CHAPTER 9

REMOVAL AND DEPORTATION

9.1 This chapter deals with two important aspects of the administration of the removal and deportation provisions of the Migration Act:

- the implementation of section 198 and the practices associated with the removal of unlawful non-citizens; and
- the deportation of long term Australian residents convicted of a criminal offence.

9.2 An outline of Australia's international legal obligation of *non-refoulement* and the need for a system of 'complementary protection' are discussed in Chapter 4.

Removal of unlawful non-citizens from Australia

9.3 Australia's mandatory detention policy requires unlawful non-citizens to be detained until they are granted a visa or are removed from country. Section 198 is one of the key provisions. It requires that 'unlawful non-citizens' must be removed as soon as 'reasonably practicable', and is generally believed to impose a duty on officials to act promptly to achieve the objects of the section.[1] Dr Nicholls argued that since the extension of mandatory detention to all classes of unlawful non-citizen,[2] any person in Australia may be required to provide evidence of a valid visa to avoid removal:

> Removal follows from failure to do so, or after a person's applications and appeal opportunities are exhausted. There is no requirement for independent review of removal actions themselves.[3]

9.4 The committee agrees with the general view that the recent cases of Ms Vivian Solon and Ms Cornelia Rau illustrate the lack of procedural safeguards in the current provisions of the Migration Act. The details of these cases are recorded in detail elsewhere and the issue of procedural safeguards in the context of mandatory detention generally is explored in detail in Chapters 5 and 6.

9.5 In respect of removals, Dr Nicholls observed that the Palmer Report, 'highlights the importance of independent review of removal actions and that:

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1 Under section 198 of the Migration Act, a mandatory removal process for a number of classes of 'unlawful non-citizens' is established. These classes include: those who have requested the Minister in writing to be so removed; those who have been brought to Australia for a temporary purpose; those who have not made a valid application for a substantive visa when in the migration zone; those who have had an application for a substantive visa finally determined against them; and those who may be eligible to apply for a substantive visa but have not done so.

2 *Migration Reform Act 1992*. Effective from 1/9/1994.

3 Dr Glenn Nicholls, *Submission 102*, p. 1.

> the pendulum has swung so far away from reviewable orders that the Palmer inquiry encountered an attitude in the (D)epartment of (I)mmigration that the power to remove a person from Australia does not require a formal decision at all because it is seen to be required by the (A)ct 4.[5]

9.6 Dr Nicholls further argued that:

> '(i)n moving away from deliberate decision-making on deportations subject to independent scrutiny, the removal system has lost contact with the body of law that enunciated the conditions for lawfully deporting somebody'.[6]

9.7 The ASRC also alleged that DIMIA often exercises its power under section 198:

> Over-zealously and without regard to physical or mental health issues, welfare issues or human rights concerns in the country of repatriation.[7]

9.8 The committee is particularly aware to the vulnerability of people living with disability or suffering mental illness. In relation to pre-departure assessments, ASRC said that:

> Whilst there is an obligation upon DIMIA to conduct a pre-departure assessment of a person's physical fitness to travel, DIMIA do not assess a person's mental fitness to travel. Persons with chronic mental illness are routinely removed from Australia in circumstances where there is no treatment for them upon arrival in the country of repatriation. This does not mean that DIMIA should never remove a person who is psychologically unwell, merely that this should be done in a sensitive and appropriate way in accordance with best mental health practice standards. In many cases it may be appropriate to organise counselling and or psychological treatment prior to removal.[8]

9.9 The Australian Psychological Society (APS) concurred with this view. The APS argued that the involuntary return of people with a mental illness is 'unacceptable' and that 'consideration must be given, in determining if a person is 'fit to travel', to the person's ability to survive, cope and integrate into the other country upon their repatriation'.[9] The committee notes Australian international obligations not to return a person to a country where there is a serious risk of violation of their

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4 *Committee Hansard*, 27 September 2005, p. 11.

5 Dr Glenn Nicholls, *Submission 102*, p. 1.

6 Dr Glenn Nicholls*, Submission 102*, p. 1.

7 ASRC*, Submission 214*, p. 36.

8 ASRC, *Submission 214*, p. 36.

9 Australian Psychological Society, *Submission 223*, p. 5.

fundamental human rights.[10] There will be circumstances where the extent and nature of an illness and the conditions on return are likely to engage those obligations.

