CHAPTER 11

MONITORING OF RETURNED PERSONS

Introduction

11.1 As a sovereign nation, Australia has the right to determine who is allowed to enter and remain in the country and, when appropriate, remove them. Matters relating to the entry, stay and departure or removal from Australia are governed by the *Migration Act* 1958, and controlled by the associated regulations, statutory directions and the issuing of visas. Circumstances under which a person may be removed from Australia include:

- persons who have been refused entry to Australia, for example, for not holding a valid visa to enter the country[1];
- persons who held a valid visa on entering Australia but who do not leave within the time specified on the visa ('overstayers');
- persons who have had their visa cancelled, for example, for breaching visa conditions; and
- persons who unsuccessfully claimed refugee status in Australia.

11.2 Concerns about the removal of this latter group have prompted the call for the introduction of monitoring of removal cases primarily to ensure that Australia is not breaching its international *non-refoulement* obligations.[2] During 1998-99, DIMA received 8257 Protection Visa (PV) applications, with 6423 being unsuccessful.[3] Although a small number of unsuccessful applicants may have received a visa through Ministerial discretion, a substantial number of persons who refuse to leave voluntarily is subject to removal each year.

11.3 Persons also may be removed from Australia if they have been convicted of a criminal offence or if they threaten national security. The removal of these persons is referred to as 'deportation'.4 This chapter does not deal with nor does the Committee suggest a need for any monitoring of this category of removal.

---

1 Concerns were raised with the Committee about the airport turnaround rate, with some 2083 persons refused entry to Australia in 1998-99 (*DIMA Annual Report 1998-99*, p. 71). This issue is discussed in Chapter 1 and Chapter 10.

2 *Non-refoulement* is discussed in greater detail in Chapter 2.

3 *DIMA Annual Report 1998-99*, p. 85. The process by which someone may seek asylum in Australia is detailed in Chapter 4.

4 *Migration Act 1958 (C'th)*, s200.

11.4 Under Australian law, the carrier, whether airline company or shipping line, who brought a person to be removed into the country, is responsible for removing that person.[5] Where the original carrier cannot be identified or for example in the case of unlawful non-citizens who arrive by boat, DIMA assumes responsibility for removal and engages a range of companies including Australasian Correctional Services P/L (ACS), which subcontracts its service delivery to its related company, Australasian Correctional Management (ACM);[6] Correction Enterprise (CORE) staff; Protection and Indemnity (P&I), a private South African firm,[7] and off- duty police officers, to assist with the removal processes.[8] Were a system of monitoring to be introduced it would be likely to commence from the time a person were taken out of Australian territory.

11.5 There are currently no formal processes in place for monitoring returnees. Under Australia's *Migration Act* 1958, migration officers have no jurisdiction or authority in respect of these people.[9] International conventions do not consider the issue of monitoring, working on the basis that persons at risk will not be *refouled*, and therefore others who are returned are not at risk.[10]

11.6 This chapter examines whether Australia has any obligations to monitor returnees, and if so, who should undertake the monitoring. It also discusses the benefits of, and difficulties with, monitoring.

International obligations and state sovereignty

The effect of international obligations

11.7 As noted above,[11] Australia has accepted international obligations arising from its ratification of treaties, although such obligations do not always require domestic legislation in order to be implemented. As noted by the Attorney-General's Department, none of the conventions explicitly require domestic legislation and new or amending legislation is only required when this is the most effective way of meeting obligations.[12]

---

5 *Migration Regulations* 1994, Reg. 2.12BA(1)

6 Australasian Correctional Management staff also work within detention centres

7 Used primarily for removals to certain African countries

8 See above, Chapter 10.

9 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 840

10 International obligations with respect to *non-refoulement* are discussed in Chapter 2.

11 See above, Chapter 2

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

11.8 Certain obligations are met by the State not limiting the expression of rights; others do need specific legislation:

> …The general position of successive Australian governments has been that we do not become party to conventions unless we have satisfied ourselves that we are able to comply with the convention before we become a party. That often involves enacting legislation before becoming a party where legislation is necessary.[13]

11.9 Australia does have an obligation not to *refoule* a person who is entitled to Australia's protection, regardless of whether the obligation has been incorporated into domestic law. The issue of whether there is also an obligation to ensure a person has not been *refouled* through monitoring their situation on their return, is somewhat more tendentious.

