CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

7.1 During this inquiry the Committee has heard a range of views about the rationale for, and expected consequences of, the Bill; whether the Bill complies with Australia's international obligations, particularly the obligation of non-refoulement; as well as other aspects of the terms of reference. The Committee's conclusions and recommendations are detailed below.

Implications of excision for border security

7.2 The proposed excised areas covered by the Bill are very extensive, as demonstrated clearly in Figure 1. They include islands off almost the entire northern coastline of Australia, from a point south of Exmouth in WA to Rockhampton in Queensland, excluding part of the Gulf of Carpentaria and the islands inside the Great Barrier Reef. Almost 4,900 islands lie within this area.

7.3 The Committee heard conflicting evidence as to what the effect of the Bill would be. Various statements by Government spokesmen and Government agencies suggested that its effect would be to deter people smuggling by making it harder for people to reach parts of Australia where they can apply for the usual range of visas.

7.4 However, the Committee also heard evidence that the Bill could drive asylum seekers closer to the mainland, either with the intent of landing there, or incidentally, as part of a journey to another country. DIMIA's evidence acknowledges this possibility:

> The bill, by extending excised offshore places to islands off the northern coast of Australia, **and therefore requiring people smugglers to bring their vessels closer to mainland Australia** [emphasis added]….[1]

7.5 The Committee found the evidence of the AFP that the likely effect will be to drive people onshore to be persuasive:

> That would be what we anticipate for those vessels intending to arrive in Australia: rather than leave the passengers to the unknown fate of arriving on a remote island or reef, they would be forced to come to the mainland...[2]

7.6 Further to this, DIMIA also suggested that asylum seekers in sight of the mainland, for example, when travelling through the Torres Strait, may well demand to be put ashore. The Committee is also mindful of the many submissions that argued that moves to excise parts of Australia's territory are unlikely to stop the flow of

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1 Answers to Questions on Notice, p. 5.

2 *Hansard*, 6 August 2002, p. 30.

refugees: desperate people will not be deterred from fleeing their situations, particularly if they have family connections or other strong links in Australia.

7.7 There is also evidence that far from reducing incentives for people to make hazardous journeys to Australian territories, the Bill will increase the likelihood of asylum seekers embarking on increasingly hazardous journeys, either through the dangerous waters of the Torres Strait or across Southern Australia, in an attempt to reach New Zealand or other destinations in the Pacific.

7.8 Consequently, the Committee considers that the Bill will not achieve the Government's stated purpose and is self-defeating.

7.9 Because of these concerns and the Committee's concern about possible breaches of Australia's international obligations to refugees and asylum seekers, as outlined below, the Committee does not support the Bill.

Recommendation 1: The Committee recommends that the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 not proceed.

Australia's international obligations

7.10 Much of the evidence that the Committee received concerned Australia's international obligations, particularly the obligation of non-refoulement of refugees under the Refugee Convention and other international treaties to which Australia is a party. Different views have been expressed during this inquiry about whether and to what extent Australia is in breach of its non-refoulement obligations. Many argued that even if Australia was not in breach of the law, its actions in relation to unauthorised boat arrivals is contrary to the spirit of the Refugee Convention.

7.11 DIMIA acknowledges that Australia's obligations to asylum seekers are engaged as soon as they enter Australian territory, but has argued that the existing scheme whereby claims for asylum are processed in declared third countries is sufficient compliance with the non-refoulement obligations. The Committee notes that the Attorney-General's Department dismissed concerns about refoulement as a 'red herring', but finds that this description is limited and inaccurate.

7.12 The Committee is concerned at the weight of evidence from international law experts such as Dr Pene Mathew, human rights and law reform agencies such as the International Commission of Jurists, the Human Rights Council of Australia, Australian Lawyers for Human Rights and Amnesty International, as well as from the UNHCR, expressing serious concerns about possible refoulement, including chain refoulement from third countries. It is accepted that Australia is responsible for chain refoulement, and the Committee notes that many countries in the region, including Nauru and Indonesia, are not parties to the Refugee Convention.

7.13 The Committee notes that no witness to this inquiry could offer evidence of particular instances of refoulement from Nauru or Manus Island, but acknowledges the difficulty in ascertaining the occurrence of such matters in other countries where there is no monitoring.

7.14 While the Committee does not consider it possible to finally determine issues of international law on which such diverging views are held, there is clearly significant concern amongst experts in international law, human rights organisations and other groups and individuals about whether Australia is complying both with the spirit and the letter of the international obligations it has voluntarily assumed.

7.15 The Committee notes the UNHCR's acknowledgement that it has been very satisfied with Australian refugee determination processes in the past, but that it has been concerned about the lack of open and accountable guidelines in processing claims in declared countries. The Committee notes advice from DIMIA that it has been concerned to model the guidelines on those of the UNHCR. Towards the end of this inquiry, a copy of those guidelines was finally made available - after almost all the claims for review of refugee status in those declared countries have been finalised.

7.16 ***Finding:*** *The Committee finds that Australia has a responsibility to ensure both that it complies and is seen to comply with those obligations it has voluntarily assumed. In matters of international law, even more than in relation to domestic legal issues, there will always be room for argument as to whether and to what extent particular obligations are being met. In particular, the Committee is concerned that the excision scheme creates parts of Australia where different rights apply.*

7.17 The Committee is concerned that the review process of DIMIA determinations in declared countries is internal. While the Department has argued that this accords with UNHCR guidelines, the Committee notes that the processes do not match Australia's existing external review processes for other determinations through the Refugee Review Tribunal, and is concerned that justice must not only be done but be seen to be done. The figures provided by DIMIA show that a significant number of determinations were in fact overturned on review. However, the Committee considers that internal review processes do not engender confidence that Australia is not effectively sending back some refugees. The UNHCR guidelines are a basic standard; Australia has a long tradition of providing review through external bodies, such as the Refugee Review Tribunal and the court system.