9.10 More generally, there are significant practical issues that face a person who is subject to involuntary removal, especially where that person is being returned to a place which is not their country of origin. The APS argued that in these circumstances:

> … it is essential that certain minimum standards are met to ensure that the person is able to integrate into this country, such as some significant prior connection with the country, access to healthcare and mental healthcare, and ability to access other basic rights such as work, education, and legal protection.[11]

9.11 The ASRC also emphasised the importance of undertaking the removal process in a respectful way and using the minimum level of force:

> Restraint may be used only if absolutely necessary to ensure the safety of staff and others, and the use of restraints must be strictly proportionate to the risk posed by the returnee. Escorts, where used, should be adequately trained to conduct the removal safely and appropriately. Clear standards and procedures for the forcible removal of individuals from Australia must be developed and adhered to.[12]

9.12 In relation to the use of physical restraint, the ASRC continued:

> Minimum forms of physical restraint may be used only in exceptional circumstances, and restraints that pose a significant risk to the health or wellbeing of the returnee must never be used. Numerous reports internationally have highlighted instances where severe injury or death by asphyxiation have resulted from the excessive use of force and inappropriate means of restraint. Such cases are clear breaches of fundamental human rights, and Australia must seek to avoid any such further cases.[13]

9.13 On the issue of medicating removees, DIMIA assured the committee that it has a clear policy that medication (including sedatives) must not be used for the purpose of restraint in removals.[14]

9.14 The ASRC also argued that the removals process must be open and transparent:

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10 Discussed in Chapter 4.

11 Australian Psychological Society, *Submission 223*, p. 5.

12 ASRC, *Submission 214*, p. 40.

13 ASRC, *Submission 214*, pp. 40-41.

14 Answers to questions on notice, 5 December 2005, p. 87.

> The returnee should be given sufficient time to prepare for the departure, should be provided with all appropriate information relating to the journey, and should also be given choices about aspects such as the timing of the return.[15]

Lack of independent pre-removal assessment of returnees

9.15 It was against the background of these concerns that some witnesses argued for independent review of the removal decision, including a person's fitness to travel. The Canadian system, which provides for a Pre-Removal Risk Assessment, was generally regarded as having merit.[16] For example, Uniting Justice Australia and the Hotham Mission agreed:

> … with recommendation 8.3 [of the Palmer Report], particularly in developing a briefing program to assess the reason behind a removal, and responsibilities associated with removals. We would ask that clear guidelines be developed in this regard, including an exploration of the Canadian practice of pre-removal assessment to ensure all removals are appropriate and that no refoulement, humanitarian or welfare concerns are present.[17]

9.16 HREOC argued that independent assessment of removal decisions should be built into the system. Mr John von Doussa QC, President of HREOC said:

> There ought to be some additional procedure beyond that which there presently is, a procedure which can be compelled - in other words, a person can require that it be fulfilled - and a procedure that has some review mechanisms at the end. Whether you set up a new tribunal or whether you adopt some of the other procedures, if the exercise were compelled to be done by the department, with reviews thereafter, that might be sufficient. The problem is that at the moment there is no compulsion.[18]

9.17 Dr Nicholls adopted a similar view. He suggested that the Federal Magistrates Court would be an appropriate body to supervise removal decisions:

> The check I have in mind would not be a further merits review but a check of the person's identity and fitness to travel and on the existence of permissions both from transit countries and from the person's country of citizenship. The costs would be modest and there would be three benefits: first, it would prevent any wrongful removals; second, it would entrench standards for the arrangements that need to be in place to ensure a person's health and wellbeing; and, third, it would give the minister and parliament assurance that the removal powers under the act are being exercised

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15 ACRC, *Submission 214*, p. 41.

16 See *Immigration and Refugee Protection Act 2001*, ss. 112-116.

17 ASRC, *Submission 190*, p. 41.

18 *Committee Hansard*, 7 October 2005, p. 53.

> appropriately in all circumstances. This is important in the absence of formal deportation orders issued under the minister's authority.[19]

9.18 The ASRC agreed that there should be independent scrutiny to ensure all removal safeguards have been complied with. ASRC also argued that:

> a pre-departure assessment of the removee's individual circumstances is conducted to ensure that Australia's human rights obligations are being met. In the course of such an assessment any health or welfare needs of the removees must be considered and serious consideration given to their reception upon return. It is not sufficient, in an area where individual human rights are the concern of the global community to abdicate responsibility for a person once they depart our shores.[20]

Insufficient notice of deportation and removal

9.19 The lack of notice to detainees was raised by a number of witnesses. The Law Society of South Australia commented that:

> Reports from legal practitioners who have acted for many detainees is that the Department gives at best brief notice that a deportation will be likely to occur, and at worst often gives notice to legal practitioners or migration agents which only becomes known in circumstances after the deportation has occurred. It is believed by many that this is part of the culture of the Department which views both the detainees and those who may wish to be involved in their dealings with the Department with scant regard.[21]

9.20 The LSSA argued that the Migration Act should be amended to require reasonable notice as a procedural safeguard and an opportunity to raise outstanding issues.[22]

9.21 In reply, DIMIA informed the committee that:

> There is a Migration Series Instruction on Removals, which provides removals officers guidance in providing notification of removal to unlawful non-citizens.
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> All detainees are notified of the Department's obligation to remove them from Australia by means of a notice provided by the department upon their induction into detention. Detention case managers also raise the issue of removal with detainees at regular meetings.
>
> There is no legislative requirement that detainees be notified of their removal arrangements. However, once arrangements are in place, the detainee is generally advised in advance of their removal by way of a

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19 *Committee Hansard*, 27 September 2005, p. 11.