Legal or moral responsibility

11.10 There are two groups of asylum seekers who may be returned to their country of origin, those who access Australia's protection stream and whose applications are subsequently rejected, and those who are returned almost immediately because it is considered that they do not make any protection claims or are ruled to have no *prima facie* claim to engage Australia's international protection obligations. As noted above, the numbers of persons removed each year is substantial, and it is unlikely that all such persons could or should be monitored on any basis at all.

11.11 Some submissions expressed concern at the number of persons turned around at airports[14] and who are therefore given limited opportunity to seek protection in Australia.[15] This is a high-risk point with respect to potential breaches of Australia's *non-refoulement* obligations, and it is vital that the 'low threshold' test used by DIMA at ports of entry is actually adhered to. Monitoring of such persons would be virtually impossible as the Department states that it maintains no records of their removal.[16]

11.12 Some organisations have argued that the obligation not to *refoule* implicitly requires Australia to monitor returnees in order to test the accuracy of negative determinations of refugee status. If those who are sent back are subject to torture or death, it is claimed, Australia would have failed in its legal obligation of *non-refoulement.* The Human Rights and Equal Opportunity Commission (HREOC) explained:

> While there is no direct international legal obligation upon Australia to monitor the fate of deportees, the direct obligation to refrain from returning

---

13 *Transcript of evidence*, Attorney-General's Department, p. 222

14 The situation for some airport arrivals is discussed in more detail in Chapter 10

15 *Submission No. 63*, National Legal Aid, pp. 743-744

16 The issue of whether or not the Department should keep more comprehensive records on turnaround cases is discussed in Chapter 10

> people to areas of risk indirectly imposes such an obligation. Australia must be confident that its processes are effective and its determinations accurate. The only way to be sure of this is to follow up those returned to document whether their claims to be at risk prove unfounded as predicted.[17]

11.13 The Refugee and Immigration Legal Centre (RILC) argued too that, while not a legal responsibility, monitoring was 'perhaps a moral one or one that would be of assistance to Australia to then be confident that it is, in fact, meeting its international obligations and that people are not being *refouled*.'[18]

11.14 The Committee considers that any argument suggesting that Australia has a moral responsibility to monitor returnees has to be viewed in the context of, not independent from, its obligation not to *refoule*. It is important to note that any subsequent 'persecution' of a returned person may not fall into the category of Convention-based persecution, as has been noted in various reports on specific cases.[19]

Limits to monitoring

11.15 The issue of numbers of persons being monitored, as opposed to those who have been removed, raises problems for most organisations. It is not assumed that all those turned around at airports or unsuccessful in their applications will experience any difficulties on their return. Thus it is argued that it should be possible to assess key cases, which would be identified by basic characteristics. National Legal Aid, for example, suggested that certain factors could identify those possibly in need of monitoring. The individual:

- comes from a refugee-producing area;
- applies for protection in Australia; and
- has some of the characteristics of persons generally accepted as refugees from that country.[20]

11.16 However, as noted above, one of the possible problems with respect to persons who may be seeking some form of protection at airports is that they may have difficulty in expressing their need.[21] A semi-formal application for protection should not be a guide to those persons most likely to require monitoring. A further problem is that, in a system that emphasises individual factors, any concentration on generic factors (such as 'refugee-producing' countries) may make it easy for some to gain

---

17 *Submission No. 51*, Human Rights and Equal Opportunity Commission, p. 534. A similar point is made by Amnesty International, *Submission No. 50*, p. 500

18 *Transcript of evidence*, Refugee and Immigration Legal Centre, p. 383

19 See for example, Department of Foreign Affairs and Trade, Documents concerning Mr SE, Items 4 and 9

20 *Submission No. 63*, National Legal Aid, pp. 742-743

21 See Chapter 4

refugee status, or special attention, as opposed to people from countries that are not so classified.