7.18 Accordingly the Committee recommends that review of initial assessments as to refugee status should not be conducted by DIMIA officers, but by an external body such as the federal magistracy or the Refugee Review Tribunal. Although it would be preferable if such reviews were to occur in Australia, the Committee recommends that such external review should be mandatory wherever the processing of claimants occurs.

Recommendation 2: The Committee recommends that initial assessments of claims for refugee status by offshore entry persons should be reviewed by an external body such as the federal magistracy or Refugee Review Tribunal.

7.19 The Committee also notes the various concerns expressed about the process under section 198A of the Migration Act of declaring countries where offshore entry people may currently be taken for determination of their refugee status. This statutory power is not reviewable, requires no undertaking by the country concerned as to non-

refoulement and does not require the Minister to revoke the declaration if no longer satisfied that the country meets appropriate human rights standards. While DIMIA has argued that there is reference to non-refoulement in the MOUs signed with Nauru and PNG, such MOUs are difficult to enforce and do not in themselves create confidence that human rights obligations will be observed.

7.20 By comparison, existing provisions under the Migration Act concerning the prescription by regulation of 'safe third countries' require the Minister to table a statement in Parliament about certain matters: the countries' compliance with relevant international law concerning the protection of asylum seekers; their meeting of relevant human rights standards and their willingness to allow people to remain in the country until their claims are determined and, in the case of those determined to be refugees, until a durable resettlement solution is found.[3]

Recommendation 3: The Committee recommends that the use of declared countries for holding and assessing claims for refugee status by those who have entered Australian territory at an excised offshore place should be abandoned.

7.21 In the event that the Government chooses not to adopt this recommendation, the Committee wishes to put forward a number of other recommendations (the following recommendation and that following paragraph 7.23) in respect of persons claiming refugee status who are held and processed offshore in declared countries.

Recommendation 4: In the event that the Government continues to use declared countries for holding and assessing claims for refugee status by offshore entry persons, the *Migration Act 1958* should be amended to incorporate similar requirements as those that apply to safe third countries under section 91D.

7.22 The Committee has other concerns about the processing of people in declared countries. Despite the involvement of the IOM and the UNHCR in the 'processing centres', the Committee considers that Australia is effectively running those centres. As discussed in Chapter 6, Australia pays the IOM's running costs, which includes the cost of providing security. In addition, the Committee considers that the arguments that the people are not in 'detention' but rather are there for their 'protection' whilst their claims for refugee status are determined are disingenuous.

7.23 The Committee finds that such people are in detention and are in centres that are effectively Australian.

7.24 The Committee also heard concerns from the UNHCR and others about the lack of transparent and accountable procedures in the processing of offshore entry persons in declared countries, as well as the lack of binding obligations to ensure that those seeking asylum are properly dealt with in declared countries and are not

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3 *Migration Act 1958*, s. 91D. The provisions were enacted in 1994 to address concerns about Indo-Chinese refugees who were covered by the UNHCR-sponsored Comprehensive Plan of Action. The provisions also extend to other asylum seekers who are covered by an agreement between Australia and a safe third country.

detained for longer than is necessary. As several witnesses pointed out, it is difficult to ascertain whether proper procedures are being followed and proper safeguards in place where information is lacking. The Committee considers that one of the valuable effects of its inquiry has been to gather more information about what is happening to offshore entry people held in those countries. It was only towards the end of this inquiry that DIMIA released a copy of the procedures applied by its officers when assessing refugee claims by offshore entry people, whether held in Australia or in declared countries.

Recommendation 5: The Committee recommends that there be statutory recognition of the standards to be applied in processing claims by offshore entry people, either by way of amendment to the Migration Act or regulations.

Recommendation 6: In the event that the Government chooses not to adopt the recommendation to abandon the use of declared countries (Recommendation 3), the Committee further recommends that reference to the relevant standards should also be incorporated in Australia's agreements with those countries.

7.25 A point of concern to the Committee in terms of Australia's international relationships was that the Bill was introduced without consultation with PNG or New Zealand, despite the anticipated effect that the proposed excisions would divert at least some boats to New Zealand. The Committee is concerned that Australia's international relations are being treated in such a cavalier fashion.

Reliance on Ministerial discretion

7.26 The Committee is also concerned about the reliance on the Ministerial discretion under section 46A of the Migration Act to lift the prohibition on an offshore entry person applying for a visa while in Australia. There is no obligation on the Minister to take any action, even to consider an application. Moreover, it appears that recourse to the High Court will be of little practical benefit.

7.27 In addition, the Committee heard evidence from law lecturers Ms LaForgia and Mr Flynn that the Migration Act does not oblige Australia to take any action in relation to offshore entry persons, but merely allows the Government to detain and transfer them. Consequently such people could remain, for example, on Christmas Island, and be left in a legal limbo: unable to apply for a visa while still in Australia and barred from initiating any legal proceedings because of section 494AA.

7.28 The Committee also heard evidence that the policy of treating all offshore entry persons in the same way discriminates against those who come directly from a country of persecution, rather than having stopped in an intermediary country, and that this is potentially a breach of Article 31 of the Refugee Convention. The Committee notes that this issue was raised in an earlier inquiry by the Senate Legal and Constitutional Legislation Committee, with that Committee suggesting that DIMIA

confer with the Refugee and Immigration Legal Centre on the issue 'as a matter of priority'.[4] It appears that nothing has eventuated.

7.29 Consequently the discretion under section 46A to 'lift the bar' is of little comfort to those concerned about the situation of offshore entry persons; it compares unfavourably with the rights available to those people who have arrived unlawfully in Australia by other means, such as by plane, those who have overstayed their visas, or indeed those who reach the mainland rather than stopping at an island just offshore.