20 ASRC, *Submission 214*, p. 37.

21 LSSA, *Submission 110*, p. 10.

22 LSSA, *Submission 110*, p. 10.

> removals notice. This notice also outlines the exclusion periods which may apply (ie time restrictions on their re-entry to Australia).
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> A notice outlining debts to the Commonwealth may also be provided at this time.
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> The timing of delivery of these notices will depend upon the particular circumstances of the removal. Generally, for low risk compliant removals, the detainee can be advised 48 hours prior, or whenever the arrangements are in place.
>
> If a removals officer believes that the early notification of a removal to a detainee may pose a significant risk to the effective removal of the person, and/or to the detainee's or other person's safety, notification can be deferred until just prior to the commencement of the actual removal process.
>
> If a removee has immediate family in Australia (eg a spouse or parent) then it will be the removee's responsibility to notify their family of their removal.
>
> If a removee is unable to do this because he or she is notified of their removal immediately before it occurs, officers ask the removee if he or she wants their immediate family in Australia to be notified of the removal. If the removee requests that their family be notified of the removal, officers notify the family as soon as practicable after the removee has departed Australia.[23]

Senate Foreign Affairs, Defence and Trade Committee's report on Ms Vivian Solon

9.22 The Senate Foreign Affairs, Defence and Trade Committee (FADTC) inquiry into the circumstances surrounding the removal of Ms Vivian Solon, made several findings relevant to this inquiry.[24] The FADTC expressed the view that:

> It is quite clear that DIMIA was ultimately responsible for Ms Solon's removal, which includes all the associated arrangements on arrival. Records on who was to meet here were confusing. It would appear that these arrangements were left to third parties and were not even checked or confirmed by DIMIA officials.[25]

9.23 The FADTC recommended that DIMIA review its removal processes to ensure that:

- clear and comprehensive records of arrangements should be kept in relation to such removals;

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23 Answers to Questions on Notice, 11 October 2005, p. 46.

24 Senate Foreign Affairs, Defence and Trade References Committee, *The removal, search for and discovery of Ms Vivian Solon, Final report*, December 2005.

25 Senate Foreign Affairs, Defence and Trade References Committee, ibid, p. 15.

- formal and proper procedures are in place for the reception of people being removed from Australia in circumstances similar to Ms Solon.[26]

9.24 The FADTC also noted the 'lack of clarity over when DIMIA's responsibility for a detainee formally ends'. The committee expressed the view that:

> … there should be no 'grey area' with regard to Australia's responsibility for those persons removed from Australia. There must be an indisputable and identifiable point at which Australia's responsibility to these people starts and ends. Ms Solon's circumstances have highlighted the need for the Australian government to review and clarify this area of responsibility.[27]

9.25 The FADTC recommended that 'DIMIA review and advise staff when their responsibilities for a detainee begin and end, noting there may be circumstances like that of Ms Solon where there may not be a strict legal obligation but a moral obligation to ensure their welfare'.[28]

Committee view

9.26 This committee agrees with the views and recommendations of the FADTC concerning the process of removing Ms Solon The committee also accepts the evidence received in the course of its inquiry suggesting that a pre-removal risk assessment system should be instituted as a safeguard to ensure that any 'refoulement', humanitarian or welfare concerns are dealt with. The committee considers the practice in Canada to be a worthy example and one that might usefully be followed in Australia. The provision of reasonable notice is a procedural safeguard against illegal or improper removals and should also be provided for by statute.

9.27 Were such a pre-removal risk assessment implemented, it would address many of the committee's concerns, and there would be less cause to consider the need for a review process for removal decisions.

Recommendation 56

9.28 The committee recommends that the Migration Act be amended to require a comprehensive pre-removal risk assessment to ensure no 'refoulement', humanitarian or welfare concerns exist.

Recommendation 57

9.29 The committee recommends that the Migration Act be amended to require that all prospective removees be provided with reasonable notice.

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26 Senate Foreign Affairs, Defence and Trade References Committee, ibid pp 15-16.

27 Senate Foreign Affairs, Defence and Trade References Committee, ibid p. 16.

28 Senate Foreign Affairs, Defence and Trade References Committee, ibid p. 16.

Deportation of long term Australian residents

9.30 The committee received a considerable amount of evidence about the use of section 501 to deport long term Australian residents on character grounds. The evidence indicates that the Commonwealth has abandoned reliance on the criminal deportation provisions (section 201) in favour of the wider power to cancel visas on character grounds under section 501, where a person has been convicted of a criminal offence.

Background

9.31 Section 201 of the Migration Act provides for the deportation of non-citizens who have been in Australia for less than 10 years, convicted of a serious criminal offence and sentenced to imprisonment for one year or more. Under section 201, a person cannot be deported after being lawfully resident in Australia for more than 10 years, except in very exceptional circumstances.

