CHAPTER 2

AUSTRALIA'S INTERNATIONAL OBLIGATIONS AND THE PRINCIPLE OF NON-REFOULEMENT

Introduction

2.1 This chapter examines Australia's treaty commitments and obligations under term of reference (c):

> Whether Australia's treaty commitments to, and obligations under, the 1951 Convention relating to the Status of Refugees, the 1984 United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the 1966 International Covenant on Civil and Political Rights are capable of being met given that the fundamental principle of non-return to face torture or death is not present in domestic law nor subject to the rule of law.

2.2 In particular, the chapter examines the nature of the obligation as it arises under three Conventions and the extent of Australia's responsibility at international law in relation to each one.

2.3 This chapter assesses the adequacy of the relevant arrangements in the Onshore Protection Program in terms of the obligation of non-refoulement. It will also function as a point of reference for issues raised in later chapters in terms of analysing in detail the process of determination of refugee status and other protective status against Australia's international obligations.

2.4 Australia's primary obligation to asylum seekers and other persons in Australia who are deemed in need of protection (that is, not just 'refugees') is to ensure that they are not refouled (returned) to their countries where they may face persecution, torture or death. The obligation of non-refoulement is principally derived from three Conventions:

- Convention relating to the Status of Refugees (1951) and the Protocol relating to the Status of Refugees (1967) (COR);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and
- The International Covenant on Civil and Political Rights (ICCPR);

2.5 The obligation may also arise indirectly under other international law instruments such as the Convention on the Rights of the Child (CROC). The

circumstances in which it is claimed that the obligation arises under the CROC are dealt with briefly below.[1]

The relevance of international instruments to Australia's domestic arrangements

2.6 The relevance of international instruments to Australia's domestic arrangements is occasionally misunderstood. The shift towards globalisation has facilitated the recognition of matters that require a cooperative response between nations. Treaties[2] are the formalised expression of international cooperation and agreement.[3] Consistent with the notion of sovereignty, Australia decides which treaties into which it wishes to enter. By participating in the treaty process, Australia can contribute to the development of international standards as well as promote its own national interests.

2.7 It has been asserted that international instruments such as treaties operate to diminish Australia's sovereign right to complete legislative competence over matters within its own territory.[4] The position, however, is that treaties have no direct legal effect within Australia unless they are incorporated into domestic law by an Act of the Australian Parliament.[5] In the *Teoh* case, the High Court considered the effect of Australia's ratification of the CROC on administrative decision-making. The Court confirmed the principle that:

> It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive.[6]

2.8 Leading judicial authority also supports the view, however, that treaties ratified[7] by Australia but not incorporated into domestic law can aid statutory

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1 See below, Paragraphs 2.52-2.54

2 In international law, the terms 'treaty' and 'convention' refer to a compact or agreement between two or more independent nations

3 *Vienna Convention on the Law of Treaties,* A 2(1)(a)

4 *Submission No 4,* Nigel Harman, pp. 11 and 13. See also *Submission No. 56,* M. Stainer, p. 574

5 See the Senate Legal and Constitutional Affairs Legislation Committee's Report on the *Administrative Decisions (Effect of International Instruments) Bill 1997*

6 *Teoh v Minister for Immigration and Ethnic Affairs* (1995) 183 CLR 273 para 25. Also see Senate Legal and Constitutional Affairs References Committee, *Trick or Treaty,* p. 44: 'The Constitution deals with two separate powers in relation to treaties. First, there is the power to enter into treaties, which is an executive power. Secondly, there is the power to implement treaties, which is a legislative power'

7 'The meaning of ratification is that the state that is ratifying the convention, or acceding to the convention, where that is the method of becoming a party, undertakes to fulfil its obligations under the

interpretation and therefore influence the development of common law and administrative law. In the *Mabo (No. 2)* case, Brennan J noted that while the common law does not necessarily conform with international law, nevertheless international law is a legitimate and important influence on the development of the common law, especially when it declares the existence of universal human rights.[8]

2.9 The High Court later made similar (though cautious) statements in relation to the effect of Australia's ratification of the CROC in the *Teoh* case. The Court held that signing and ratifying an international instrument creates a 'legitimate expectation' that rights under that instrument will be considered in administrative decision-making even where the international instrument has not been incorporated into Australian domestic law through legislation:

> But the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the court should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.[9]

2.10 Nevertheless, it is clear that international obligations alone cannot override the plain words of a statute, even if these are inconsistent with that treaty. Successive governments, confirmed that this is the case and criticised the High Court's judgment in the *Teoh* case. The former Government, in a joint statement by the Minister for Foreign Affairs and the Attorney-General, advised that the judgement gave treaties an effect that is inconsistent with the proper role of Parliament in implementing treaties. That is, although the Executive Government has the power to make Australia party to a treaty, it is the role of the Parliament to change Australian law to implement treaty

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convention. Some of those might be to do certain acts that the government has to do, in which case it can do those without legislation. Some of the obligations under a convention may be to give certain rights to citizens or prohibit actions by citizens. Where that is the case, it is much more likely that legislation would be needed. In becoming a party to a convention, Australia is undertaking, from the date that it comes into force for Australia, to comply with all of the obligations …; except in relation to conventions where the obligation is to progressively implement in accordance with available resources, which some conventions allow for. Except in those cases, obligations are immediate, from the time that the convention comes into force for that country': *Transcript of evidence*, Attorney-General's Department, pp. 222-223

8 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42-43. That dictum was also affirmed by Mason CJ and Toohey J in their joint judgment in a later case, namely *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 499: 'As this court has recognised, international law, while having no force as such in Australian municipal law, nevertheless provides an important influence on the development of Australian common law, particularly in relation to human rights.' See also comments in *Dietrich v The Queen* (1992) 177 CLR 292 at 306 per Mason CJ and McHugh J, at 321 per Brennan J and at 360 per Toohey J

9 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per the joint judgment of Mason CJ and Deane J

obligations. The then Labor Government introduced the Administrative Decisions (Effect of International Instruments) Bill, but this Bill lapsed when the Parliament was dissolved in March 1996. The Coalition Government introduced a similar Bill and it was passed by the House of Representatives in May 2000. In the Government's view, the act of the Executive entering into a treaty should not be construed as giving rise to legitimate expectations in administrative law that could form the basis for challenging any administrative decision in the future.[10]

2.11 There has also been confusion about the position of claims for refugee status relative to migration issues. As explained above in Chapter 1, however, the two matters are quite separate. Migration is a matter of government policy, whereas the determination of refugee status is a matter of domestic law, with reference to the Refugee Convention:

> Migration control is a sovereign right and responsibility of States. Nevertheless, States, in acceding to the Convention, have pledged themselves to respect and observe a special regime for the protection of refugees. Preservation of the right to seek asylum remains imperative, and it is of paramount importance that the crucial distinction between refugees and ordinary migrants be maintained.[11]

Obligation of non-refoulement: 1951 Refugee Convention

2.12 The primary source of Australia's international obligations to refugees is contained in the 1951 UN Convention on Refugees and the subsequent 1967 protocol. Australia has signed and ratified both instruments and consequently has assumed certain obligations towards people who come within the Convention definition. In terms of Australia's obligations to those who come within the Convention definition, the foremost consideration is protection. The obligation of non-refoulement under Article 33 of the Refugee Convention is one of the most important ways of ensuring that protection is extended to refugees.

2.13 Article 33(1) of the Refugee Convention prohibits States Parties from expelling or returning (refouling) a refugee to territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion. The exception contained in Article 33(2) states, however, that the obligation does not apply to refugees who may be reasonably regarded as a danger to the security of the country in which he or she is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

2.14 Under the Refugee Convention, therefore, Australia is only obliged not to refoule those who satisfy the Convention definition of 'refugee'. Australia's Onshore

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10 The Minister for Foreign Affairs and the Attorney-General and Minister for Justice, *The Effect of Treaties in Administrative Decision Making*, Press Release, 25 February 1997

11 *Submission No.83*, United Nations High Commissioner for Refugees, p. 1431

Protection Program is consistent with that obligation in that a Protection Visa (and therefore the right to remain in Australia) may be extended to those who are determined to be 'refugees' in accordance with that same definition[12] (see paragraphs 2.15-2.35). As will be discussed below, the only recourse for those who are in need of protection and who fail to satisfy the Convention definition is to seek the favourable exercise of the Minister's discretion under s417 of the *Migration Act 1958.*

Who are 'refugees'?