7.30 The Committee heard strong arguments, including from the Human Rights and Equal Opportunity Commission, that reliance on a non-compellable ministerial discretion is an inadequate recognition of Australia's human rights obligations.

Recommendation 7: The Committee recommends that the Government review the operation of section 46A of the Migration Act:

(i) to ensure there is no possibility that offshore entry persons in Australian territory may be left in a 'legal limbo', and

(ii) to ensure that those asylum seekers coming directly from a place of persecution are not penalised by virtue of their place of entry into Australia.

Addressing the flow of refugees in other ways

7.31 During discussion of this Bill and the inquiry, the Government has also emphasised that it is for Australia to determine who is allowed to come to this country. The Committee acknowledges that this has been a policy underlying Australia's migration laws over the last fifty years. However, as a relatively wealthy country in the region, the Committee considers that Australia has a responsibility to ensure that those people who flee persecution have the opportunity to have their claims for asylum properly assessed and have a chance for resettlement here, regardless of their method of arrival.

7.32 The Committee is concerned that to date, New Zealand has been more generous towards those people who have met the refugee criteria in Nauru and Manus Island than Australia has been.

7.33 While acknowledging that Australia has been involved on a number of different levels in addressing the problems of refugee flows and people smuggling, the Committee considers that more proactive and preventative steps could be taken in cooperation with other countries and the UNHCR.

7.34 An example of such a coordinated approach occurred during the 1990s. The international community responded to the flow of over one million people from Vietnam and Laos by approving a Comprehensive Plan of Action (CPA) for

4 *Provisions of the Migration Legislation Amendment Bill (No.1) 2002*, June 2002, p. 15.

Indochinese Refugees. The plan, brokered by the UNHCR, was approved by the 76 countries that attended the Geneva international conference in 1989. Australia enacted legislation that reflected the terms of the CPA plan, particularly by ensuring that domestic law was consistent with international refugee assessment arrangements, in 1994.[5] Australia also accepted a significant number of Vietnamese refugees from camps in the countries of first asylum, following refugee assessments carried out in accordance with UNHCR-approved processes.

7.35 The Committee urges the Government to engage with the UNHCR in an effective regional response to the current and any anticipated flow of refugees.

Effect on affected communities

7.36 The Committee is aware of the general nature of the concerns expressed by Indigenous communities about border protection issues. While there are undeniably concerns about unauthorised arrivals seeking a migration outcome, there is a wider concern that includes any unauthorised intrusion.

7.37 The Committee notes that the Indigenous communities it consulted wish to have a much greater border protection role. There are a number of reasons for this, including local knowledge, dissatisfaction with current arrangements and the need for local employment opportunities which are very much lacking in such areas. Australia's coastline is long and in many places sparsely inhabited, which increases the challenge of detecting unauthorised arrivals of any kind. The Committee considers there is much merit in investigating the possibility of working with local communities to enhance the effectiveness of Australia's response.

7.38 The Committee therefore makes the following recommendations.

Recommendation 8: The Committee recommends that the Government, in consultation with community representatives, investigate methods of expanding opportunities for island Indigenous communities to undertake aspects of border protection duties.

Recommendation 9: The Committee further recommends that the Government provide funding for training and employment of Indigenous people in this role.

The financial impact on the Commonwealth

7.39 The Committee notes that the Explanatory Memorandum for the Bill stated that the Bill would have 'minimal' financial impact. As discussed above, various and conflicting consequences of excising more islands have been suggested, from driving people onto the mainland to sending them further afield to countries such as New

5 *Migration Legislation Amendment Act (No. 4) 1994.*

Zealand. Consequently it is difficult to gauge the effect that the legislation might have on future movements of people.

7.40 However, the Committee notes concern about the cost of managing offshore processing facilities at Nauru and Manus Island, as well as Christmas Island. By the end of May 2002, $56.2 million had been spent on Nauru and Manus. Another $138 million has been allocated to build the facility at Christmas Island, out of a total Budget allocation for 2002-03 of $353 million for 'unauthorised boat arrivals'. The Committee considers that the so-called 'Pacific Solution' is not a cost-effective way to deal with this issue.

Other aspects of the Bill

7.41 Two other issues arose during this inquiry: the proposed retrospective application of the Bill, and quarantine issues.

Retrospectivity

7.42 The Bill proposes retrospective excision of the islands under consideration to 19 June 2002, the date on which the regulations were overruled. The Committee is of the view that, even if the retrospectivity provided for in the Bill may have been justified originally because of concerns that boats were en route, the lapse of time has made that retrospectivity unnecessary and excessive.

7.43 If the government were to introduce further legislation of this type in the future, serious consideration must be given to the need for any retrospectivity, and a clear and convincing explanation must be provided to the Parliament.

Recommendation 10: The Committee recommends that if the Bill proceeds, its application should not be retrospective.

Quarantine

7.44 The Committee also heard some evidence of concerns about, and the incidence of, exotic pests such as black-striped mussels found on illegal vessels in Northern Territory waters. While the Committee does not in any way diminish the seriousness of those concerns, the Committee does not consider this to be justification for the passage of the current Bill, whose stated aim is to deter people smuggling.

Senator the Hon. Nick Bolkus

Chair

DISSENTING REPORT BY

GOVERNMENT SENATORS

1. This bill is the second excision bill introduced into the Parliament, the previous being the Migration Amendment (Excision from Migration Zone) Bill 2001. The current bill extends the concept embodied in the first Bill.

2. Government Senators on the Committee largely disagree with the majority report, which would reject the Bill and undermine the Pacific solution adopted last year. They do not support the recommendation that the Bill not proceed.