9.32 A decision to cancel a visa under section 501 consists of two stages:

- the decision-maker must find that the visa holder does not pass the 'character test' (defined in subsection 501(6)); and
- if it is found that the visa holder does not pass the character test, then the decision-maker must decide whether it is appropriate to cancel the visa, given all of the relevant circumstances.[29]

9.33 *Ministerial Direction No. 21 – Visa Refusal and Cancellation* provides guidance on the exercise of discretion under section 501.[30]

9.34 However, evidence indicated that since the introduction of a broader character and conduct test in section 501 of the Migration Act,[31] it has become routine practice to deal with convicted non-citizens by cancelling their visas on character and conduct grounds, rendering them unlawful non-citizens and liable to removal.[32]

9.35 Several witnesses argued that section 501 is being used increasingly as a way of 'bypassing' the specific deportation power contained in section 201. For example, the South Brisbane Immigration & Community Legal Service (SBICLS) informed the committee that, in its experience, 's[ection] 501 is being used far more than the s[ection] 201 power'.[33]

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29 DIMIA, Answers to questions on notice, 11 October 2005, p. 17.

30 DIMIA, Answers to questions on notice, 11 October 2005, p. 17. Issues that must be considered under the Ministerial Direction in the exercise of the power under section 501 are set out later in this chapter.

31 Effective 1 June 1999.

32 See, for example, Dr Glenn Nicholls, *Submission 102*, p. 2.

33 SBICLS, *Submission 200*, p. 4.

9.36 It was said that the change in Commonwealth practice reflected a tension between the executive and the judiciary. CCHRL explained:

> Recently, following a battle between the executive and the courts and tribunals over the implementation of the [criminal deportation power under section 201 of the Migration Act], the Department of Immigration has abandoned the use of the [criminal deportation power] in favour of the powers to cancel visas on character grounds…[34]

> There is evidence that the current section 501 is being used as a form of 'disguised' deportation to bypass the specific power in section 201 of the Act – the Criminal Deportation Power (CDP) … The use of section 501 (the 'character test' power) in lieu of section 201 (the CDP) is significant because of several important differences between the powers…[35]

9.37 During hearings DIMIA provided background to the amendments to section 501:

> My recollection is that [amendments to section 501 in 1998 were] against the background of a number of cases that occurred in the mid-1990s where the government was unable to remove non-citizens who had committed very serious violent crimes in Australia, but because of the nature of the provisions the government decisions were overturned in the courts. The government took the view at the time that that was an outcome that it did not agree with.[36]

9.38 DIMIA argued that the primary purpose of the 1998 amendments was to:

> ensure that the Government can effectively discharge its fundamental responsibility to prevent the entry and stay in Australia of non-citizens who have a criminal background or have criminal associations.[37]

DIMIA also noted that the amendments were supported, at the time, by both the major parties.[38]

9.39 A brief review of the second reading debate on the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct Bill 1998, indicates that the bill was intended to:

- broaden the criteria upon which a person might be refused entry or have their visa cancelled on character grounds; and
- facilitate quicker removal.

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34 Castan Centre for Human Rights Law, *Submission 71*, p. 10.

35 Castan Centre for Human Rights Law *Submission 71*, p. 10.

36 *Committee Hansard*, 11 October 2005, p. 19.

37 *Committee Hansard*, 11 October 2005, p. 19.

38 *Committee Hansard*, 11 October 2005, p. 19.

9.40 The emphasis during debate was on screening of people seeking to enter Australia and the prompt removal of people who committed a serious offence while in Australia. There is no evidence that the bill was intended to apply to long term permanent residents and no suggestion that section 201 should be repealed.[39] The committee is only aware of one case in mid 1997 in which the Minister sought to cancel a visa and subsequently abandoned the action.[40]

Differences between sections 201 and 501 of the Migration Act

9.41 The committee notes the important differences between section 201 and section 501; and the human rights and legal concerns raised by the Commonwealth's preferred use of section 501. Some of these concerns are:

- section 201 assumes that a person, 'integrated' into the Australian community after a period of 10 years, with extensive ties in Australia should be removed. This includes permanent residents who have spent the majority of their lives in Australia, have children and other dependents who are Australian citizens, or have already served their time in prison. In contrast there is no time limit in section 501.[41]
- section 201 is confined to persons sentenced to a term of imprisonment of not less than one year but no more than 10 years. In this way, section 201 reflected a certain level of seriousness about the crime. By contrast, the 'character test' in section 501 captures a far wider range of behaviour. Mere association with someone else reasonably suspected of criminal activity by the Minister is sufficient to establish that a person is not of good character; and cumulative periods of periodic detention count toward the calculation of a term of imprisonment which constitute a 'substantial criminal record';[42]
- section 501 is intended to facilitate *refusing* visa applications from people seeking to enter Australia or cancel a visa where the person present a

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39 *House Hansard*, p. 1229.