2.15 The Convention definition of a 'refugee' is any person who has:

> … a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion, is outside the country of his nationality or of habitual residence, if stateless and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.[13]

2.16 As discussed above,[14] the meaning of the words in the Convention definition has been the subject of judicial interpretation. In the *Chan* case[15] it was held that the concept of 'well-founded fear' contains both a subjective and an objective element. Therefore, although an applicant's 'fear' must be assessed in terms of the fear actually held by the applicant, an objective assessment should also be made as to whether there is a 'real chance' that the applicant would be persecuted on return. The judgement of McHugh J in the same case is the leading authority on the meaning of 'persecution':

> The notion of persecution involves selective harassment. It is not necessary, however, that the conduct complained of should be directed against a person as an individual. She may be "persecuted" because she is a member of a particular group that is the subject of systematic harassment. Nor is it a necessary element of "persecution" that the individual should be the victim of a series of acts. A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, she is "being persecuted" for the purposes of the Convention.[16]

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12 It is noted, however, that the United Nations High Commissioner for Refugees retains a right to state that a person is a refugee even though a State may declare a person not to be a refugee: United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992, Introduction, p. 2

13 The definition is the result of the combined effect of the 1951 Refugee Convention and the 1967 Protocol

14 See Chapter 1, Paragraphs 1.14-1.21

15 *Chan* (1989) 169 CLR 379

16 *Chan* (1989) 169 CLR 379 at 429-430. McHugh J went on to elaborate that the threat need not be the product of a government policy. In some circumstances, it may be enough if the government has failed to protect the person from persecution. Referring to the United Nations High Commissioner for Refugees Handbook, McHugh J held that forms of harm short of loss of liberty and life may also

2.17 The nexus between the well-founded fear and the five convention grounds (race, religion, nationality, membership of a particular social group and political opinion) is critical to satisfy the Convention definition.[17]

Race

2.18 Although the determination of 'race' is generally based on readily identifiable characteristics,[18] Brennan J in *Commonwealth v Tasmania* (1983) 158 CLR 1 confirmed that the word 'race' is neither a term of art nor a precise concept.[19] He concluded that, in determining membership of a race, genetic ancestry, though an essential element, is but one element of a more general test. Referring to that biological element Brennan J said:

> … it does not ordinarily exhaust the characteristics of a racial group. Physical similarities, and a common history, a common religion or spiritual beliefs and a common culture are factors that tend to create a sense of identity among members of a race to which others have regard in identifying people as members of a race.[20]

2.19 Similarly, the UNHCR Handbook states that the word 'race' as used in the Convention is understood to be used in its widest sense and includes all kinds of ethnic groups that are commonly referred to as 'races'.[21]

2.20 In terms of raising 'race' as a convention ground, however, the issue in dispute is not usually whether a person is a member of a particular race but whether that person can show that he or she fears persecution, based on his or her race, for a good reason. Judicial authority suggests that 'persecution on account of race' has been interpreted narrowly:

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constitute 'persecution', for example, measures 'in disregard' of human dignity such as serious violations of human rights. He added: 'Hence, the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason'

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

18 *Submission No. 69,* Department of Immigration and Multicultural Affairs, Attachment, *Refugee and Humanitarian Visa Applicants, Guidelines on Gender Issues for Decision Makers,* p. 872

19 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 243 per Brennan J citing *Ealing London Borough Council v Race Relations Board* [1972] A.C. 342 at p. 362 per Lord Simon of Glaisdale

20 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 244 per Brennan J putting into context the words of Kerr LJ in *Mandha v Dowell Lee* [1983] 1 QB 1 at p. 19 that the words 'race or ethnic origin' 'clearly refer to human characteristics with which a person is born and which he or she cannot change, any more than the leopard can change his spots'. Brennan J referred to the 'biological element' as essential, as pointed out by Kerr L.J., but not exhaustive. Brennan J also approved Richardson J's conclusion in *King-Ansell v Police* [1979] 2 NZLR 531 at p. 542 that ultimate legal proof of genetic ancestry is not possible

21 United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status,* Geneva, 1992, Part One, p. 6

- constitutional discrimination of racial minorities, for example against Fijian-Indians, may not constitute persecution on the ground of race;[22] and
- positive discrimination policies (affirmative action) may not constitute persecution on the ground of race.[23]

2.21 It is recognised that persecution on the basis of race can also be gender specific. A persecutor intent on destroying the ethnic identity of a racial group, for example, may choose to kill men and persecute women through sexual violence.[24]

Nationality

2.22 The Convention ground of 'nationality' is understood to cover persons fearing persecution on account of their ethnicity or membership of a minority ethnic, religious or cultural sub-group within a state:

> In cases where refugee claims are made on the grounds of nationality, this term seems to be used synonymously with the notion of ethnicity.[25]

2.23 The UNHCR Handbook also confirms that the meaning of 'nationality' is to be construed widely. The Handbook advises that the term does not mean 'citizenship' but rather refers to membership of an ethnic or linguistic group and may overlap with the term 'race'. A member of an ethnic or linguistic minority group may fear persecution from a majority group; and a member of a national majority may fear persecution from a dominant minority group.[26]

Religion

2.24 The UNHCR advises that mere membership of a particular religion will usually be insufficient in itself to substantiate a claim for refugee status. Special

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22 *Uma Chand* (Unreported, Federal Court, Branson J, 17 March 1997). Branson J held that limitations on the democratic powers of a particular race are not conclusive evidence of persecution for a Convention reason: See Dr Mary Crock, *Immigration and Refugee Law in Australia*, Federation Press, p. 144

23 *Gunaseelan* (Unreported, Federal Court, French J, 9 May 1997). The discrimination claimed was the preference of Indigenous Malays in employment and eduction. The appeal failed with French J holding that whether an affirmative action policy constitutes persecution for the non-assisted group depends on the nature and operation of the policy and the impact it has on the refugee claimant's group: per Dr Mary Crock , *Immigration and Refugee Law in Australia*, Federation Press, p. 144

24 *Submission No. 69*, Department of Immigration and Multicultural Affairs, Attachment, *Refugee and Humanitarian Visa Applicants, Guidelines on Gender Issues for Decision makers*, p. 872. See also *Submission No. 83*, United Nations High Commissioner for Refugees, p.1433: Referring to the Guidelines, the United Nations High Commissioner for Refugees stated: 'These guidelines have enabled female asylum-seekers to present independent claims and to seek protection from gender-related persecution. They represent a watershed in terms of recognition of types of harm that are peculiar to women but often not accommodated within traditional approaches to refugee law'

25 Dr Mary Crock, *Immigration and Refugee Law in Australia*, Federation Press, p. 144

26 United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992, Part One, p. 7

circumstances may exist, however, when it will be sufficient. Recognised forms of persecution on account of a person's religion include prohibiting membership of certain religions, prohibiting worshipping, prohibiting religious instruction, and serious discriminatory practices aimed at persons on account of their religion.[27]

2.25 Claims of refugee status based on fear of persecution for one's religious beliefs have been approved by the courts and the RRT.[28] There have been some circumstances, however, where the RRT has declined to grant refugee status on this ground. These include cases involving:

- claims that repressive measures have impacted on believers, such as the imposition of a curfew after which time believers are restricted to worshipping at home;[29] and
- claims that the freedom to proselytise has been restricted.[30]

2.26 The issue of the right to proselytise as part of one's religion has perhaps attracted the most controversy. A 1997 decision by the RRT found in favour of an applicant living under an Islamic regime who had converted to Christianity. After some adverse attention by local religious authorities, the applicant had fled and changed his identity. Although proselytising is not an integral part of the Christian faith, the applicant told the RRT that it was his duty to spread the word about Christianity to non-believers. In conclusion, the RRT found that the applicant was determined to express his religious views and that confining such proselytising within his home would not guarantee that authorities would not become aware of his activities. Ultimately, there was a risk that the authorities might discover his true identity and the result could be serious and persistent harassment. The RRT upheld the applicant's claim for refugee status based on his fear of persecution on account of his religion.[31]

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27 United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992, Part One, p. 7

28 See the discussion in Dr Mary Crock, *Immigration and Refugee Law in Australia*, Federation Press, 1998, p. 145 citing *Woudneh v Inder* (Unreported, Federal Court, Gray J, 16 September 1988)

29 See Dr Mary Crock, *Immigration and Refugee Law in Australia*, Federation Press, 1998, p. 146 citing RRT BV93/00127, 1 October 1993; RRT BV93/00205, 5 October 1993; and RRT 00296, 7 December 1993