3. In relation to the majority's recommendation that the bill not proceed, Government Senators note that the Australian Labor Party not only supported the original bill, but also announced a bipartisan approach to Bills of that nature. The Hon Con Sciacca MP, then Shadow Minister for Immigration, said in the Second Reading debate:

> The opposition will support these migration measures contained in the Migration Amendment (Excision from Migration Zone) Bill 2001 and related bills . . . The measures are in accordance with the bipartisan approach to matters of this nature . . .It is very important when . . . we talk about the integrity of our borders, when we talk about people who come here on an unauthorised basis, that we do so in a way that both governments, of whatever political persuasion, and oppositions do their best to think about the nation and the security of the nation and ensure that, wherever possible, these matters are looked at in a bipartisan way.[1]

4. The Australian Labor Party was quite aware that the Bill for the Excision Act enabled regulations to be made excising islands that were part of a State or Territory but specifically declined to support a motion by Senator Brown for deletion of the power to make regulations prescribing islands which are part of a State or territory.[2]

5. Government Senators note Labor's decision to oppose the bill, completely reversing their earlier position.

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[1] *House of Representatives Hansard*, 19 September 2001, pp. 30954-5.

[2] *Senate Hansard*, 25 September 2001, pp. 27867, 27869.

Is the Bill self-defeating?

6. The report justifies its recommendation that the Bill not proceed by claiming that it is self-defeating and will not reduce incentives for people to make hazardous journeys to Australian territories. It claims that the Bill will increase the likelihood of asylum seekers embarking on increasingly hazardous journeys, either through the dangerous waters of the Torres Strait or across southern Australia, in an attempt to reach New Zealand or other destinations in the Pacific. Government Senators do not support this position.

7. DIMIA gave evidence that the Excision Act, in the context of other government arrangements in relation to unlawful asylum seekers,[3] had been effective in reducing the incentives for asylum seekers to try to reach Australian territory. As DIMIA representatives noted:

> . . . When you put it all together and look at the fact that we have not had a boat since last November, I think the assessment would have to be that the full range of strategies – including the excision measures – has been very successful in terms of preventing people smuggling.[4]

8. It was made quite clear to the Committee that it was understood that people smugglers, deterred from targeting Australian territory by the Excision Act and other measures, were changing their tactics. As DIMIA said in evidence:

> The intelligence that we are gathering suggests that smugglers are now changing their tactics, not necessarily to target the mainland but to by pass the mainland on the way to New Zealand . . . It is that change in tactics that we are noting from the smugglers that this bill - and the regulations that were disallowed – is seeking to prevent.[5]

9. The purpose of the Bill is in fact to prevent people smugglers aiming for Australia or deciding to divert to Australia while on their way to New Zealand or elsewhere in the Pacific. The Bill will discourage people smugglers from undertaking the hazardous journeys which they already propose to New Zealand or elsewhere in the Pacific because there will be no fall-back position.

10. Government Senators note that at paragraphs 3.25 - 3.26, the majority report seeks to highlight alleged inconsistencies in statements made by Senator Hill on the anticipated routes of people smugglers. In fact, both statements make it quite clear that the anticipated route of people smugglers is through the Torres Strait.

International obligations and non-refoulement

11. Government Senators note that, while concerns were expressed during this inquiry about possible breaches of Australia's international obligations, particularly in

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[3] Including increased penalties for people smugglers

[4] *Hansard*, 6 August 2002, pp. 15-16.

[5] *Hansard*, 6 August 2002. p. 6.

relation to refoulement of refugees to places of persecution, both DIMIA and the Attorney-General's Department strongly denied that there was any question of refoulement. As the Attorney-General's Department stated:

> The crux of non-refoulement is not returning people to the frontiers of the place where they are going to again face persecution. There is no question here of that taking place.[6]

12. DIMIA further explained:

> Australia ensures that persons who enter Australia's territory are able to access a refugee determination process. This process may be undertaken either in an excised offshore place or in a declared country and is in line with [UNHCR] processes.[7]

13. Both agencies emphasised that asylum seekers who had arrived at excised offshore places and had been taken to declared countries are given the opportunity to apply for refugee status. All such claims have been processed in accordance with UNHCR guidelines, including the opportunity for review of initial decisions.

14. In relation to possible refoulement from declared countries, DIMIA stated:

> The declaration process ensures that the Minister is satisfied that appropriate arrangements are in place in the declared country to provide protection for persons seeking asylum, pending determination of their refugee status, and to provide protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country. Provision exists for the Minister to revoke declared status if satisfied that appropriate arrangements no longer existed. At present, the only two declared countries are Papua New Guinea and Nauru. In Australia's agreements with Nauru and Papua New Guinea, those countries have made commitments to provide such protection.[8]

15. Government Senators note the UNHCR's comments that Australian processing of applications has 'traditionally been first-class'.[9] Government Senators note that during this inquiry DIMIA made public the assessment guidelines for offshore entry persons, so that possible concerns about accountability and transparency have been addressed.

16. In relation to concerns expressed about possible refoulement of persons from Indonesia and suggestions about the need for monitoring by Australia, Government Senators note the evidence given by DIMIA as to its satisfaction with existing processes (discussed at paragraph 4.40 of the report):

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[6] *Hansard*, 19 August 2002, p. 160.

[7] DIMIA *Answers to questions on notice*, 21 August 2002, p. 5.

[8] DIMIA *Comment on matters addressed in submissions to the Committee*, 21 August 2002, p. 2.

[9] *Hansard*, 6 August 2002, p. 49.