40 In mid 1997, the then Acting Minister for Immigration and Multicultural Affairs (Senator Vanstone) cancelled the visa of Lorenzo Ervin, who had been convicted of air piracy and kidnapping in the United States in 1969. Mr Ervin sought judicial review of the decision in the High Court. On 10 July 1997, counsel for the Minister proposed that the Minister's decision cancelling Mr Ervin's visa be set aside: *Re: The Minister for Immigration and Multicultural Affairs Ex parte Ervin* B 29/1997 (10 July 1997); See Spry M. and Margarey K., *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998,* Bills Digest No.48 1998-99, 11 November 1998 p.3.

41 For example, see CCHRL, *Submission 71*, p. 11; Dr Glenn Nicholls, *Submission 102*, p. 2; Migration Institute of Australia, *Submission 144*, p. 4. The committee notes that in 1998 the Joint Standing Committee on Migration examined this issue and 'resolved to maintain the ten year limit on liability for deportation for juveniles (immigrants who arrive in Australia under the age of 18) as an appropriate balance between the need to protect the community and the obligation Australia accepts for very young immigrants': Joint Standing Committee on Migration, *Deportation of Non-Citizen Criminals*, June 1998, p. 17.

42 CCHRL, *Submission 71*, p. 11.

significant risk. It was not intended to be relied on for the purpose of deporting Australian residents convicted of minor or even serious criminal offences if they lived in Australia more than ten years;[43]

- decisions under sections 201 and 501 are reviewable by the AAT. However, the section 501 is subject to personal intervention by the Minister (which is unreviewable, and not subject to independent scrutiny or the rules of procedural fairness);[44]
- the policy directions which govern the exercise of powers under sections 201 and 501 are significantly different. For example, the power to deport under section 201 requires a range of personal considerations relating to family unity to be taken into account. By contrast, section 501 emphasises the 'expectations of the Australian community';[45]

9.42 It was also argued that section 501 effectively exposes a long term Australian resident to an additional penalty: The ICJ said:

> Someone has done their time and yet they are further penalised as a result of the immigration implications once they are released. That is one of the public interest considerations that should be taken into account in the discretion not to cancel.[46]

9.43 The committee understands that the ICJ is emphasising the practical effect of deportation rather than making a legal argument that deportation constitutes double jeopardy and questioning the policy of deportation. Based on the evidence before the committee, it does appear that the policy considerations for criminal deportation overlaps with, but is substantially different to, those which inform cancellation on character grounds.

No right to legal representation

9.44 LACNSW criticised the lack of legal assistance available to permanent residents who face criminal deportation under section 201. LACNSW informed the committee that DIMIA notifies the person that they will be deported after completion of their custodial sentence. The letter of notice includes information about appeal rights. Where DIMIA is unable to deport immediately, section 253 of the Migration Act provides that such persons may be held in immigration detention on expiration of the custodial sentence until deported.[47]

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43 Dr Glenn Nicholls, *Submission 102*, p, 3.

44 CCHRL, *Submission 71*, p. 11; SBICLS, *Submission 200*, p. 4.

45 CCHRL, *Submission 71*, p. 11.

46 *Committee Hansard*, 28 September 2005, p. 45.

47 Legal Aid New South Wales, *Submission 166*, p. 18.

9.45 According to LACNSW, the notice also advises the individual to contact the Legal Aid Office or Commission in their state or territory for assistance with their appeal.[48] However, as LACNSW explained:

> The fact that the letter directs the applicant to the Legal Aid Office or Commission in their state or territory, clearly attests to the necessity for legal assistance in these proceedings. However … this assistance is not available. The applicant is denied the right to access the advice and assistance they require.
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> A challenge against a DIMIA decision is a complex and lengthy process. At the AAT, DIMIA is represented by a solicitor; the non-citizen (the applicant) is often unrepresented because free legal representation is not available either under the IAAAS or under Commonwealth legal aid guidelines … The only remaining option is private representation, which is often not affordable, or pro bono assistance, which is in short supply.[49]

9.46 It was argued that people serving custodial sentences who have their visas cancelled under section 501 of the Migration Act are extremely vulnerable and need legal assistance:

> DIMIA detains or deports them immediately after they complete their custodial term. Whilst in custody or detention they are not referred to a registered migration agent for advice on their legal rights. This group is largely unrepresented throughout this process. The visa cancellation process is complex. DIMIA is represented by a solicitor or trained officer of the Department of Immigration throughout the process. The unrepresented applicant is greatly disadvantaged as he or she cannot effectively participate in this process.[50]

9.47 Further:

> Legal assistance and representation in this process is essential in enabling individuals to exercise their legal rights, given the serious consequences to people who have, in many cases, spent much of their lives in Australia and face being returned to the country of their birth with which they have little or no connection.[51]

The risk of breaching Australia's international obligations

9.48 The committee received evidence suggesting that Australia may be acting in breach of its international obligations if it has or is deporting someone originally accepted by Australia as refugee. Mr David Bitel from the Refugee Council of Australia argued that

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48 Legal Aid New South Wales, *Submission 166*, p. 18.