30 See Dr Mary Crock, *Immigration and Refugee Law in Australia*, Federation Press, 1998, p. 146 comparing the decisions in RRT N93/00044, 19 January 1994 where the claim of persecution was upheld and RRT N93/2241, 9 March 1994 where the Refugee Review Tribunal took the view that the Refugee Convention does not recognise an absolute right to freedom of religion. Compare also the view of Mansfield J in *Thalary* (Unreported, Federal Court, 4 April 1997) that the practice of proselytising is relevant to the right to practice religion

31 See Dr Mary Crock, *Immigration and Refugee Law in Australia*, Federation Press, 1998, p. 145 citing RRT N97/16401 (8 August 1997)

Membership of a particular social group

2.27 'Particular social group' is described by the UNHCR Refugee Handbook as comprising persons of similar background, habits or social status. Claims under this heading frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality:

> Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.[32]

2.28 Of all the Convention grounds, the interpretation of 'particular social group' has been the most contentious. While it is recognised that the terminology is intended to be a safety net for cases that may fail the four more specific Convention grounds of race, nationality, religion and political opinion, it is not interpreted so broadly as to include a group who share no more than common fears.[33] In *Applicant A and Another*[34] the High Court held that Chinese nationals who opposed China's 'one-child policy' and feared sterilisation did not constitute a 'particular social group'.[35] In the recent decision *Chen Shi Hai v The Minister for Immigration and Multicultural Affairs*[36], the High Court relied on the principle established in *Applicant A* but distinguished the two cases. In the *Applicant A* case, the Court had considered whether people who contravened China's 'one child policy' and feared the consequences of their failure to abide by it, constituted a social group for the purposes of the Convention. In the *Chen* case, however, the Court considered whether 'black children'[37] who did not contravene that policy but were born in contravention of it can constitute a 'particular social group'. The High Court held that they did. While the question to be determined was different, the principle enunciated in *Applicant A and Another* remained firm:

> In this case, the question is whether children, who did not contravene that policy but were born in contravention of it, can constitute a group of that kind. To put the matter in that way indicates that the group constituted by

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32 United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992, Part One, pp. 7-8

33 *Applicant A and Another* v *Minister for Immigration and Ethnic Affairs and Another* (1997) 142 ALR 331: This was the view of the majority, Dawson, McHugh and Gummow JJ

34 (1997) 142 ALR 331

35 The Court's view was that the 'common thread' linking 'persecuted', 'for reasons of', and 'membership of a particular social group' in the Convention definition of 'refugee' dictates that a shared fear of persecution is not sufficient to constitute a particular social group. McHugh J pointed out that to find that it is sufficient would make the other four grounds of persecution superfluous. See *Applicant A and Another v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 at 358

36 [2000] HCA 19 (13 April 2000)

37 'Black children' is a term used to refer to children born in contravention of China's 'one-child policy'

> children born in those circumstances is defined other than by reference to the discriminatory treatment or persecution that they fear. And so much was recognised by the Tribunal in its finding that a "child is a 'black child' irrespective of what persecution may or may not befall him or her."[38]

2.29 The majority of the High Court *in Applicant A and Another*[39] confirmed that members of a social group must have associative qualities that go to the member's identity. The association must go to who a person *is* rather than what he or she *does.* Some judicial and Tribunal interpretations have led to the emergence of ambiguities in the practical identification of social groups. Thus 'young single women' has been rejected as too broad a classification, while 'women of X nationality' has been accepted on the basis that the women from a particular country may be subject to what is considered in Australia as persecution, even within the context of domestic violence.[40]

2.30 The cases that have attracted the most controversy are those where asylum seekers have sought to rely on fear of domestic violence to substantiate a claim of refugee status. An analysis of the cases indicates that those involving a religious or political dimension to the claimed domestic violence are found to more readily satisfy the Refugee Convention ground of 'membership of a particular social group' than those involving no such obvious overtone.[41]

Political opinion

2.31 Persons have been granted refugee status where they have publicly expressed views for which they may face detention, torture, unfair trial and imprisonment by their home State, even in circumstances where their public display was no more than a peaceful display of opinion contrary to the prevailing government view. Where political dissent is privately rather than publicly expressed, however, perhaps by the taking of some form of evasive action, the application for refugee status based on political opinion is unlikely to succeed.[42]

2.32 'Political opinion' implies that an applicant holds an opinion not tolerated by the authorities and which has actually come to the attention of the authorities.[43]

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38 Per Gleeson CJ, Gaudron, Gummow and Hayne JJ at paragraph 22, p. 6 of 21 at http://www.austlii.edu.au/cases/cth/high_ct/2000/19.html

39 (1997) 142 ALR 331

40 For example in RRT V96/04080, 5 August 1996 and RRT N94/06730, 14 October 1996. See Dr Mary Crock, *Immigration and Refugee Law in Australia*, Federation Press, 1998, p. 148-151. But compare the outcome of Refugee Review Tribunal decision N98/25902 16 April 1999, Sydney referred to below at Paragraph 3.35 where the Refugee Review Tribunal refused to find refugee status based on a fear of domestic violence

41 Dr Mary Crock, *Immigration and Refugee Law in Australia*, Federation Press, 1998, p. 150

42 Dr Mary Crock, *Immigration and Refugee Law in Australia*, Federation Press, 1998, p. 152

43 United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992, Part One, p. 8

Australian cases have shown that there is a general requirement that there be some public manifestation of the dissent,[44] although it may be enough that such dissent is imputed to the person by the authorities.[45]

2.33 An application for refugee status on this ground may also be successful on the basis that the applicants may be persecuted for actions that are deemed to be unacceptable by their Home State. The most powerful example of this nature is that of any Iraqi seeking refugee status in Australia. It has been ruled that such behaviour has led Iraqi authorities to impute an anti-government political opinion by the applicant for which they may be persecuted should they be returned to Iraq, even if they do not necessarily hold that viewpoint.[46]

Operation of the Convention definition

2.34 The effect of the Convention definition is that it confines the operation of the Onshore Protection Program to those people who can prove a connection between a well founded fear and one of the five Convention grounds. It does not cover those who may have legitimate concerns that are recognised under either the ICCPR or the CAT. In this sense, the definition has been described as 'narrow' because it excludes other people who are also seemingly deserving of protection:

> Because of the nature of the Refugee Convention and the restricted grounds on which protection can be granted it is always possible that a person may fail to establish a sustainable claim for protection but still be at risk of torture or death if returned home. This is often found in countries where there is civil war or ongoing fighting between conflicting groups or clans. Civilians can be returned home where they will find themselves at serious risk of harm because of such conflict but where they will be unable to show that they will be targeted for persecution on one of the five Convention grounds.[47]

2.35 The following cases are intended to be illustrative only of the arguably narrow operation of the Convention definition:

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44 RRT N97/15379 (28 July 1997)

45 *Guo Wei Rong* (1997) 144 ALR 567

46 Dr Mary Crock, *Immigration and Refugee Law in Australia,* Federation Press, 1998, pp. 152-153

47 *Submission No.66*, Mr Michael Thornton, Macpherson and Kelly Solicitors, p. 801. See also *Submission No.16*, Dr Rory Hudson, p. 76. In such circumstances the person may make an application to the Minister under s417 of the *Migration Act 1958* (C'th) to request that the Minister exercise his non-compellable, non-reviewable ministerial discretion to allow the applicant to remain in Australia on the ground that it is in the public interest to do so because the applicant would suffer torture or death if returned to the country of origin

- Chinese nationals (excluding 'black children')[48] subject to the PRC's one-child policy do not qualify as a 'particular social group' for the purposes of the Convention definition;[49]
- An applicant whose participation in a pro-democracy movement resulted in her being dismissed from employment and suffering domestic violence was not a 'refugee' within the Convention definition;[50]
- A stall holder in the Ukraine who objected to a trader's tax increase suffered detention, mistreatment, economic harm, extortion from local government officials and his attempts to find employment were thwarted by tax inspectors. The RRT held, however, that the harm suffered by the applicant was not of a nature to bring him within the Convention definition and that the extortion occurred as a result of the corruption and because the applicant was regarded as being able to pay.[51]

Does Australia meet the obligation of non-refoulement in the Refugee Convention?

2.36 As the obligation of non-refoulement under the Refugee Convention only extends to those who are 'refugees' for the purposes of the Convention, it is clear that Australia's Onshore Protection Arrangements are consistent with that obligation. Recognition as a 'refugee' is the essential criterion to be eligible for a Protection Visa. The requirement as it arises under the Refugee Convention has been directly incorporated into Australian law by virtue of s36 of the *Migration Act 1958*:

> 36 (1) There is a class of visas to be known as protection visas.