> … we provide support for [the International Organisation for Migration] to provide support to asylum seekers. We provide assistance to the UNHCR to operate their refugee assessment process in Indonesia. As a matter of practical fact, we are confident that the Indonesian government is allowing these people to stay within their territory while they go through that process and, if they are found to be refugees, while they await international resettlement arranged by the UNHCR. With those elements addressed, there is no need to consider some form of tracking mechanism for individuals.[10]

17. Government Senators acknowledge the concerns behind the monitoring suggestions. In the last parliament, such suggestions were considered at length in this Committee's report 'A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes'. This Committee stated:

> . . . 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. (p. 328)[11]

18. The Committee considered the possibility of Non-Government Organisations undertaking monitoring but rejected it for various reasons, including the risks for NGOs (p.338), the limited resources of potential monitors, (p. 339) and their accountability for Australian government funds (p. 340). Government Senators consider that this Committee's view in the year 2000 that suggestions for a monitoring system are impractical is still valid.

19. Government Senators also note that no witness provided evidence of any instance of refoulement having occurred (as reflected in paragraphs 4.35-4.36 of the majority report, referring to evidence from Amnesty International, Dr Susan Kneebone and Dr Pene Mathew). While the difficulties in gathering evidence are acknowledged, Government Senators consider the lack of any such evidence supports government agencies' claims that refoulement is not occurring. Given the sensitivity of the refoulement issue, there is little doubt that any possible example among recent arrivals would have been brought to the Committee's attention.

20. The Government has already taken steps for the establishment of a detention centre on Christmas Island, which may well make it unnecessary for the claims to refugee status of offshore entry persons to be assessed in other countries.

21. As noted above, it was made clear from evidence given by DIMIA and the Attorney-General's Department that in their view Australia has fully met its international obligations under treaties to which it is a signatory. There was no

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[10] *Hansard*, 17 September 2002, p. 254.

[11] A Sanctuary Under Review

specific evidence advanced to suggest that the current legislative scheme contravenes any obligation at international law.

22. However, if the Opposition is in committed to this argument, then to be consistent, they would have to conclude that the original Act also failed to uphold Australia's international obligations under various treaties and they would have to seek to repeal it. Yet they not only fully supported the original bill, but have based their entire border protection strategy on using Christmas Island as a processing centre for asylum seekers because of its excised status. This is simply illogical.

23. Concerns about this Bill failing to meet Australia's obligations under international treaties would also extend to the original Act yet were not expressed by the authors of the majority report or by the Opposition during debate. We must conclude, therefore, that the Opposition is not clear about the impact of the Excision Act or that the majority report is a precursor to winding back the Government's comprehensive border protection measures.

Review of initial assessments

24. Government Senators do not support the recommendation that an external body such as the federal magistracy or the Refugee Review Tribunal should review initial assessments of claims for refugee status by offshore entry persons. The UNHCR stated that:

> . . . DIMIA has noted that all persons who seek asylum in the excised area will have their claims for refugee status assessed against the criteria contained in the Refugee Convention, which would include an internal administrative review of a negative decision.[12]

25. Not only is internal administrative review adequate under the Convention but it is also in accordance with the practice of the UNHCR when it is conducting assessments. This was made clear by the following evidence from the UNHCR:

> Chair: Would you require an independent review process or do you want just a review?
> UNHCR: Under EXCOM conclusions, an independent review process is not required – that is EXCOM conclusion No. 8 – but an appeal is necessary.
> Chair: An appeal is necessary?
> UNHCR: Yes, for a person who has failed to be recognised as a refugee in the first instance decision.
> Chair: To what sort of body should that appeal go?
> UNHCR: In our own refugee status determination, UNHCR also does the appeal by a different officer
> Chair: By a different officer.
> UNHCR: Absolutely.[13]

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[12] *Submission 30*, p. 4.

[13] *Hansard*, 6 August 2002, pp. 48-49.

26. The integrity of the process is illustrated by the figures at paragraph 2.17 and Table 1 in relation to the 'Outcome of processing of offshore entry persons'. Of the 858 reviews of unfavourable assessments completed, 181 produced a favourable result. This suggests that reviewing officers take their role seriously and do not simply rubber stamp the initial decisions.

Abandonment of use of declared countries

27. Government Senators do not support the recommendation that the use of declared countries for holding and assessing claims for refugee status by those who have entered Australia at an excised offshore place should be abandoned at this stage. The concerns expressed in the report relate to the risks that the declared country will refoule a refugee or no longer meet appropriate human rights standards.

28. Government Senators note that the Australian Labor Party supported the Bill for the Excision Consequential Provisions Act which inserted the provisions for the declaration of countries in the Migration Act.[14] In fact, the Australian Labor Party did not support an Australian Democrats motion for an amendment restricting the power of the Minister to declare countries.[15] The Australian Labor Party has not explained why it now wants to undo legislation which it supported last year.

Procedure for declaring countries

29. Government Senators would be pleased to see consideration given to the recommendation that in the event that the Government continues to use declared countries for holding offshore entry persons while their claims for refugee status are assessed, the Migration Act should be amended to incorporate similar requirements to those that apply to safe third countries under section 91D. This would require a 'declared country' to be nominated in regulations and for the Minister to table a statement that it complied with the appropriate human rights standards and was committed against refoulement.

Statutory standards in processing claims by offshore entry persons?

30. Government Senators do not support the recommendation that there be statutory recognition of the standards to be applied in processing claims by offshore entry persons, by way of amendment to either the Migration Act or the regulations, if this means that offshore entry persons would have greater access to Australian administrative review and judicial processes than provided in current arrangements.

Criteria for declared countries to be written into agreements?

31. Government Senators note the majority's recommendation that in the event that the Government chooses not to adopt the recommendation to abandon the use of

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[14] *Senate Hansard*, 24 September 2001, p. 27689.