49 LACNSW, *Submission 166*, pp 18-19.

50 LACNSW, *Submission 166*, p. 22.

51 LACNSW, *Submission 166*, p. 22.

> In the criminal deportation area, one commonly hears of cases involving people, particularly from Vietnam, who have come to Australia as refugees, as minors in earlier years, who have then got themselves caught up in serious criminal activity and in respect of whom deportation orders have been signed following section 501 orders or decisions. In my mind, that certainly does enliven the question as to whether Australia is in breach of its obligations, because there has been no change in country situation in Vietnam in terms of the refugee convention.
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> … I cannot give you a settled, learned opinion as to whether Australia is in breach of its obligations. My gut reaction is that Australia may well be, but then other considerations may come into play such as the effluxion of time and the cessation provisions under the convention.[52]

9.49 The committee notes that whether the expulsion from Australia is executed under sections 189, 201 or 501, the facts of an individual case may engage Australia's international legal obligation not to return a person to a country where there is risk of breaching the non-refoulement obligation under the CSR, CAT or ICCPR. The issue is whether there is adequate procedural safeguard to ensure that Australia does not act inconsistently with those requirements. Australia's protection obligation towards refugees raises a particular set of cases where vigilance is required to prevent refoulement.

The Commonwealth's increased use of section 501

9.50 The committee notes recent media reports about the extent to which section 501 has been used to deport long term Australian residents with criminal convictions. In November 2005, it was reported that since 2000-01, some 293 people have been removed under this section, while only 18 people have been deported under the section 201, criminal deportation provisions.[53] Media reports indicate that some of these people have lived in Australia since infancy and have never turned their mind to or simply been unaware that technically they were not citizens. It follows that their family life, work and community ties are Australian – for all practical purposes they are Australian.

9.51 There have been a number High Court cases concerned with the deportation of British nationals.[54] In *Shaw* the High Court held that British migrants who had arrived in Australia after 1949 are 'aliens' unless they become citizens and, although the person in that case had lived in Australia since the age of 2, he could be deported to his birthplace.[55] The ruling in *Shaw* overturned the 'protection against deportation

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52 *Committee Hansard*, 28 September 2005, p. 11.

53 Meaghan Shaw, Get out: almost 3000 given their marching orders from Australia, *Age*, 25 November 2005, p. 2.

54 *Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72; Re Patterson; Ex parte Taylor (2001) 207 CLR 391.

55 Prince P., *Deporting British Settlers,* Research Note No.33, 2003-04, Parliamentary Library, 10 February 2004, p. 1.

conferred on long term British settlers conferred by the High Court in Taylor (2001)'.[56] In *Taylor*, the majority held that 'such people were 'non-removable non-citizens'.[57] These cases raise what some witnesses have described as the constitutionally entrenched 'alien-citizen dichotomy', which underlies an general lack of sense of responsibility toward the rights and humanitarian needs of non-nationals.[58] In a settler country with high levels of migration the potential reach of section 501 is considerable. There are, for example, some 355,000 British born migrants in Australia who have not become citizens.[59]

9.52 Recent Federal Court cases involving the use of section 501 have drawn rare judicial comment.[60] Most notable is the recent case of *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs,*[61] in which Moore and Gyles JJ expressed concern about the inappropriate use of section 501:

> 'This is yet another disturbing application of s[ection] 501 of the Migration Act … [which] suggests that administration of this aspect of the Act may have lost its way'.[62]

9.53 The majority in *Nystrom* noted the need for change:

> … it is timely for there to be a review by the Minister of the proper approach to matters such as this. That would be very likely to yield a different result in this case. In our opinion, it is difficult to envisage the bona fide use of s 501 to cancel the permanent absorbed person visa of a person of over 30 years of age who has spent all of his life in Australia, has all of his relevant family in Australia, by reason of criminal conduct in Australia so leading to his deportation to Sweden and permanent banishment from Australia.
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> … Section 501 should not be used to circumvent the limitations in s 201. Apart from anything else, to do so is to retrospectively disadvantage permanent visa holders who happen to be non-citizens.[63]

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56 Prince P., *Deporting British Settlers,* Research Note No.33, 2003-04, Parliamentary Library, 10 February 2004, p. 1

57 Prince P., *Deporting British Settlers,* Research Note No.33, 2003-04, Parliamentary Library, 10 February 2004, p. 1.

58 See Assoc Professor Kneebone, Castan Centre for Human Rights Law, Submission, 71, p. 4.

59 See The United Kingdom born Community at http://www.immi.gov.au/statistics/infosummary/textversion/uk.htm, citing 2001 census referred to in Prince P., *Deporting British Settlers,* Research Note No.33, 2003-04, Parliamentary Library, 10 February 2004, p. 1.

60 For example, see *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121 and *Ayan v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 7 & 139.

61 [2005] FCAFC 121.

62 *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121 at para 1.