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48 As noted above, the recent High Court decision *Chen Shi Hai v The Minister for Immigration and Multicultural Affairs* [2000] HCA 19 (13 April 2000) established that 'black children' can constitute a 'particular social group' for the purposes of the Refugee Convention. In that case, the question to be determined was whether children, who did not contravene China's one-child policy but were born in contravention of it, constitute a group of that kind. The High Court found that they could: 'Once it is accepted that "black children" are a social group for the purposes of the Convention, that they are treated differently from other children and that, in the case of the appellant, there is little scope for concluding that that treatment he is likely to receive amounts to persecution, there is little scope for concluding that that treatment is for a reason other than his being a "black child". As a matter of common sense, that conclusion could only be reached if the appellant had some additional attribute or characteristic and the treatment he was likely to receive was referable to that other characteristic or attribute. However, it has not been suggested that that is the position': per Gleeson CJ, Gaudron, Gummow and Hayne JJ at paragraph 32, p. 7 of 21 at http://www.austlii.edu.au/cases/cth/high_ct/2000/19.html

49 *Applicant A & Another* (1997) 142 ALR 331. See also *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 at 569 per Burchett J. The Committee was advised, however, that the European Parliament and the Executive Committee of the United Nations High Commissioner for Refugees have both called for socially ostracised women to be recognised as a 'particular social group'. (Resolution of the European Parliament of 13 April 1984 (1984) OJC 127/137 (14 May) and United Nations High Commissioner for Refugees EXCOM Conclusions No 39 (XXXVI) (1985)); and *Submission No. 29A*, Mr Stephen Tully, p. 177

50 RRT N98/25902 16 April 1999, Sydney

51 RRT V99/09972 28 April 1999, Melbourne

> (2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugee Convention as amended by the Refugees Protocol.

2.37 It has been pointed out, however, that the use of the words 'may be given a protection visa' in s29 of the *Migration Act* imports some uncertainty into the system that may be contrary to the absolute nature of the non-refoulement principle.[52]

2.38 In addition, the non-refoulement obligation in the Refugee Convention has also been given effect to in other legislation.[53]

Concerns about the operation of the Protection Visa system: Identifying 'refugees'

2.39 Concerns were raised throughout the inquiry about the manner in which Australian authorities determine and interpret applications under the Refugee Convention. It was claimed that, in practice, the process often leads to a breach of the non-refoulement obligation because authorities fail to properly identify persons who are entitled to the benefit of refugee status. The Refugee Council of Western Australia claimed that this occurs because of deficiencies in the information obtained and used by DIMA and the RRT, a lack of legal expertise in initial determination of the application, a restrictive interpretation by the Australian judiciary; political incursions into the legal arena and the non-compellable discretionary powers of the Minister.[54]

2.40 Although these matters are dealt with more fully in Chapter 8, it is important to raise them at this point because they go to the heart of Australia's compliance with its international obligation of non-refoulement under the Refugee Convention. While the Committee is satisfied that the present arrangements meet Australia's obligation under the Refugee Convention in theory, consideration should be given to whether the actual procedures that are in place to give effect to those arrangements, in practice, facilitate the proper determination of refugee status. The Committee agrees with the Refugee Council's view that, as DIMA and RRT decision-makers play a critical part in the fulfilment of the obligation, consideration should be given to whether they are well enough resourced to assist them in identifying 'refugees'.

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52 *Submission No.54A*, Jesuit Refugee Service, p. 562

53 See *Submission No. 75*, Attorney-General's Department, p. 1140. The *Extradition Act 1988* also gives effect to elements of Australia's non-refoulement obligations in respect of persons who are the subject of an extradition request. Under 22(3), a person is only to be surrendered in relation to a qualifying extradition offence if the Attorney-General is satisfied, amongst other things, that the person will not be subjected to torture or where relevant, the country requesting extradition has given certain undertakings in relation to the death penalty. In addition, under s7 of the *Extradition Act 1988* extradition may be objected to if: (a) the extradition offence is a political one; (b) the purpose of the extradition is to punish the person on account of one of the five Convention grounds; or (c) if the person may be prejudiced at trial, or punished, detained etc. by reason of any of the Convention grounds. These sections therefore import elements of the Convention on Refugees, Convention Against Torture and International Convention on Civil and Political Rights into extradition requests

54 *Submission No. 18*, Refugee Council of Western Australia, pp. 98-99

2.41 For example, the Jesuit Refugee Service suggested that decision-makers should be able to apply the international jurisprudence of bodies such as the Human Rights Committee and the Committee against Torture to ensure that Australia's interpretation of its international legal obligations is consistent with that adopted by the bodies that supervise those obligations.[55] The Committee was told that at present the only relevant international jurisprudence used by DIMA or the RRT is that relating to the Refugee Convention.[56] However, the Jesuit Refugee Service is of the view that such jurisprudence is limited:

> Unfortunately, state practice under the Refugee Convention is not subjected to scrutiny in the same way as other human rights treaties which establish independent supervisory body of experts whose "views" and "general comments" are generally accepted as constituting the "international jurisprudence" on the question.[57]

2.42 The proper identification of refugees and the assessment of claims that are made present decision makers with very difficult tasks. To undertake their role, they must have access to up to date information and also be provided with the tools and equipment to interpret the information.

Recommendation

Recommendation 2.1

The Committee **recommends** that the Government ensures decision-makers are well enough resourced to facilitate proper assessment of claims for refugee status in accordance with the Convention definition of 'refugee'.

Obligation of non-refoulement: Convention against Torture

2.43 Australia ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT) on 8 August 1989 and it entered into force for Australia on 7 September 1989.[58] The obligation of non-refoulement is contained in article 3 which provides that:

> (1) No State Party shall expel, return ('refoule') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

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55 *Submission No. 54A*, Jesuit Refugee Service, p. 562

56 For example the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugees Status*, and the conclusions of the United Nations High Commissioner for Refugees Executive Committee (EXCOM). Note also that decision-makers have the benefit of the Country Information Service. The Country Information Service, however, is not a resource of 'jurisprudence' in the sense of the present discussion

57 *Submission No. 54B*, Jesuit Refugee Service, p. 1250

58 Australian Treaty Series 1989 No. 21

> (2) For the purposes of determining where there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

2.44 Article 1 defines 'torture' as the intentional infliction of severe pain or suffering by, or at the instigation of, a public official, on a person in order to obtain a confession from him or another, or as a punishment, or to intimidate or coerce him or another, or for any reason based on discrimination.[59]

2.45 Evidence to the Committee has identified that the CAT has four key features:

(1) Under the CAT, there is no exception to the principle of non-refoulement on the grounds of national security or danger to the community as is contained in Article 33(2) of the Refugee Convention. International jurisprudence has affirmed that the nature of the protection afforded by the Article is absolute.[60]

(2) A person's right to protection under the CAT is not dependent on his or her satisfying the Refugee Convention definition of 'refugee'.[61] Thus, although an asylum seeker may not satisfy the Convention definition of 'refugee', Australia's obligation of non-refoulement may still arise under the CAT if that person can show that they would be returned to a country where they would be at risk of being subjected to torture.

(3) The circumstances under which a person can claim protection under the CAT require a higher degree of State complicity than those under the Refugee Convention:

> State acquiescence of torture is interpreted as a situation where public officials are clearly unwilling to protect a particular victim from torture; this compares with the Refugee Convention's requirement of mere unwillingness.[62]

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59 The words in Article 1 are: Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information of a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include the pain or suffering arising from only from, inherent in or incidental to lawful sanctions

60 *Chahal v UK Eur Ct HR* (70/1995/576/662) 1996 where the Court stated that the "National interests of the State could not be invoked to override the interest of the individual where substantial grounds had been shown for believing that he would be subjected to ill-treatment if expelled." The European Court was referring to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which is similar to Article 3 in the Convention Against Torture: "No-one shall be subjected to torture or to inhuman or degrading treatment or punishment"

61 *Submission No. 51*, Human Rights and Equal Opportunity Commission, p. 529

62 *Submission No. 73*, Law Council of Australia, p. 1073. Contrast, however, the comment by the Jesuit Refugee Service that the United Nations Human Rights Committee has recognised that "State parties to

(4) The CAT is narrower than the Refugee Convention because it relies on an objective standard and requires 'substantial grounds' as compared to the less restrictive 'real chance' test and the subjective/objective tests as expounded in *Chan* (1989) 169 CLR 379.[63]

Does Australia meet the obligation of non-refoulement in the CAT?