[15] *Senate Hansard*, 25 September 2001, pp. 27871-73.

declared countries, reference to the appropriate human rights standards and to the commitment against refoulement be inserted in agreements with those countries. Government Senators point out that Papua New Guinea is a signatory to the refugee convention and is therefore already bound by the non refoulement obligations. While Nauru is not a signatory, the Memorandum of Understanding with Nauru includes a clause which provides that:

> …any asylum seekers awaiting determination of their status or those recognised as refugees, will not be returned by Nauru to a country in which they fear persecution, nor before a place of resettlement is identified.[16]

32. Accordingly, Government Senators are not convinced of the need for the majority's recommended course of action.

Section 46A review

33. Government Senators note the concerns raised in relation to the operation of section 46A of the Migration Act. Government Senators would expect processes to be in place to ensure that individuals are not left in a position which witnesses have described as 'legal limbo' and that cases must be dealt with in an appropriate timeframe. If experience shows this not to be the case, Government Senators would support a review of the operation of section 46A.

Consultation with affected indigenous communities

34. Government Senators agree with the report on the manifest inadequacy of government consultation with affected communities – see paragraphs 6.37 to 6.43. In particular, they are disappointed with the passive approach taken by DIMIA, which stated that the information kit was clear and that no further visits were planned unless significant concerns were raised. Government Senators consider that DIMIA should be taking positive steps to ensure that it hears of and is able to deal with any concerns in affected communities as soon as they arise.

35. The inadequate consultative process with affected communities prior to the Bill's introduction does appear to have caused anxiety and concern, as was reflected in the evidence given by Mr James Marrawal of the Warrawi community who met with the Committee on Goulburn Island:

> When you came out that time, we did not know what was going on. In the back of our minds we were thinking: why are we getting kicked out from the rest of Australia? [17]

36. Similarly, Mr Terry Waia, the President of the Torres Strait Regional Authority, told the Committee:

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[16] Clause 30

[17] *Hansard*, 11 September 2002, p. 221.

> It was of very short notice. The fact that consultation had not been done prior to that letter coming from the Commonwealth government was a concern all over the Torres Strait region.[18]

37. Given that this is an area of significant public discussion, and a debate prone to hyperbole, Government Senators believe that much more strenuous efforts to communicate the plans to expand the excision process should have been made in affected communities, in contrast to the approach taken in this instance.

38. However, it should be noted that all the indigenous communities living in the proposed offshore excised places who made submissions or gave evidence during this inquiry supported this bill, as recorded by the Committee at paragraphs 6.22 to 6.28. For example, the Tiwi Land Council, after regretting its inability to meet the Committee, stated:

> In the event we did further discuss the matter of the Commonwealth legislation at our Land Council meeting number 224 held at Ngulu 12th September. Members expressed surprise that there could be any opposition to the Commonwealth legislation to assist it in the protection of our coastal zone and deny access to foreign persons and vessels on the shores of Bathurst and Melville Island.
>
> Our member for Arafura, Marion Scrymgour MLA was also at our meeting and agreed that it was helpful for there to be such legislation but that it be accompanied by good information for island residents of what the legislation intended.[19]

39. In a similar vein, Mr Richard Gandhuwuy, who spoke at the hearing on Elcho Island, strongly supported the Bill:

> I would like to strongly support the new proposal that the committee is looking into now that is going to be a part of the legislation to control the coast, especially in Arnhem Land, Northern Territory. I would like to strongly support that legislation to go ahead and be approved by parliament and become a law, an act.[20]

40. The Bill is also supported in the Torres Strait:

> …we are pleased to have greater border protection.[21]

41. If the Bill does not proceed, it will be necessary for Senators who vote against it to explain their reasons to the communities in the excised offshore places.

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[18] *Hansard*, 21 August 2002, p. 193.

[19] *Submission 44*, p. 1.

[20] *Hansard*, 11 September 2002, p. 201.

[21] *Submission* 16.

Involvement of island Indigenous communities in border protection

42. Government Senators agree with the recommendation for investigation of methods of expanding opportunities for island indigenous communities to undertake aspects of border protection duties.

43. During the Committee's visit to the indigenous communities on Goulburn and Elcho Islands, it was clear to the Committee that indigenous communities participate at a high level in a number of government related activities, including border protection and monitoring of illegal fishing activity. This participation takes place with little recognition and no remuneration.

44. In the interests of effective cooperation, the Government Senators urge the Government to investigate methods of how to best involve and remunerate indigenous communities in these areas, where they have the potential to make a real and valuable contribution.

Quarantine issues

45. Ms Andria Marshall, Program Coordinator of the Aquatic Pest Management Group of the Northern Territory Department of Industry, Resource and Development, gave significant evidence about the dangers and the limited resources available to deal with introduced aquatic pest species. She said:

> International vessels apprehended off our northern coastline originate from ports known to be inhabited by potential marine pest species, such as the black-striped mussel and the Asian green mussel.[22]

46. She described the capacity of these species to devastate sedentary marine industries:

> Senator Scullion: Can you tell me what sort of impact that the establishment of something like either of these two invasive species would have on the production of the Tiwi Islanders' barramundi farm?
>
> Ms Marshall: As with any cage-farmed fish, water flow is a pretty important consideration. Without the water flow, the fish do not feel, feed or grow very well. The effect of fouling on the cages themselves actually reduces the water flow, and so it impacts on the health of the fish: it stresses them, and they are more susceptible to disease, and their productivity levels are significantly reduced – not to mention how the added weight on the cage structures themselves would affect security type issues. And then there are the internal maintenance issues: there is enough of a cleaning program that goes on as it is, to keep the cages clean of fouling, without the prolific fouling capabilities of theses two animals, should they be introduced.[23]

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[22] *Hansard*, 11 September 2002, p. 227.

[23] *Hansard*, 11 September 2002, p. 230.

