respect, the Committee notes that while there was an overwhelming need for a quick response to the plight of the Kosovars, the operation required extensive travel by people at a time when they were very likely at their most vulnerable. It should be a matter for further assessment then as to whether the welfare and needs of such people are best served by the provision of safe havens at huge distances from their home countries.[167]

1.116 In the case of the safe haven operation for the East Timorese, the Committee believes that Australia's response was both timely and necessary. Given Australia's proximity to the humanitarian emergency, Australia was a suitable choice for safe haven.

1.117 In conclusion, the Committee considers that the safe haven operations should be assessed in terms of their viability. Such assessments would contribute to the planning and development of strategies to ensure the success of any future safe haven operations. They would also help identify possible alternative solutions. In addition, the Committee notes that decisions by the Australian Government to grant safe haven

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167 An alternative solution might be to apply the monies that would be spent on an operation safe haven directly to evacuees situated in a different location

should be applied consistently against a proper assessment of the humanitarian need and the viability of the operation.

Recommendation

Recommendation 1.1

The Committee **recommends** that the Government arrange for a detailed cost-benefit analysis of the concept of the provision of temporary safe haven, including estimates of all services likely to be provided by both Government and non-government agencies.