2.46 The question of whether the present arrangements in the Onshore Protection Program meet Australia's obligation of non-refoulement under the CAT is considered simultaneously with the obligation of non-refoulement under the ICCPR. This is because both are given effect through the provision of the ministerial discretion under s417 of the *Migration Act 1958*. The adequacy of this arrangement in terms of the non-refoulement obligation is assessed below at paragraphs 2.55-2.78.

Obligation of non-refoulement: International Covenant on Civil and Political Rights

2.47 Australia ratified the ICCPR on 13 August 1980 and it entered into force for Australia on 13 November 1980.[64] It is claimed that various articles in that Covenant impose the obligation of non-refoulement, although it is not expressed in the direct language that is present in either the Refugee Convention or the CAT.

2.48 Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The Human Rights Committee has asserted that refouling a person to a country where that person will be placed at risk of torture or inhuman and degrading treatment or punishment by another country will constitute a breach of Article 7.[65] The ICCPR obligation of non-refoulement is accordingly clearly not restricted solely to persons who come within the Convention definition of 'refugee'.[66]

2.49 It has also been argued that the principle of non-refoulement attaches to the ICCPR Article 6 protection of the right to life,[67] Article 9 protection of the right to

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the Convention Against Torture are required to *ensure* protection by the law against acts amounting to torture even if committed by persons acting outside or *without* any official authority: General Comment 77/16, para 2; appendix to Nowak, *id.*, at 853 (Emphasis in original)"

63 *Submission No. 73*, Law Council of Australia, p. 1073

64 Australian Treaty Series 1980, No. 23

65 General Comment 20, Paragraph 9

66 *Submission No. 51*, Human Rights and Equal Opportunity Commission, p. 529

67 *Submission No. 51*, Human Rights and Equal Opportunity Commission, p. 529. Article 6 provides: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' The paragraphs which follow in Article 6 deal with the imposition of the death penalty, genocide, and the right to seek pardons and commutation of the death sentence

security of person[68] and to the general requirement for the protection of the rights of individuals contained in Article 2.1.[69]

2.50 Arguably, the obligation of non-refoulement that is claimed to attach to the various articles under the ICCPR arises in a wider range of circumstances than under either the Refugee Convention or the CAT. In terms of the ICCPR, the obligation:

- Does not require a nexus between the harm feared and the five Convention grounds;
- Does not require persecution or intentional acts. It may apply to people caught up in situations of generalised violence and war but who cannot show that they have been targeted.[70] and
- The phrase 'cruel, inhuman or degrading treatment or punishment' contained in Article 7 of the ICCPR is wider than the definition of torture under the CAT.[71]

2.51 The Jesuit Refugee Service, and also the United Nations, contend that although an applicant may not be a 'refugee' within the meaning of the Refugee Convention, Australia might still be obliged not to refoule that person if he or she can show that they would face persecution in the form of a serious human rights violation which nonetheless need not constitute 'torture' within the CAT definition.[72] The Committee notes that the statements from the Jesuit Refugee Service concerning Australia's obligation of non-refoulement are open-ended and decidedly so from that organisation's perspective.

Obligation of non-refoulement: Other international law instruments

2.52 Australia ratified the United Nations Convention on the Rights of the Child (CROC) on 17 December 1990. It came into force for Australia on 16 January 1991. Although the CROC has not been incorporated directly into Australian domestic law, it has been appended to the *Human Rights and Equal Opportunity Commission Act*

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68 *Submission No. 51*, Human Rights and Equal Opportunity Commission, p. 529. Article 9 provides: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.' The paragraphs following in Article 9 deal with the rights of persons arrested or detained

69 *Submission No. 75*, Attorney-General's Department, p. 1139. Article 2.1 requires State Parties to: 'respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'

70 *Submission No. 73*, Law Council of Australia, p. 1073

71 *Submission No. 73*, Law Council of Australia, p. 1073. On the other hand, the Law Council also argued that the obligation of non-refoulement in Articles 6 and 7 of the International Convention on Civil and Political Rights is narrower than that under the Refugee Convention because it is based on an objective standard

72 See the discussion in *Submission No. 54*, Jesuit Refugee Service, pp. 551 and 552-555

1986 as schedule 3. Other Government initiatives have provided a strong indication of Australia's acceptance of the standards set out therein.[73]

2.53 The Provisions of the CROC are intended to grant special protection for children who are refugees or who are seeking refugee status.[74] Article 22 provides that children are to 'receive appropriate protection and humanitarian assistance in the enjoyment of [their CROC rights and also other human rights and humanitarian instruments to which the State Party is a party]'.[75] Article 22, therefore, explicitly includes Australia's obligations to asylum seeker children under the Refugee Convention and other instruments.[76] The obligation of non-refoulement arises in relation to children in much the same way as it arises under the other Conventions in relation to adults:

> Like the ICCPR, CROC protects children from torture and other cruel, inhuman and degrading treatment and punishment (Article 37) and recognises the child's inherent right to life (Article 6). Again there is an obligation not to expel, return or extradite a child to another country where he or she will be subjected to or at risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment or of death.[77]

2.54 The arguments relating to whether Australia meets its obligation of non-refoulement under the CAT and the ICCPR are also relevant to the CROC. The Ministerial Guidelines that direct the exercise of the Ministerial discretion in s417 include references to the CROC as circumstances that may justify the Minister exercising his power to substitute a more favourable decision for an applicant.[78] A copy of the Ministerial Guidelines (as at March 1999) are attached as Appendix 9.

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73 See for example the initiatives referred to in another report of this Committee, namely *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, tabled March 2000, p. 63

74 Under the Convention on the Rights of a Child, Australia must, in all its actions towards asylum seeker children, make their best interests a primary consideration (Article 3). An unaccompanied asylum seeker child must be afforded 'special protection and assistance' by the government (Article 20). In the case of children in Australia, Australia must 'take all appropriate measures to promote physical and psychological recovery' of all those who are victims of torture or any other form of cruel, inhuman or degrading treatment or punishment or of armed conflict regardless of their nationality (Article 39): See *Submission No. 51*, Human Rights and Equal Opportunity Commission, p. 530

75 *Submission No. 51*, Human Rights and Equal Opportunity Commission, p. 529

76 For example, the International Covenant on Economic, Social and Cultural Rights (ICESCR). According to the Human Rights and Equal Opportunity Commission, the significance of this is that a child asylum seeker whose Refugee Convention rights or ICESCR rights are allegedly violated by an act or practice of the Commonwealth can complain to the Human Rights and Equal Opportunity Commission under A22 of the Convention on the Rights of a Child. This is because the Convention on the Rights of a Child is an international instrument which has been the subject of a declaration under s47 of the Human Rights and Equal Opportunity Commission Acts whereas the Refugee Convention and the ICESCR are not

77 *Submission No. 51*, Human Rights and Equal Opportunity Commission, pp. 529-530

78 *Submission No. 69*, Department of Immigration and Multicultural Affairs, Attachment K, *Ministerial Guidelines for the Identification of Unique or Exceptional Cases where it may be in the Public Interest to Substitute a More Favourable Decision under s345/351/391/417/454 of the Migration Act 1958*, p. 939

Does Australia meet the obligation of non-refoulement under the CAT and ICCPR?

2.55 Under Australian domestic law, there is no obligation of non-refoulement as it arises under the CAT and the ICCPR. However, Australia has chosen to meet that obligation by the provision of the non-reviewable and non-compellable Ministerial discretion in s417 of the *Migration Act 1958.* [79] As neither convention has been incorporated into Australian domestic law, the Committee is required by its terms of reference to give consideration to the following issues in the assessment of the adequacy of this arrangement in terms of Australia's international obligations:

- Whether Australia's treaty commitments are capable of being met if the principle of non-refoulement is not present in domestic law nor subject to the rule of law - term of reference (c); and
- Whether the non-compellable, non-reviewable ministerial discretion in s417 is sufficient to satisfy Australia's non-refoulement obligation under the CAT and the ICCPR – term of reference (b).

2.56 Under the public interest powers in s417, the Minister may exercise his discretion to ensure that persons are not returned to a country where they face torture and death and to allow a person to remain in Australia for non-Convention, humanitarian and compassionate reasons. s417(1) reads:

> (1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under s415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.

2.57 The Minister has published guidelines to indicate those circumstances in which he may use his discretion, which specifically identify obligations under the CAT, ICCPR and the CROC.[80] As noted above, a copy of the Guidelines (revised March 1999) are attached as Appendix 9.