47. In relation to the resources to deal with such infestations at the islands to be excised, she gave the following evidence:

> Acting Chair: In the islands off the coast, if a vessel ends up in the sorts of environments in which we met earlier today, does your department have any responsibility for inspecting that vessel there?
>
> Ms Marshall: As the protocols exist at present, no. Due to limited resources, we have actually confined our activities to the port of Darwin and the Territory regulated coastline.[24]

48. Government Senators are therefore disappointed by the dismissive approach taken by the report at paragraph 7.43 to the issue of quarantine for excised offshore places. The point of the legislation is to discourage people smugglers from attempting the journey to Australia or to New Zealand or other places by way of Australia. The risk of exotic pests being brought into Australian waters will be reduced because of the reduction or elimination of voyages to or through them by people-smuggling vessels.

Recommendation

Government Senators recommend that the bill be passed without further delay.

Senator Marise Payne
Senator for New South Wales

Senator Nigel Scullion
Senator for the Northern Territory

24 *Hansard*, 11 September 2002, p. 228

APPENDIX 1

ORGANISATIONS AND INDIVIDUALS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

1. Miss Emilia Della Torre – The University of New England, School of Law
2. Mr Brian Bond
3. Ms Joan Kinnane
4. Ms Kim Rubenstein – The University of Melbourne
5. Congregation of the Sisters of Mercy
6. Australian Presentation Society
7. Citizens Electoral Council of Australia
8. Ms Alison Murdoch
9. Ms Charlotte Brewer
10. Mr Robert Lindsay
11. Australian Political Ministry Network Ltd
12. Social Action Office – CLRIQ
13. Dominican Sisters of North Adelaide
14. Boolaroo/Warners Bay Social Justice Action Group
15. Ms Judith Roberts
16. Torres Strait Regional Authority
17. New South Wales Council for Civil Liberties Inc.
18. Mr John Young
19. St Vincent de Paul Society
20. Ms Rebecca LaForgia and Mr Martin Flynn

20A. Ms Rebecca LaForgia and Mr Martin Flynn

21. New South Wales Combined Community Legal Centres Group
22. Sisters of the Good Samaritan Social Justice Catalyst Committee

23. Dr Susan Kneebone – Monash University Castan Centre for Human Rights Law

24. Network for International Protection of Refugees

24A. Network for International Protection of Refugees

25. Human Rights Council of Australia Inc.

25A. Human Rights Council of Australia Inc.

26. Mr Angus Francis – School of Law, University of Canberra

26A. Mr Angus Francis – School of Law, University of Canberra

27. Ms Maureen Keady - Brigidine Convent

28. Catholic Commission for Justice, Development and Peace, Melbourne

29. Amnesty International Australia

30. United Nations High Commissioner for Refugees

30A. United Nations High Commissioner for Refugees

31. Australian Lawyers for Human Rights

32. Australian Federal Police

32A. Australian Federal Police

33. Australian Catholic Migrant and Refugee Office and the Australian Catholic Social Justice Council

34. Dr Penelope Mathew – The Australian National University, Faculty of Law

34A. Dr Penelope Mathew – The Australian National University, Faculty of Law

35. Human Rights and Equal Opportunity Commission

36. International Commission of Jurists, Australian Section

37. Refugee and Immigration Legal Centre

38. Refugee Council of Australia

39. The Rockhampton Social Justice Action Group

40. The Social Responsibilities Commission

41. Missionary Franciscan Sisters

42. Australian Seafood Industry Council

43. Attorney-General's Department

43A. Attorney-General's Department

44. Tiwi Land Council

45. Department of Premier and Cabinet, WA

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, Tuesday 6 August 2002

Australian Catholic Migrant & Refugee Office
Reverend John Murphy, Director

Australian Catholic Social Justice Council
Ms Sandra Cornish, National Executive Officer

Australian Federal Police
Commissioner Michael Keelty
Federal Agent Brendan McDevitt, General Manager National Operations

Department of Immigration and Multicultural and Indigenous Affairs (DIMIA)
Mr Edward Killesteyn, Acting Secretary
Mr Vincent McMahon, Acting Deputy Secretary
Mr Desmond Storer, First Assistant Secretary, Parliamentary and Legal Division
Mr Robert Illingworth, Assistant Secretary Onshore Protection
Ms Nelly Siegmund, Assistant Secretary Border Protection Branch
Mr Douglas Walker, Assistant Secretary, Visa Framework Branch

Flinders University
Ms Rebecca LaForgia, Lecturer in Law

Network for International Protection of Refugees
Dr U Ne Oo, Secretary

St Vincent de Paul Society
Mr Terence McCarthy, President, National Social Justice Committee
Mr John Wicks, Vice-President, National Social Justice Committee

United Nations High Commissioner for Refugees
Mr Michel Gabaudan, Regional Representative
Ms Gabrielle Cullen, Resettlement Officer
Ms Ellen Hansen, External Relations Officer

University of Western Australia
Mr Martin Flynn, Senior Lecturer, Faculty of Law

Mr Robert Lindsay (private capacity)

Sydney, Wednesday 7 August 2002

Amnesty International Australia
Ms Catherine Wood, Acting Refugee Coordinator, National Refugee Team
Mr Alistair Gee, Member, National Refugee Team

Australian Political Ministry Network Ltd
Mr James McGillicuddy, Coordinator

Catholic Commission for Justice, Development and Peace, Archdiocese of Melbourne
Mr Marc Purcell, Executive Officer

Human Rights Council of Australia
Mr Andrew Naylor, Member

International Commission of Jurists
The Hon. Justice John Dowd AO, President, Australian Section

Monash University Castan Centre for Human Rights Law
Dr Susan Kneebone, Member

New South Wales Council for Civil Liberties Inc
Mr Cameron Murphy, President
Mr Stephen Blanks, Committee Member

