SENATE LEGAL AND CONSTITUTIONAL REFERENCE COMMITTEE

INQUIRY INTO THE MIGRATION LEGISLATION AMENDMENT (FURTHER BORDER PROTECTION MEASURES) BILL 2002

SUBMISSION NO:	**25A**
DATE RECEIVED:	**03/09/02**
ORGANISATION:	**HUMAN RIGHTS COUNCIL OF AUSTRALIA INC.**
ADDRESS:	**PO BOX L23 SOUTH MAROUBRA NSW 2035**
SUBMITTOR:	**MR ANDREW NAYLOR**
TELEPHONE:	**02 9311 0159**
FAX:	**02 9311 0159**
EMAIL:	**Andref@mpx.com.au**
NO. OF PAGES:	**3**

Human Rights Council of Australia

PO Box L23 South Maroubra NSW 2035 Australia
Telephone / Fax: +61 2 9311 0159
Email: andref@mpx.com.au
Website: http://www.hrca.org.au
ABN 51 998 793 677

3 September 2002

The Secretary
Senate Legal and Constitutional References Committee
Room S1.61
Parliament House
CANBERRA ACT 2600
By Facsimile: 02 6277 5794

Dear Sir

Re: Inquiry into Migration Zone Excision

I refer to my appearance before the Committee at its hearing in Sydney on 7 August 2002. At that time, I was invited to take two questions on notice. Those questions, and the relevant context in which they were posed, are set out below:

1. Senator Tchen: *"On a number of occasions you have emphasised the fact that the Human Rights Council endorses and supports Australia's right to border and territorial protection.*

   Mr Naylor: *"Yes.*

   Senator Tchen: *"You might want to take this question on notice, because I do not expect you to be able to come up with a very quick answer. In that case, what would the Human Rights Council suggest Australia do to protect our borders against organised people-smuggling?"* (emphasis added).

   [Proof Copy of Transcript at p118.1]

2. The Chair [Senator Bolkus]: *"The legislation provides a capacity for the minister to determine that it is in the public interest that a person be able to make a valid visa application. Have you considered whether that determination of the minister is one that can be subjected to judicial scrutiny."*

   [Proof Copy of Transcript at p119.9]

Question 1

The question incorporates two separate and distinct policy objectives, namely, border protection and deterrence of people-smuggling. Responses to one such policy objective are not necessarily appropriate to the other.

In relation to the question of border protection, while the Council recognises the need for Australia to preserve its territorial integrity, it is questionable whether asylum seekers pose a threat sufficiently real to justify the reaction contemplated by the Bill. It is important that problems associated with asylum seekers are not confused with challenges posed by, and Australia's reactions to, the threat of terrorism.

The real mischief addressed by the Bill is people-smuggling, not border protection. The Council is of the opinion that while there is merit in appropriately designed measures being used to deter those who may seek to obtain a benefit from being involved in the trafficking of asylum seekers in circumstances where the safety of those seeking asylum is placed at risk, the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 is not such a measure. This is because the real burden of the Bill will be felt by asylum seekers, not people-smugglers. The denial to asylum seekers of their rights under the Refugees Convention and the International Covenant on Civil and Political Rights will be relatively more profound than any benefits that might be yielded by the Bill in terms of the deterrence of people smugglers.

The imposition of higher penalties for those convicted of people smuggling may go some way towards deterring those considering becoming involved in such a venture. Ultimately, however, not even this kind of response adequately addresses the fundamental cause of the problem. What is required are mechanisms that will: (a) help to prevent human rights violations of the kind that lead to those being persecuted needing to seek asylum; and (b) international cooperation in dealing with those who do seek asylum. It is acknowledged that the search for such mechanisms is not necessarily an easy one. As much was recognised by those involved in the drafting of the Refugee Convention. The Convention nevertheless represents the starting point in terms of a set of guiding principles. The mechanisms may involve, for example, a concerted effort on Australia's part to engage bilaterally and multilaterally with those countries suspected of being involved in human rights violations. Whatever the precise nature of the mechanisms, it is abundantly clear that international cooperation is critical. As previously submitted, the Bill is the antithesis of international cooperation.

Question 2

It is noted at the outset that the provision to which Senator Bolkus referred was sub-s 46A(2) of the *Migration Act 1958*. That sub-section provides an exemption from the deeming provision in sub-s 46A(1) that a visa application by an offshore entry person is not a valid application. Sub-section 46A(2) provides that:

> *If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.*

The phrase, "*the public interest*", attracts a variety of meanings, depending upon its context and the circumstances of the case. Among these meanings is the public interest in ensuring that a person's rights at law are not frustrated: see eg *Sankey v Whitlam* (1978) 142 CLR 1 at 32 per Gibbs ACJ. As previously submitted, the Bill will have the effect of placing asylum seekers at a disadvantage when compared with asylum seekers who arrive in Australia other than at an excised place, in that they will be denied access to the Refugee Review Tribunal and the courts. An asylum seeker arriving at such an excised place would therefore likely have good grounds to make application to the Minister for an exercise of the discretion available under s 46A(2) of the *Migration Act*.

Until the enactment of s 474 of the *Migration Act*, a person who was denied a favourable determination under s 46A(2) would have been entitled to seek judicial review of the Minister's decision. Remedies in the nature of the prerogative writs would have been available, for example, to quash a decision that had been taken without regard to relevant considerations. The insertion of s 474 into the *Migration Act* casts doubt upon whether a determination under s 46A(2) can be judicially reviewed. The Council understands that the High Court is shortly to consider whether, despite s 474, it retains a jurisdiction to review administrative decisions of the kind provided for by s 46A(2). There would appear to be a reasonable prospect that the High Court will indeed find that it does have jurisdiction to review determinations such as those that may be made under sub-s 46A(2). Whatever the High Court may conclude, as a matter of policy, the Council is of the opinion that all decisions taken under the *Migration Act*, whether by a Minister or a member of his Department, should be amenable to judicial review.

Yours faithfully

Andrew Naylor
Human Rights Council of Australia Inc