Can Ministerial discretion be used to give effect to international obligations?

2.58 The provisions of the CAT and ICCPR do not prescribe or indicate what mechanisms, if any, State Parties should put in place to meet their obligations. The requirement is that countries should honour their obligations under those Conventions. Whereas one country may choose to legislate every detail of its obligations, another country may choose to implement its obligations a different way.[81] DIMA submitted

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79 The Minister's public interest discretionary powers will be discussed more fully in Chapter 8

80 *Ministerial Guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s 345/351/391/417/454 of the Migration Act 1958*, Part 4. See *Submission No. 69*, Department of Immigration and Multicultural Affairs, Attachment K. These are attached at Appendix 9

81 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 42

that the Australian Government has chosen to meet the *non-refoulement* aspects of these obligations via the operation of the Minister's public interest powers.[82]

2.59 The Attorney-General's Department stated that it is a basic principle of international law that each state has a 'margin of appreciation' as to how it gives effect to its treaty obligations.[83] Whether there is a need to amend domestic legislation may depend on a number of factors, such as whether existing domestic legislation is appropriate or whether the Convention matters require legislation at all. Many obligations under the ICCPR, such as freedom of association, simply require governments to refrain from doing things that would impede or impact upon people's enjoyment of their rights.[84] The nature of some obligations, however, will require legislation either to be in existence or to be passed: for example, the obligation to criminalise all conduct identified under the CAT as torture.[85]

2.60 The obligation of non-refoulement, however, only requires that the government refrain from doing something, namely, not return a person to a place where their life or freedom will be threatened:

> The government does not need to legislate to regulate its own behaviour. The government can simply undertake not to, and in fact not, refoul people. It is where obligations are going to be imposed on citizens that it is likely to be necessary to enact a law so that the government can impose those obligations on people subject to its jurisdiction. Where the obligation is only on the government, the government can simply undertake to fulfil that obligation without any law to compel it to do so.[86]

2.61 The Attorney-General's Department contended that, in any event, it is not domestic law that compels the Australian Government to carry out its international

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82 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 14

83 *Submission No. 75*, Attorney General's Department, p. 1139. See also the comment of *Submission No. 29*, Stephen Tully, p. 170: 'There is no obligation to incorporate a specific provision of a treaty into domestic law. The International Law Commission, an authoritative body of international jurists, has commented: "So long as the State has not failed to achieve *in concreto* the result required by an international obligation, the fact that it has not taken a certain measure which would have seemed especially suitable for that purpose – in particular, that it has not enacted a law, cannot be held against it as a breach of that obligation': YBILC (1977) Part 2 at p. 23

84 *Transcript of evidence*, Attorney-General's Department, pp. 221-222

85 When an assessment was done of Australia's compliance with the Convention Against Torture's requirements before it became a party, it was found that existing criminal law which criminalised assault in its various forms covered all of the aspects of torture in the Convention Against Torture, except for the situation where torture is committed extraterritorially. This required legislation: *Transcript of evidence*, Attorney-General's Department, p. 222

86 *Transcript of evidence*, Attorney-General's Department, p. 224

obligations[87] but the fundamental principle of international law that treaties are to be honoured in good faith and their provisions are to be carried out:[88]

> Now there is no international police force that compels that, but it is such a fundamental rule of international law that governments do in fact abide by their treaty obligations – certainly Australia does – and were countries to begin to ignore their treaty obligations and not consider themselves bound by them, then the entire treaty base of international law would start to erode, which would not be in the interests of any of the governments of the world. So that fundamental principle of international law is what underlies our international compulsion to comply with our obligations.[89]

2.62 Clearly, while there is an overriding and non-derogable obligation of *non-refoulement*, each country may select its own means of determining whether an individual is owed such protection obligations, based on its own system of law and government. The Australian Government has exercised its sovereign right consistent with the principles of international law by choosing to give effect to the obligation of non-refoulement under the CAT and the ICCPR through the provision of the Ministerial discretion.[90] The issue then is whether the Ministerial discretion in its present form satisfies those obligations.

Does the Ministerial discretion meet the CAT and ICCPR non-refoulement obligation?

Non-incorporation

2.63 In evidence to the Committee, concern was expressed that the obligation of non-refoulement in the CAT and the ICCPR had not been specifically incorporated into domestic law.[91] The inclusion of references to those conventions in the ministerial guidelines does not constitute incorporation. The concern expressed to the Committee is that such guidelines do not create enforceable rights and obligations.[92]

2.64 The Law Council noted that international law does not vest rights in domestic law[93] and, as neither the ICCPR nor the CAT has been strictly incorporated into

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87 The Government might choose domestic law as the vehicle to carry out its obligations, as for example, the regime under the *Migration Act* for Protection Visas enables the Government to carry out its non-refoulement obligation under the Refugee Convention

88 *Transcript of evidence*, Attorney-General's Department, pp. 224-225

89 *Transcript of evidence*, Attorney-General's Department, p. 225

90 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 831

91 See for example: *Submission No. 54A*, Jesuit Refugee Service, p. 563; *Submission No. 60*, Ethnic Communities Council, p. 608; *Submission No. 50*, Amnesty International, p. 22; and *Transcript of evidence*, Refugee and Immigration Legal Centre, p. 372

92 *Submission No. 50*, Amnesty International, p. 22; and *Transcript of evidence*, Refugee and Immigration Legal Centre, p. 372

93 The Law Council cited *Simsek v Macphee* (1982) 148 CLR 636 as authority for that proposition

Australian domestic law,[94] breaches of non-refoulement obligations under those Conventions are not illegal within Australia.[95] The effect of this is that:

> There is no mechanism that is subject to rule of law, which provides a safeguard against people being returned to countries in circumstances which are contrary to Australia's obligations under treaties other than the Refugee Convention.[96]

2.65 This concern led those organisations to conclude that non-refoulement provisions under the various international treaties should be clearly and fully incorporated into domestic legislation[97] which would significantly strengthen their protection in Australia.[98]

Recommendation

Recommendation 2.2

The Committee **recommends** that the Attorney-General's Department, in conjunction with DIMA, examine the most appropriate means by which Australia's laws could be amended so as to explicitly incorporate the *non-refoulement* obligations of the CAT and ICCPR into domestic law.

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94 Although the International Convention on Civil and Political Rights is included in Schedule 2 of the *Human Rights and Equal Opportunity Commission Act* 1988 (Cth), this is not incorporation. Some provisions of the CAT have been included in the *Crimes (Torture) Act* 1988 (Cth) and Article 3 has been given legal effect in s22(3) of the *Extradition Act* 1988 (Cth), but this limited incorporation only relates to extraditions

95 *Submission No. 73*, Law Council of Australia, p. 1075

96 *Submission No. 38*, Refugee and Immigration Legal Centre, pp. 317-318: 'Whilst the Human Rights and Equal Opportunity Commission is charged with the responsibility for monitoring Australia's compliance with its international obligations, there is no court or Tribunal where an aggrieved asylum seekers can bring a claim of violation of their rights under another Convention (for example the International Convention on Civil and Political Rights) without going to the relevant body of the United Nations itself. Even where such a committee finds in the asylum's seeker's favour, the decision is not enforceable in domestic law and there is no way to transform findings of international bodies or the Human Rights and Equal Opportunity Commission into rights to a visa'

97 *Submission No. 24A*, Refugee Council of Australia, p. 260. On p. 261, the Council acknowledged that, as the Convention Against Torture does not contain an exception clause as does the 1951 Convention in article 33(2), there would be some concern that domestic incorporation of the Convention Against Torture could result in an obligation for the Australian Government to extend protection to war criminals or to people who may pose a threat to domestic security. Similarly, the Kingsford Legal Centre asserted that the capacity of a legal system to ensure that international obligations are met is best served by entrenching human rights given under such international conventions in domestic law. By entrenching such rights, the ability of individuals to seek legal redress under such covenants is improved: *Submission No. 36*, Kingsford Legal Centre, University of NSW, p. 307

98 *Submission No. 51*, Human Rights and Equal Opportunity Commission, p. 533

Discretion is non-reviewable and non-compellable[99]

2.66 A central concern was that as the exercise of the Ministerial discretion is both non-reviewable and non-compellable, it is unacceptable as a means for determining the fate of persons claiming protection under an international obligation.[100] In terms of lack of compellability, it should be noted that the Minister has a power but not a duty to consider whether to exercise that power.[101] It was argued that the practical effect of this is that the Minister can refuse to exercise the discretion even before receiving a request.[102]