Refugee and Immigration Legal Centre Inc
Mr David Manne, Coordinator

Canberra, Monday 19 August 2002

Attorney-General's Department
Mr Mark Zanker, Acting First Assistant Secretary, Office of International Law

Department of Foreign Affairs and Trade
Mr John Oliver, Assistant Secretary, New Zealand and Papua New Guinea Branch
Mr Roderick Smith, Assistant Secretary, International Organisations Branch
Mr Dominic Trindade, Legal Adviser and Assistant Secretary, Legal Branch

Mr Angus Francis (private capacity)

Canberra, Wednesday 21August 2002

Torres Strait Regional Authority
Mr Terry Waia, Chair

Dr Penelope Mathew (private capacity)

Northern Territory, Wednesday 11 September 2002

Elcho Island
Mr Oscar Datjarrangu, Galiwinku Community
Mr Keith Djinyini, Galiwinku Community
Mr Richard Gandhuwuy, Garrawurra Clan
Mr Joe Gumbula, Milingimbi Community
Mr Jeff Leggat, Counil Clerk, Milingimbi Council
Mr Roger McIvor, Manager, Marthakal Homelands Resource Centre
Mr Jeffry Mulawa, Milingimbi Community
Mr Mike Newton, Council Clerk, Galiwinku Council
Timothy, Galiwinku Community
Mr Terry Yumbulul, Galiwinku Community
Mr Charles Yunupingu, Chairman, Galiwinku Community
Aaron
Other community members from Elcho Island

Goulburn Island
Mr Graeme Dobson
Mr Bunuk, Galiminda, CDEP Coordinator, Warruwi Community, Goulburn Island
Mr Jim Gorey, Goulburn Island
Mr Alan Keeling
Mr James Marrawal, Employee, Community Health Centre
Mr William Yarmirr
Other community members from Goulburn Island

Darwin
Ms Andria Marshall, Program Coordinator, Aquatic Pest Management Group, Northern Territory Department of Industry, Resource and Development

Canberra, Tuesday 17 September 2002

DIMIA
Mr Vince McMahon, Acting Deputy Secretary
Mr Desmond Storer, First Assistant Secretary, Parliamentary and Legal Division
Mr Robert Illingworth, Assistant Secretary Onshore Protection
Mr Douglas Walker, Assistant Secretary, Visa Framework Branch

APPENDIX 3

CLASSES OF VISA, MERITS REVIEW AND JUDICIAL REVIEW RIGHTS

Description of visa applicant	**Classes of available visas**	**Merits review rights**	**Judicial review in Australian Courts**
1. Landed on mainland (unauthorised), no previous contact with excised place	Onshore visa classes, particularly subclass 785 (Temporary Protection) (subject to meeting criteria)	MRT or RRT	- High Court under s 75(v) of the Constitution. - Federal Court or Federal Magistrates Court as modified by Part 8 of the Act.
2. Landed on mainland (unauthorised), has previously landed at excised place (eg detained at excised island, transferred to mainland by authorities)	None unless s.46A bar is lifted for onshore visa classes (they are an offshore entry person)	N/A	High Court, but not in relation to a visa decision.
3. Applying while at sea in territorial waters, no previous contact with excised place (eg at anchor, not intercepted)	For making an application not in migration zone, offshore visas. Protection claims would be assessed (subject to meeting criteria and note practical difficulties of applying)	- Visa applicant has no right to review. - The Australian sponsor or relative may have review rights to the MRT for certain classes of visas	- High Court under s 75(v) of the Constitution. - Federal Court or Federal Magistrates Court as modified by Part 8 of the Act.
4. Applying while at sea in territorial waters, previous contact at excised place (eg: boat not intercepted, lands at remote community, goes back to sea)	For making an application not in migration zone, offshore visas. Protection claims would be assessed (subject to meeting criteria and note practical difficulties of applying) (is an offshore entry person)	- Visa applicant has no right to review. - The Australian sponsor or relative may have review rights to the MRT for certain classes of visas	- High Court under s 75(v) of the Constitution. - Federal Court or Federal Magistrates Court as modified by Part 8 of the Act.

Description of visa applicant	**Classes of available visas**	**Merits review rights**	**Judicial review in Australian Courts**
5. Applying from Christmas island processing centre after being intercepted at sea, previous contact with excised place	None unless s.46A bar is lifted for onshore visa classes (they are an offshore entry person)	N/A	High Court, but not in relation to a visa decision.
6. Applying from Christmas island processing centre after being intercepted at sea, no previous contact with excised place	None unless s.46A bar is lifted for onshore visa classes (they are an offshore entry person)	N/A	High Court, but not in relation to a visa decision.
7. Applying from declared country processing centre after being intercepted at sea, previous contact with excised place	Offshore visa classes, particularly subclass 447 (Secondary Movement Offshore Entry (Temporary) (subject to meeting criteria)	- Visa applicant has no right to review. - The Australian sponsor or relative may have review rights to the MRT for certain classes of visas - If a protection claim, UNHCR-like review process	- If visa applicant - High Court under s 75(v) of the Constitution. - Federal Court or Federal Magistrates Court as modified by Part 8 of the Act. - Otherwise none.
8. Applying from declared country processing centre after being intercepted at sea, no previous contact with excised place	Offshore visa classes, particularly subclass 451 (Secondary Movement Relocation (Temporary) (subject to meeting criteria)	- Visa applicant has no right to review. - The Australian sponsor or relative may have review rights to the MRT for certain classes of visas - If a protection claim, UNHCR-like review process	- If visa applicant - High Court under s 75(v) of the Constitution. - Federal Court or Federal Magistrates Court as modified by Part 8 of the Act. - Otherwise none.