11.17 It is the Committee's view that more rigorous testing of claims by DIMA in the first instance, and then by the RRT where necessary, would limit the need for monitoring in any but the most exceptional case. However, the Committee also notes that in some instances – as in the case of Ms Z – there were no valid claims under the Refugee convention. Ms Z's claims for consideration occurred later in her period of detention and would have been better addressed under s417 or a more flexible and open discussion of her situation by senior departmental officials.

State sovereignty

11.18 With respect to the monitoring of returnees, the Department of Foreign Affairs and Trade (DFAT) advised the Committee of the importance of ensuring a respect for the sovereignty of other nations:

> …there is the question of state sovereignty and the recognition of the sovereign right of states to conduct their own affairs and that the nationals of that state residing in that territory are subject to that state's jurisdiction. That principle, which is a very clearly established principle, does raise serious issues concerning the role of officers or officials from third countries in monitoring the circumstances of nationals of that country. That is a basic principle.[22]

11.19 State sovereignty implies limits on the capacity of an Australian Government Department to take action in another country on behalf of individuals. In addressing this point, DFAT officers noted that:

> There is a distinction between providing assessments of how the law works or does not work as the case may be and activity which is actually seeking to change the way in which the law operates.[23] The Committee notes that foreign missions passively observe and report on what happens in a nation either at a general level or in relation to individuals. In fact, this is a key role of any overseas representation. Additionally, issues of sovereignty do not of themselves prohibit a more active intervention by Australian government representatives into particular issues.[24]

11.20 This should be distinguished from the situation in which a decision is made to try to influence a foreign government's treatment of one of its nationals, which would appropriately be done via the normal diplomatic procedures. Such intervention occurs through the appropriate diplomatic channels, in such a way as to limit perceptions of

---

22 *Transcript of evidence*, 26/8/99, Department of Foreign Affairs and Trade, p. 538.

23 *Transcript of evidence*, 26/8/99, Department of Foreign Affairs and Trade, p. 540. The Committee, however, expressed concern at the accuracy of assessments made by DFAT in relation to how the law operates in China with regard to abortion. This issue is discussed in Chapter 9.

24 *Transcript of evidence*, Department of Foreign Affairs and Trade, pp. 541, 542-543

direct interference in the domestic law or governance of the country in question. Australia would expect similar respect to be shown by foreign representatives in this country.

> There would be some quite serious diplomatic implications in terms of accepted international practice with regard to the activity of officers of Australia overseas. I think any member of the committee would appreciate the impact on the Australian public if it became aware that embassy officials in Canberra from another state were known to be monitoring the activities of an Australian citizen.[25]

Benefits of monitoring

11.21 A number of submissions suggested that there could be benefit obtained from establishing some form of monitoring. These arguments fall into three categories:

- *Argument 1*: monitoring the outcome for returned asylum seekers once they are in their country of origin is the only way of genuinely testing the accuracy of a negative determination of refugee status and ensuring that our *non-refoulement* obligations are met
- *Argument 2*: monitoring would assist DIMA and the RRT to test the reliability of country information available to them and used in their decision-making
- *Argument 3*: detail of that monitoring might also address community perceptions and concerns about refugees and the refugee determination process

Monitoring the outcome for removal cases

11.22 Amnesty International expressed concern that on most occasions returnees from both Australia and other countries are not heard from again either as a result of 'assimilation into local society or for more sinister reasons.'[26] The Committee considers that the former case scenario is more probable, but that the possibility of cases falling into the latter category should not be lightly dismissed.