2.67 Concerns identified by witnesses about the lack of review include that:

- the absence of review is not in conformity with the accepted principles of administrative law;[103]
- the discretion is not sufficiently transparent[104] and therefore does not satisfy the need for legal certainty, fairness and judicial scrutiny of executive decisions;[105] and
- the absence of checks and balances calls into question the quality of the decision making especially given that the high number of requests under s417 must place an enormous burden on the Minister's office.[106]

2.68 Some witnesses suggested that, in order to fulfil Australia's obligations under the CAT and the ICCPR, the function of determining humanitarian claims should be given to the RRT where it could then be subjected to the usual review mechanisms.[107] The Law Council, for example, suggested widening the RRT's powers to allow it to grant humanitarian visas under specific guidelines.[108] Another suggestion is to require the Minister to act on the recommendation of the RRT in cases in which it is unable to

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99 *Migration Act 1958* (C'th), s475(2)(e): A decision of the Minister not to exercise, or not to consider the exercise of, his or her power under s417 is not a judicially reviewable decision

100 *Submission No. 73*, Law Council of Australia, p. 1072

101 *Submission No. 69*, Department of Immigration and Multicultural Affairs, Attachment K, *Ministerial Guidelines for the Identification of Unique or Exceptional Cases where it may be in the Public Interest to Substitute a More Favourable Decision under s345/351/391/417/454 of the Migration Act 1958*, p. 937

102 *Submission No.61*, South Brisbane Immigration & Community Legal Service Inc., p. 628

103 *Submission No. 40*, Legal Aid Western Australia, pp. 370-371

104 *Submission No. 18*, The Refugee Council of WA, p. 97

105 *Submission No. 36*, Kingsford Legal Centre, University of NSW, p. 306

106 *Submission No. 40*, Legal Aid Western Australia, pp. 370-371

107 *Submission No. 16*, Dr Rory Hudson, p. 76. Dr Hudson asserted that the Refugee Review Tribunal is best placed to assess whether a person faces a real chance of serious harm (whether Convention-related or not) upon return to his or her country of origin. Those kinds of decisions by the Refugee Review Tribunal could then be reviewed by the Federal Court on the usual grounds. See also *Submission No. 60*, Ethnic Communities Council, p. 608

108 *Submission No. 39*, Mr John Young, pp. 357-358

grant protection on Convention grounds but where there are grounds for believing that the applicant would suffer torture or death if returned to the country of origin.[109] These issues are dealt with in Chapter 8.

Narrowness of the discretion

2.69 The circumstances in which the Minister is able to exercise the power may be too narrow. The Minister is only able to substitute a more favourable decision of the Tribunal once the RRT has reviewed a claim for consideration of refugee status under the Refugee Convention.[110] That means that the Minister is unable to use the power until the relevant review authority has made a decision in a particular case.[111] Similarly, where a decision is quashed or set aside by a Court and the matter is remitted to the decision maker to be decided again, the Minister is unable to use the public interest power as there is no longer a review decision in respect of which he can substitute a decision.[112]

2.70 The Guidelines for the exercise of the ministerial discretion reflect the requirement in s417 that the discretion may only be exercised after the RRT has made a decision on refugee status under the Refugee Convention. Only in those circumstances can the Minister make a decision more favourable to the applicant.

Pathway to Ministerial discretion is long

2.71 The pathway to claiming protection under the CAT and the ICCPR requires the applicant to first make an application to DIMA for 'refugee status' based on the grounds of the Refugee Convention, then to have that negative decision reviewed by the RRT. This is so, even though the applicant and their advisor may consider such a claim for refugee status on Convention grounds to be without merit.

2.72 Case examples were given to the Committee to illustrate the point. Certain applicants from the former Soviet Union are seeking protection on humanitarian grounds because they face persecution from criminal groups and are unable to seek protection from their governments. Although not 'refugees' within the Convention definition, they have had to proceed through the refugee system in order to gain access to humanitarian visas via the Ministerial discretion. This has been achieved by some but only after lengthy delays.[113] Another case example, that of a Sri Lankan Tamil

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109 *Submission No. 66*, Macpherson and Kelly Solicitors, p. 801

110 The Minister's exercise of the power under s417 is confined to those circumstances where he can 'substitute' for a decision of the Refugee Review Tribunal: This is the wording in s417

111 *Submission No. 69*, Department of Immigration and Multicultural Affairs, Attachment K, *Ministerial Guidelines for the Identification of Unique or Exceptional Cases where it may be in the Public Interest to Substitute a More Favourable Decision under s345/351/391/417/454 of the Migration Act 1958*, p. 938

112 *Submission No. 69*, Department of Immigration and Multicultural Affairs, Attachment K, *Ministerial Guidelines for the Identification of Unique or Exceptional Cases where it may be in the Public Interest to Substitute a More Favourable Decision under s345/351/391/417/454 of the Migration Act 1958*, p. 938

113 *Submission No. 39*, Mr John Young, p. 358

male who feared serious persecution should he be returned home, illustrates the effect of the long process:

> His experiences of torture and war trauma in his home country, exacerbated by the trauma of his being detained for more than 18 months in an Australian IDC have damaged him psychologically. The Minister's decision to allow him to remain in Australia has brought him some relief, but he now has to pick up the pieces of his very fractured life. He asks the question, "Why did the whole process have to take so long and take so much of my teenage and early adult life?"[114]

2.73 It was claimed in evidence to the inquiry that this pathway to the Ministerial discretion through the refugee system results in a number of unintended adverse consequences:

- it significantly adds to the number of apparently 'unsuccessful' applications; [115]
- it fosters professional disrepute by forcing practitioners to utilise the refugee determination process for the purpose of seeking ministerial discretion; [116]
- it wastes public monies by requiring the assessment of humanitarian cases in the first instance against refugee criteria - which will, by their very definition, fail;[117]
- it causes delays for alleged refugees who may be emotionally vulnerable; [118] and
- Applicants in detention centres may be detained for lengthy periods waiting to access the Ministerial discretion.[119]

2.74 Mr John Young claimed that these problems could be overcome by developing a system so that humanitarian entry can be considered at an earlier stage within the refugee determination process. This would reduce the number of applicants going through DIMA and the RRT, simply to access the Ministerial discretion.[120] For further discussion see Chapter 8.

Referral of cases

2.75 Evidence to the Committee suggested that the process of referral of cases to the Minister should be examined with a view to ensuring that people with genuine claims under the CAT and the ICCPR are accessing the Ministerial discretion. The

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114 *Submission No. 15*, Springvale Community Aid and Advice Bureau, p.72A (p. 4 of submission)

115 *Submission No. 61*, South Brisbane Immigration & Community Legal Service Inc., p.628

116 *Submission No. 61*, South Brisbane Immigration & Community Legal Service Inc., p.628

117 *Submission No. 61*, South Brisbane Immigration & Community Legal Service Inc., p.628

118 *Submission No. 39*, Mr John Young, pp. 357-358

119 *Submission No. 39*, Mr John Young, pp. 357-358

120 *Submission No. 39*, Mr John Young, p. 358. Legal Aid Western Australia asserted that this would save time and resources. See *Submission No. 40*, Legal Aid Western Australia, pp. 370-371

Guidelines require that when a case officer receives notification of an RRT decision that is not the most favourable decision for the applicant, the officer is to assess that person's circumstances against the Guidelines. If the officer assesses the case as falling within the Guidelines, the officer is to bring it to the attention of the Minister for his consideration. If the case is assessed as not falling within the Guidelines, the officer is to make a file note to that effect. According to paragraph 6.4, written requests can also be made by the person seeking the Minister's intervention, his or her agents or supporters. Again, a case officer is to assess the person's circumstances and either refer it for the Minister's consideration or make a short summary, recommending that the Minister not consider exercising his power.

2.76 It has been suggested that the referral process should be further formalised in order to ensure that people with claims under either of those conventions are properly referred to the Minister. For example, it was suggested there should be a mechanism for the RRT to refer cases to the Minister:

> … the RRT has a role to play in examining the humanitarian cases and a mechanism be introduced whereby the Tribunal can flag up cases where a s417 application may be warranted.[121]

Conclusion

2.77 The Committee appreciates that, as a device to give effect to Australia's non-refoulement obligations under the CAT and the ICCPR, some aspects of the present structure of the Ministerial discretion under s417 seem to run counter to the absolute nature of the obligation under the CAT. For example:

- While the non-refoulement obligation under the CAT is absolute, the Minister *may* choose to exercise his discretion to allow a person who has established a case under that convention to stay, but equally the Minister may not. A claim to protection under the terms of ICCPR or CAT does not oblige the Minister to exercise his discretion under s417 of the Act; and
- The discretionary power granted to the Minister is to be exercised only 'if the Minister thinks that it is in the public interest to do so'. This also appears to run counter to the absolute requirement in the CAT to protect an individual from torture. Theoretically, the Minister could decide that it is not in the public interest to exercise his discretion so as to allow a person fearing torture in his or her home country to remain in Australia.