11.23 National Legal Aid (NLA) cited two examples, that of the Chinese woman (Ms Z) and a young Tamil man, Mr 'J', where it considers Australia failed in its duty to provide protection.[27]

11.24 Mr J was removed from Villawood Detention Centre and returned to Sri Lanka where, it is alleged, he was handed over to the Central Intelligence Division (CID) of the Sri Lankan police, the people from whom he had sought protection in Australia. He was charged with illegal departure from Sri Lanka and terrorist

---

25 *Transcript of evidence*, Department of Foreign Affairs and Trade, p. 544

26 *Submission No. 50*, Amnesty International, p. 500

27 The case of the Chinese woman is discussed in detail at Chapter 9

activities, for which he was released on bail awaiting trial. NLA maintains that this and similar cases highlight the need for some form of monitoring.[28]

11.25 In HREOC's view:

> …it may precisely be because of the impossibility of monitoring that we decide that a person from a particular country should not be returned, or at least not returned at this stage, because the risk is considered to be very great.[29]

11.26 While the Refugee Council of Australia (RCA) noted that it was the exception rather than the rule for returnees to make contact with human rights groups associated with the case, it acknowledged that generally speaking people are able to return to their countries without difficulty. However, the RCA advised the Committee that it was aware of a number of cases in which the individual concerned:

- has a well-founded fear of returning to their country of origin for reasons that fall outside the 1951 Convention definition;
- where the fear of returning is subjective rather than objective, in particular in cases where the person's fear relates to a changed political climate; and
- where the person has been traumatised by an experience in Australia and has therefore been unable to think rationally or make competent decisions about returning.[30]

11.27 While Australia has specific *non-refoulement* obligations, it does not have the responsibility for directly addressing human rights issues in other countries. With respect to the third point, the Committee considers that all allegations of mistreatment in Australia should be quickly and thoroughly investigated prior to a person's removal.

11.28 Additional arguments supporting the monitoring of returnees are that:

- DIMA and the RRT would be better able to review reliability of country information sources used to determine particular cases; and
- DIMA and the RRT could use statistics of safe returns to justify their decision to the wider community to refuse applications.[31]

---

28 *Submission No. 63*, National Legal Aid, p. 742

29 *Transcript of evidence*, Human Rights and Equal Opportunity Commission, p. 154

30 *Submission No. 24*, Refugee Council of Australia, pp. 147-148

31 *Submission No. 59*, Society of St Vincent de Paul, p. 598. See also *Submission No. 64*, Queensland Refugee Claimants Interagency Group, p. 774: 'There must be some form of monitoring with publicly reported outcomes in order to ensure the integrity of Australia's refugee and humanitarian program.'

Improving country information and decision-making

11.29 In addition to directly ascertaining whether Australia's refugee determination processes are effective, monitoring would also provide valuable information to be considered by DIMA and the RRT when assessing future applications for refugee status.[32]

11.30 Dr Rory Hudson, former member of the RRT, stated that he was aware of only four publicly available Australian Government reports about the treatment of returnees from Australia, three involving the return of Chinese asylum seekers to the PRC and one relating to the return of Vietnamese asylum seekers to the PRC under the Comprehensive Plan of Action.[33]

11.31 While noting that one report had stated that Australian embassy officials knew of no cases where returnees had been mistreated, Dr Hudson added that '[i]t is unlikely that a returnee who had been mistreated by the PRC Government would admit this to a representative of the government which had deported him or her.'[34] Significantly, cases for which some monitoring took place were those that had attracted media attention or were otherwise high profile. Importantly, in the context of Australia's refugee determination system, only this information was made available to the RRT, according to Dr Hudson.[35]

11.32 It was also argued that one of the dangers inherent in a refugee determination system lacking a monitoring stage is a 'risk assessment culture which may not be as in-depth as it otherwise could be, were the consequences of deportation to certain countries fully appreciated.'[36]

11.33 Applications for asylum are assessed on a case by case basis. It is the Committee's view any evidence about a particular individual's case cannot be directly applied to another case unless the circumstances are essentially the same. Thus, only general information on the possible mistreatment of returnees could be used to more favourably judge the credibility of claims from people in a similar situation. On the other hand, caution would need to be exercised to ensure that statistics on safe returns would not detrimentally affect the assessment of claims from another individual from the same country, particularly as statistics do not in themselves provide information on the substance of the claims made by people prior to their repatriation.

---

32 *Transcript of evidence*, Refugee and Immigration Legal Centre, p. 383. See also *Submission No. 63*, National Legal Aid, p. 743

33 *Submission No. 16*, Dr Rory Hudson, pp. 84-85

34 *Submission No. 16*, Dr Rory Hudson, , p. 85

35 *Submission No. 16*, Dr Rory Hudson, p. 85. The comprehensiveness and diversity of material available through the Country Information Service is discussed in Chapter 4 and Chapter 5

36 *Submission No. 50*, Amnesty International, p. 501. See also *Submission No. 38*, Refugee and Immigration Legal Centre, p. 351

11.34 The Committee considers that an area where monitoring may prove especially useful is in those cases where an individual may not have been subject to persecution on Convention grounds prior to their departure from their country of origin, but for whom the act of leaving would result in persecution, not necessarily in the form of torture, on their return.[37]

Addressing community perceptions and concerns about refugees

11.35 Community perceptions about the current wave of illegal immigration and the costs of Australia's refugee and humanitarian program were discussed earlier in this report. To counter some of the negative reactions to asylum seekers, the South Brisbane Immigration and Community Legal Service proposed that non-government organisations be funded to undertake the monitoring role to ensure that this would be perceived as an independent and objective mechanism.[38]

11.36 Some form of monitoring may be the only way in which Australia can be assured that its refugee determination processes are correctly identifying genuine refugees and humanitarian cases. If the need to carry out some form of monitoring were accepted, the next step would be deciding who should do the monitoring, which categories of returnees should be monitored, how the monitoring should be funded and conducted, and to whom those doing the monitoring should report.

Who should monitor and how?

Direct monitoring by government agencies

11.37 One suggested option is direct monitoring by Australian government agencies such as DIMA and DFAT, based in overseas posts. Amnesty International argued that Australia has a wide network of embassies, consulates and other representatives posted all over the world, who could have access to relevant information more readily than human rights organisations that may not be granted access to certain countries.[39]

11.38 National Legal Aid also pointed out that the involvement of Australian embassy staff in monitoring may offer indirect benefits, for example, enabling overseas staff to confirm or question country information gathered through government contacts.[40]

11.39 HREOC, on the other hand, expressed concern at this suggestion, arguing that 'it may well expose the individuals to greater risk than was there in the first place.'[41] The Human Rights Commissioner provided one example of the danger:

---

37 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 351

38 *Submission No. 61*, South Brisbane Immigration and Community Legal Service, p. 635

39 *Transcript of evidence, ,* Amnesty International, pp. 203-204

40 *Submission No. 63*, National Legal Aid, p. 32. This view was supported by a former RRT member. *Submission No. 16*, Dr Rory Hudson, p. 85

41 *Transcript of evidence*, Human Rights and Equal Opportunity Commission, p. 152

> I do know of one situation that I came across some years ago where two people were deported in circumstances where there was concern for their wellbeing. The government at the time did decide to do some monitoring and sent officials around from the local Australian mission a couple of times to check up on the welfare of these two people. After the second or third visit in the space of 12 months, the individuals concerned let the Australian officials know quite clearly that they were not to call again, thank you very much, because the only thing exposing them to danger was their regular visit. It is for that reason a very difficult issue.[42]

11.40 As stated earlier, the Committee considers that for Australian overseas officials to go beyond the current nature and level of involvement in making representations on behalf of foreign nationals would likely draw undue or unwelcome attention to returned persons. The Committee is also concerned about the diplomatic ramifications if Australia were seen to be interfering in the domestic affairs of other nations. The Committee is also concerned about the diplomatic ramifications if Australia were seen to be interfering in the domestic affairs of other nations.