2.78 In conclusion, however, the Committee is of the view that the Ministerial discretion should remain and that it is an appropriate means through which Australia can meet its obligations under the CAT and the ICCPR. Further discussion of the Ministerial discretion and the Committee's recommendations pertaining to it,

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121 *Submission No. 36*, Kingsford Legal Centre, University of NSW, p. 307

particularly its application in relation to cases based on humanitarian grounds, are contained in Chapter 8.

Safe third country

2.79 The international principle of non-refoulement obliges nations not to return people to countries where they will face persecution. The concept of 'safe third country' was developed as a basis for excluding refugees who have access to protection in other countries. The term 'safe third country' is used, in the refugee context, to refer to countries which are non-refugee-producing countries or countries in which refugees can enjoy asylum without any danger.[122]

2.80 The concept of 'safe country' generally has two applications: safe country of origin and safe country of asylum. The application of 'safe country of origin' may result in nationals of countries designated as safe being automatically precluded from obtaining asylum or refugee status in receiving countries. Under the application of the 'safe country of asylum' concept, asylum seekers or refugees may be returned to countries where they have, or could have, sought asylum and where their safety would not be jeopardised.[123]

2.81 The provisions that govern the exclusion of certain asylum seekers from the refugee determination procedure on the basis of the third country principle are contained in s91A-G of the *Migration Act* (C'th) 1958. Section 91A states:

> This subdivision is enacted because the Parliament considers that certain non-citizens who are covered by the CPA, or in relation to whom there is a safe third country, should not be allowed to apply for a protection visa, or in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.

2.82 Under the Act, a country is a 'safe third country' in relation to a non-citizen if it is prescribed by the Minister (by regulation) to be a safe country in relation to the non-citizen or to a class of persons to whom the non-citizen belongs, or the non-citizen has a prescribed connection with the country. A prescribed connection includes where the non-citizen was in that country at a particular time or where the non-citizen has the right to enter and reside in that country.[124] In summary, the

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122 Executive Committee of the United Nations High Commission on Refugees, *Background note on the safe country concept and refugee status*, p. 1

123 This applies particularly to situations in which asylum seekers are citizens of third countries or have permanent residency in a third country. This issue has arisen in Australia in relation to East Timorese, and whether Portugal is a viable 'safe third country': See Jong Jim Koe (1997) 143 ALR 695. The viability of 'safe third country' was also considered by the Full Federal Court in *Thiyagarajah (1997) 143 ALR 118.* In *Thiyagarajah*, the Full Federal Court considered whether a Sri Lankan Tamil who had been granted refugee status in France was excluded from Convention protection in Australia. The Court endorsed the safe third country principle and found that the existence of effective protection from France, the third country, precluded the granting of Convention protection in Australia

124 *Migration Act (C'th)* 1958, s91D(1)(a) and (b)

statutory framework requires the minister to table in parliament a statement indicating the human rights situation in relation to any particular group. That statement is prepared in consultation with the group and after discussions with the UNHCR.[125]

2.83 The following historical examples demonstrate the application of the principle of 'safe third country'. In late 1994, the government announced its intention to legislate to declare the People's Republic of China a 'safe third country' for the purposes of Sino-Vietnamese persons (ethnic Chinese of Vietnamese nationality) who had fled Vietnam following the 1979 border war. In respect of that decision, DIMA representatives told the Committee that UNHCR had advised that:

> … in their view China had provided and would continue to provide effective protection to this group. From their point of view, provided China was prepared to take them back, which they were, and they provided an undertaking they would continue to provide effective protection, UNHCR had no problems with them being excluded from our protection visa process and being returned to China.[126]

2.84 Similarly, the 'safe third country' approach was used in relation to applicants covered by the Comprehensive Plan of Action (CPA), approved by the International Conference on Indo-Chinese Refugees held at Geneva Switzerland in June 1989. The CPA people were returned to the refugee camps around the region in which they had previously been receiving protection.[127]

2.85 In the context of a discussion on Australia's international obligations to asylum seekers, the question for consideration by the Committee is whether that safe third country principle is consistent with those obligations.

2.86 The Jesuit Refugee Service has suggested that Australia's use of the 'safe third country' concept erodes the application of its non-refoulement obligation and may not be an acceptable interpretation of the Refugee Convention. The Service asserted that this is because there is a tendency to amend the Migration Act to *exclude* certain categories of asylum seekers from accessing the refugee status determination procedure.[128]

2.87 DIMA's view is that the concept of 'safe third country' is not contrary to Australia's international obligations to refugees. According to DIMA, Australia's obligations do not arise in respect of such people to whom the concept applies because, as they already have protection, they are not in need of it:

> So there is, from UNHCR's and our point of view, no requirement. In effect, they have already been granted refugee status because they have been

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125 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 857

126 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 857

127 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 857

128 *Submission No. 54A*, Jesuit Refugee Service, p. 562

> provided with protection in either refugee camps in the CPA complex under the auspices of the UNHCR or by China in relation to the ethnic Chinese Vietnamese.[129]

2.88 An examination of relevant material of the Executive Committee of the UNHCR (Excom) indicates that the UNHCR considers that the concept of 'safe third country' is not inconsistent with international obligations to the extent that it is applied appropriately. Excom conclusion No. 58(XL) deals with refugees who move in an irregular manner from countries where they have already found protection. Excom concluded that refugees should normally not move from that country. Where they do, they may be returned to that country if they are protected there against refoulement and if they are treated in accordance with basic human rights standards until a durable solution can be found for them.[130]

2.89 Excom conclusion No. 87(XLX) reiterated the earlier conclusion 58(XL) and affirmed that notions such as 'safe third country' should be appropriately applied so as not to result in improper denial of access to asylum procedures or violations of the non-refoulement obligation. Excom also noted with concern the continued irregular movement of refugees from countries of first asylum on a significant scale and encouraged States to address the causes of that movement with a view to maintaining high standards of protection and creating awareness about the risks of irregular movement.[131] In recent times, however, the UNHCR has raised concerns about the way States have applied the concept of 'safe third country':

> The widespread misuse of the notion of 'safe third country' has been another major concern for UNHCR. Due to an inappropriate application of this notion, asylum seekers have often been removed to territories where their safety cannot be ensured. This practice is clearly contrary to basic protection principles and may lead to violations of the principle of *non-refoulement.*[132]

2.90 The Excom reaffirmed its earlier conclusions that no asylum seeker should be returned to a third country for determination of the claim without sufficient guarantees, including protection against refoulement and being treated in accordance with international standards. In addition, it was stated that the question of whether a country is 'safe' cannot be determined generically, that is, a country may be safe for

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129 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 857

130 Executive Committee of the United Nations High Commissioner for Refugees, Conclusion No. 58(XL), 1989, paragraphs (e) and (f)

131 Risks include being exploited by traffickers. Executive Committee of the United Nations High Commissioner for Refugees, Conclusion No. 87(XLX) - 1999, *General Conclusion on International Protection*, paragraphs (j) and (l)

132 Executive Committee of the High Commissioner's Programme, *Fiftieth Session, Note on International Protection*, 7 July 1999, paragraph 19

asylum seekers of a certain origin and unsafe for others, depending on the individual's background and profile.[133]

2.91 In terms of the appropriateness of the 'safe third country' provisions in the *Migration Act 1958*, the Committee was advised that the UNHCR had indicated its support for the provisions when the Australian Government was considering enacting them in 1994.[134]

2.92 The Committee believes that there are no grounds upon which it could form the view that the 'safe third country' provisions in the *Migration Act* are contrary to Australia's international obligation of non-refoulement.

133 Executive Committee of the High Commissioner's Programme, *Fiftieth Session, Note on International Protection,* 7 July 1999, paragraph 19. The conclusions referred to are Nos. 15(XXX) of 1979 and 58(XL) of 1989

134 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 858. See *Transcript of evidence*, Mr Pierre-Michel Fontaine, Regional Representative, United Nations High Commissioner for Refugees, Regional Office for Australia, New Zealand and the South Pacific, to Senate Committee on Legal and Constitutional Affairs, 30 September 1994, Hansard, pp. SLC, 146-151