11.41 The Committee notes that DFAT is unaware of any country undertaking a formal monitoring role, and notes DFAT's advice that the Netherlands had introduced monitoring procedures in 1993 in respect of persons returned to particular countries, but that these had been 'substantially wound back' such that checks are only made to verify that returned persons have arrived at the airport of particular countries.[43]

Indirect monitoring through NGOs

11.42 The issue of monitoring was a somewhat sensitive one during much of the period of the Committee's inquiry. Although it has been suggested that various organisations such as the Red Cross would be suitable to undertake monitoring of individuals, reports of the case of the Australian CARE workers in Yugoslavia, who were alleged to have been involved in passing on secret information, made it plain to the Committee that it is necessary to establish a very clear line between providing aid, and undertaking other activities which may be interpreted adversely.[44]

11.43 Amnesty International argued that where no Australian mission exists, the monitoring role should be shared by independent human rights agencies, such as UNHCR.[45] This view was supported by NLA, which suggested that Australia could liaise with UNHCR prior to the removal of a failed asylum seeker, presumably one

---

42 *Transcript of evidence*, Human Rights and Equal Opportunity Commission, p. 144. See also *Submission No. 40*, Legal Aid Western Australia, p. 377; *Transcript of evidence*, National Legal Aid, p. 237

43 *Transcript of evidence*, Department of Foreign Affairs and Trade, p. 544

44 See for example, news reports: *AAP News Service*, 30 May 1999, *Convictions of Aust CARE workers a "political verdict"; AAP*, 31 May 1999, *Australian MP has message from jailed CARE workers*; AAP, 4 June 1999, *Governor-General appeals to Milosevic over CARE workers*; and parliamentary debate, for example, *House Hansard*, 21 June 1999, p. 6834

45 *Submission No. 50*, Amnesty International, p. 501

who falls within their 'greater risk' category, so that the returnee could be handed over to UNHCR representatives who would undertake the monitoring processes.

11.44 The shortcoming of this proposal is that it fails to take into consideration the limited resources of UNHCR itself and the total number of returnees worldwide. As of January 1999, it is estimated that there were just under two million returned asylum seekers constituting ten per cent of UNHCR's total population of concern[46] of some 21.5 million**.** While UNHCR does assume a limited responsibility for returnees, it would be equally impractical to expect it to oversee all returnees from Australia.[47] The Committee notes that repatriation is UNHCR's first option as a solution for asylum seekers.

11.45 Alternatively, NLA in acknowledging that UNHCR may not be present in all countries and may have limited resources, suggested that networks be established with leading human rights organisations in relevant countries and appropriate reporting structures established. The Human Rights and Equal Opportunity Commission (HREOC), through its involvement with the Asia-Pacific Forum of National Human Rights Commissions, was proposed as a possible facilitator.[48]

11.46 The Refugee Council of Australia (RCA) also advised that UNHCR consider returnees to be beyond its mandate[49], but that the Australian Red Cross has attempted on occasions to have a representative meet a returnee at the airport and maintain contact with him or her.[50]

11.47 The Committee notes, however, the response by Mr Fair from the Australian Red Cross who stated that he did not 'believe that the Red Cross would undertake a monitoring role as common practice.'[51]

11.48 Another proposal - that rejected asylum seekers could ask to be monitored by an appropriate instrumentality following their return[52] - has some merit. However, it does not seem to be much different to the informal monitoring currently undertaken by human rights agencies of individuals in whom they have an interest.

---

46 UNHCR's total population of concern includes, refugees, asylum seekers and internally displaced persons as well as returned asylum seekers

47 See the UNHCR web page at http://www.unhcr.ch/un&ref/un&ref.htm

48 *Submission No. 63*, National Legal Aid, p. 743. See also, *Transcript of evidence*, Human Rights and Equal Opportunity Commission, p. 145; *Submission No. 38*, Refugee and Immigration Legal Centre, p. 352

49 The Committee notes that material on the UNHCR's Internet web site indicates that returnees are seen as part of UNHCR's total population of concern for at least two years

50 *Submission No. 24*, Refugee Council of Australia, p. 148

51 *Transcript of evidence*, , Australian Red Cross, p. 389

52 *Submission No. 59*, Society of St Vincent de Paul, p. 598

11.49 HREOC considered that it should be possible for Australian missions to devise confidential monitoring processes, with the assistance of local or international NGOs or the UNHCR, to avoid exposing returned persons to suspicion in their country of origin, and recommended that the Australian Government should fund them appropriately to perform this role.[53]

11.50 Another aspect of the proposal to fund NGOs to perform a monitoring role concerns the evaluation of their performance. If Australia were to provide funds it would be difficult to see how organisations could be accountable for the money they receive for this task. It is also possible that organisations may be established for the sole purpose of providing monitoring services, with resulting operations open, if not prone, to abuse and misuse.

Scope of monitoring

11.51 As mentioned earlier, the monitoring of persons turned around at the airport has been cause for some concern. A level of monitoring could be achieved for these people if DIMA were to keep appropriate records on their arrival and departure.[54] This issue is discussed in Chapter 10.

11.52 Suggestions have varied considerably in the type of monitoring of returnees envisaged. The Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) observed that evidence of mistreatment of returnees may not be obvious physically from Australia should not necessarily be assigned a benign interpretation.[55] STARTTS therefore recommended a broad approach to monitoring, arguing that it 'should not be limited to whether the harms they fear have occurred but include broader clinical data, such as suicidal ideation and other thoughts or actions associated with self harm.'[56]

11.53 As STARTTS itself acknowledges,[57] medical personnel would be required to perform these types of health assessments, something that would prove even more difficult than general monitoring. The Committee considers that this sort of appraisal should take place while the asylum seeker is still in Australia rather than attempting what is a logistically problematic and potentially dangerous task in a foreign country.

---

53 *Submission No. 51*, Human Rights and Equal Opportunity Commission, p. 534. See also *Submission No. 61*, South Brisbane Immigration and Community Legal Service, p. 635

54 This issue is discussed in Chapter 10. The Committee recommended that DIMA keep more comprehensive records on people turned around at airports

55 *Submission No. 47*, Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, p. 450

56 *Submission No. 47*, Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, p. 450

57 *Submission No. 47*, Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, p. 450

11.54 HREOC recognised that there were insufficient resources available to monitor all returnees. Mr Sidoti stated:

> …I think we should also do it for some form of randomly selected sample so that we do not have people falling through the net…There does need to be some kind of random check, as well as using risk assessment factors to decide where we monitor and where we do not.[58]

11.55 National Legal Aid suggested that assistance could be limited to providing returnees with the phone numbers of human rights organisations that could be contacted if anything were to happen.[59] However, while there may be benefits to monitoring some returnees, these have to be weighed against the problems that are likely to be encountered if Australia were to introduce a system of formal monitoring.

Problems with monitoring

11.56 Problems with monitoring arising from state sovereignty issues and the potential risks to returnees and those who might undertake the monitoring, have been discussed above. By far the most important issue, however, is the one of the impracticality of assuming such a responsibility. Establishing a formal monitoring regime would be limited by significant logistical and economical difficulties.

Practical limitations

11.57 As stated in the introduction, in 1998-99 some 6423 Protection Visa applications were unsuccessful. In the same period, 2083 people were refused immigration clearance[60] and were turned around at the airport without engaging any of Australia's refugee obligations. While it is difficult to determine with any certainty the exact number of those who could be classified as 'returnees' for the purposes of monitoring, it is certainly in the thousands. After departure from Australia, these people are returned in increasing numbers to a large number of countries.[61]

11.58 The Australian government agency currently responsible for advising on request on Australia's international obligations is the Attorney General's Department, who made this comment in relation to their supervisory role:

> The Office of International Law has neither the role nor the capacity to undertake a monitoring function in respect of each of those decisions. We do our best to ensure that the obligations are well known by departments who have responsibilities that might impinge on those obligations. With

---

58 *Transcript of evidence*, Human Rights and Equal Opportunity Commission, p. 154. See also *Submission No. 63*, National Legal Aid, p. 32

59 *Transcript of evidence*, National Legal Aid, p. 236

60 Department of Immigration and Multicultural Affairs, *Annual Report 1998-99*, p. 71

61 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 840. See also *Transcript of evidence*, Department of Foreign Affairs and Trade, p. 538; *Submission No. 66*, Macpherson and Kelley, p. 805

> departments where there are significant human rights and other international obligations that it is important Australia comply with, we have quite a close working relationship that is directed to ensuring a culture of compliance with those obligations. But, in respect of the individual cases, we are not in a position to monitor every decision that other departments take that might impact on our international obligations, unless it is one on which our advice is sought.[62]

11.59 DFAT also cast doubt on its ability to be able to monitor all removal cases:

> …it may be the case that there are human rights violations of which we are unaware. I am afraid it is impossible for this department, and I suspect for most ministries around the world, to be able to monitor every instance of human rights abuse.[63]

11.60 Australia currently spends some $62 million on its refugee and humanitarian programs alone and the introduction of a formal program of returnee monitoring would lead to substantial additional costs.[64] As has been discussed elsewhere in this report, there is increasing community concern at the rising cost of the humanitarian program including assessing refugee claims, the detention of illegal arrivals, and otherwise addressing the problem of illegal immigration and 'people smuggling'.

11.61 The Committee considers that a more effective and efficient way of ensuring that our international *non-refoulement* obligations are met is to improve current refugee determination procedures and to ensure that a sufficiently wide humanitarian safety net, in the form of the s417 ministerial discretionary power, is in place for those in genuine need of protection.

Conclusions

11.62 The Committee is conscious of the concerns raised in submissions and evidence heard about the fate of returnees and the inadequacy of the present refugee determination system to provide categorical assurance that a genuine asylum seeker is not returned to face Convention-related persecution, torture or death.[65] The Committee also understands the dilemma facing the Australian Government, both diplomatically and economically, in devising a system that tests whether we meet our international *non-refoulement* obligations.

---

62 *Transcript of evidence*, Attorney General's Department, p. 428

63 *Transcript of evidence*, Department of Foreign Affairs and Trade, p. 557

64 *Department of Immigration and Multicultural Affairs, Annual Report 1998-99*, p. 77. This does not include funding for new initiatives announced in October 1999 to address the increasing number of illegal arrivals, or the running costs for border control and compliance and detention

65 See for example, *Submission No. 50*, Amnesty International; *Submission No. 38*, The Refugee and Immigration Legal Centre; *Transcript of evidence*, 20/7/99, HREOC; 21/7/99, Amnesty International; 21/7/99, National Legal Aid. See also Chapters 4 and 5 for concerns raised about the refugee determination process

11.63 The Committee is of the view that better records should be kept on the people who are turned around at airports. While they may have been given the opportunity to make an application for refugee status, the inadequacy of the information kept on these people makes it difficult to verify whether this has been the case. [66]

11.64 The Committee considers that while there is scope for further development of the informal representations and monitoring currently undertaken by Australian overseas missions and local and international human rights organisations, the operation and funding of a formal monitoring system would be impractical and may also be counter-productive. However, the Committee also considers that the Australian government should take every opportunity to raise human rights obligations in its dealings with foreign governments and at the UN. The Committee has also recommended that the Government explore the appropriateness of incorporating other international convention obligations into domestic law.[67]

Recommendation

Recommendation 11.1

The Committee **recommends** that the Government place the issue of monitoring on the agenda for discussion at the Inter-Government/Non-Government Organisations Forum with a view to examining the implementation of a system of informal monitoring.

66 See Chapters 4 and 10

67 See Chapter 3, Recommendation 3.1