9.54 Further, the majority stated that:

> It is one thing to say that the responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies with the discretion of the responsible minister. That has little to do with the permanent banishment of an absorbed member of the Australia community with no relevant ties elsewhere. [Mr Nystrom] has indeed behaved badly, but no worse than many of his age who have also lived as members of the Australian community all their lives but who happen to be citizens. The difference is the barest of technicalities … Apart from the dire punishment of the individual involved, it presumes that Australia can export its problems elsewhere.[64]

9.55 The committee questioned DIMIA about the impact of the judgment in *Nystrom*, and the issue of 'absorbed persons' visas. DIMIA provided the following information:

> Assessment of whether someone holds an absorbed person visa is a complex legal and evidentiary task and can only be determined after a comprehensive review of a range of information relating to the individual in question. Such assessments therefore are only done where it is necessary to determine the immigration status of the person.
>
> Once a full analysis of the court decision [in *Nystrom*] had been completed, including its implications for other persons who could be in a similar situation, the department commenced a case by case review of persons whose visas had been cancelled under section 501 and who were in immigration detention to see if they were affected by the *Nystrom* decision. As a result, twelve people in immigration detention and one in prison were identified as likely holders of an absorbed person visa that was not considered in the cancellation process. Apart from the person in prison, all were released immediately the assessment had been completed. In a small number of these cases, involving very serious crimes, action has commenced to consider again whether to cancel the visa under section 501.[65]

9.56 DIMIA also advised, as a result of *Nystrom*, that:

> … an assessment has been done for persons in immigration detention as a result of visa cancellation under section 501, persons about to be transferred from prison to immigration detention as a result of visa cancellation under section 501, and non-citizens being considered for visa cancellation under section 501.[66]

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63 *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121 at paras 26 and 27.

64 *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121 at para 29.

65 Answers to questions on notice, 5 December 2005, p. 1.

66 Answers to questions on notice, 2 December 2005, p. 2.

9.57 The impact of the Commonwealth's use of section 501 in individual cases is a matter of considerable concern. Some submitters argued that permanent residents who suffer from mental illness have been affected by the regime under section 501.[67] SBICLS argued that '(a) person who has become an Australian permanent resident as a juvenile and become part of the Australian community should not be subject to cancellation under s[ection] 501 on character grounds'; rather, the 10-year rule in section 201 should apply.[68]

9.58 Mr Julian Burnside QC also highlighted some of the specific problems with section 501:

> … some people have come here, not as refugees, to take up permanent residency but do not bother to apply for citizenship, and there are many illustrations of this problem. But the general shape of it is that people come here, sometimes as infants. They live here without becoming Australian citizens and get into trouble in their 20s or 30s. They are then deported to the streets of Croatia or goodness knows where, without any support, any of the language of the country they are sent to and without any real prospect of surviving, except at the lowest imaginable level. That seems to be infinitely unjust. As one judge in a case of this sort mentioned: 'This person's offences may be unfortunate, but on any view they are the product of his upbringing in Australia. To throw him out of the country into a place where he will be a complete alien seems unjustifiable.' It is not as though we have such a burgeoning criminal class in Australia that we have to clear out the rubbish to make room for more. Every society will have a few people who misbehave; you should not throw them out just because you can.[69]

9.59 Mr Burnside continued:

> I would take a different approach, if you have someone who has committed high-level criminal offences and has only lived in Australia for, say, the last 10 years of their adult life. But, if they have been here from infancy or childhood, to send them back by themselves to a country where they have no connections but for it being their place of birth is plainly unjust. I know of one case where a guy is living on the streets of Zagreb, I think. He speaks nothing but Australian, he has no contacts, none of the support agencies is able to help him and he is living from hand to mouth on the streets. We sent him back because he committed a low-level offence in Australia, after living here for 25 years. His wife and children are still here. It is not something we can be proud of.[70]

9.60 Mr Burnside suggested a possible alternative approach which might help overcome some of the current problems with section 501:

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67 For example, see LACNSW, *Submission 166*, p. 23.

68 SBICLS, *Submission 200*, p. 5.

69 *Committee Hansard*, 27 September 2005, pp 51-52.

70 *Committee Hansard*, 27 September 2005, p. 52.

> In principle - I have not thought this through - you start with the fact that there is ministerial discretion to cancel a person's residency or visa where they have been convicted of an offence that carries a sentence of 12 months or more. There ought to be guidelines for the exercise of that discretion to introduce considerations of fairness and humanitarian concern that would look to the consequences, both for the family here and for the person's future wherever they are sent, in order to restrict the discretion.[71]

9.61 However, in Mr Burnside's opinion, the ministerial discretion device should be used with caution:

> Unbounded discretions, wherever they appear in the act, have certainly been useful in recent times because the act otherwise allows such harsh outcomes, but they are not a long-term solution. The discretions I think need to be bounded or guided by considerations of fairness and compassion.[72]

9.62 In evidence, the Migration Institute of Australia also raised concerns about section 501 and offered a possible alternative approach:

> Section 501 and the ministerial directions, which is a policy document that says how section 501 is to the administered, tend to leave aside that a person can have a period of years where they have reformed whatever bad behaviour there was and that some of the bad behaviour might have even been innocent. But it is a situation where perhaps the term 'a spent conviction' should be used. It is a fundamental part of the process of law that a conviction after 10 years - in this state anyway - is considered to be a spent conviction. If that is the way our community operates why could that not be included in section 501 so that somebody who has reformed is a public or community benefit, and we go back to section 4. If somebody has reformed and they have paid their debt to society, whatever that particular debt is, they should be treated like any of the rest of us, and in that sense it should be written into section 501 that there should be some community benefit recognition. Perhaps the best way of doing it is simply to write in words about the acceptability of a spent conviction. There may be other ways of doing it but when we put submissions forward about section 501 we refer to spent convictions as a community norm, but it is not enshrined in the Act.[73]

Commonwealth Ombudsman's own-motion investigation

9.63 The committee notes that the Commonwealth Ombudsman is currently undertaking an own-motion investigation into the issue of criminal deportation under section 501 of the Migration Act. The Ombudsman provided the committee with some background into the investigation:

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71 *Committee Hansard*, 27 September 2005, p. 52.

72 *Committee Hansard*, 27 September 2005, p. 52.

73 *Committee Hansard*, 28 September 2005, p. 75.

> Independent of the Federal Court decision on Nystrom, I decided to commence an own-motion investigation into the issue of criminal deportation. There is a draft report which has been completed and is currently sitting on my desk which I hope will be going to the department within the next week or two. The reason we commenced the own-motion investigation is because we had received a number of complaints from people who were in detention. The general picture is that these are people who were Australian residents. Some of them came to Australia many years ago, while some came as young people. Some were even unaware that they were not Australian citizens, because they had simply grown up in Australia. Then a decision was made by the minister under section 501 of the Migration Act that, after conviction of an offence, a person failed the good character test in that section and should be removed from Australia.[74]

9.64 The Commonwealth Ombudsman highlighted the complex issues arising from the implementation of section 501:

> The complaints to our office have, again, illustrated the complexity and sensitivity of the different issues that arise. As I have indicated, sometimes these are people who really have grown up in Australia. Most of them are people who have completed the term of imprisonment for the offence committed in Australia and their removal to another country raises distinct issues. Often they are people with close family and other connections. Sometimes the country to which their citizenship belongs is a country that no longer exists or they may be a country that the person has never visited and in which they are not proficient in the language or culture. Sometimes that results in the person being in detention for quite a long period in Australia while these issues are addressed, reviewed and so on. Indeed, some of the people within this group come within our two-year detention review. Because of the range of issues we decided that it was an appropriate topic for an own-motion investigation. I should add that there is one major restriction - the Ombudsman has no jurisdiction to investigate decisions of the minister. But, nevertheless, we have been able to investigate the general picture. Again, I will not foreshadow what the recommendations are, because the draft is on my desk and I may well vary it, and, under our act, it has to go to the department for comment before we make any adverse public comment.[75]

9.65 The Commonwealth Ombudsman also clarified that 'the focus of the s[ection] 501 own motion investigation is limited to the visa cancellation of long-term Australian residents who had been in Australia since childhood'.[76] The Ombudsman also advised that:

> '(a)s at the commencement of the own motion investigation, the office was dealing with seven complaints into the visa cancellation of long-term

74 *Committee Hansard*, 7 October 2005, p. 64.

75 *Committee Hansard*, 7 October 2005, p. 64.

76 Answers to questions on notice, 24 October 2005, p. 2.

> Australian residents. These people had spent their formative years in Australia and were in detention pending removal'.[77]

9.66 The committee was subsequently advised that the Ombudsman aims 'to complete to the bulk of the investigations in 2005-06'. However, 'this timeframe may change due to matters beyond the control of this office as the investigations proceed, for example, due to the unforeseen complexity of some matters or the availability of information from DIMIA'.[78]

Government response

9.67 In response to suggestions that visa cancellation amounts to 'double jeopardy', DIMIA stated its view that:

> Visa cancellation and consequent removal of a non-citizen is not an additional punishment for the commission of a criminal offence by a non-citizen – it is an administrative decision taken by Australia pursuant to its sovereign right to decide the circumstances in which a non-citizen is permitted to enter and remain within its jurisdiction, with the power to do so clearly enacted by the Parliament.[79]

9.68 Further, DIMIA explained that:

> Although a substantial criminal record is a trigger for considering the exercise of the power, the test for visa cancellation considers the totality of a non-citizen's circumstances. These include the length of the sentence and the seriousness of the crime, in the context of the protection of the Australian community, and also include a range of other factors such as the best interests of any children, and the extent of their ties to the Australian community. These matters are covered in *Ministerial Direction No. 21 – Visa Refusal and Cancellation* under section 501.
>
> A decision to cancel a visa under s501 is not taken lightly, and all relevant information is taken into account.[80]

9.69 DIMIA also pointed out that the Joint Standing Committee on Migration, in its 1998 report on *Deportation of Non-Citizen Criminals*,[81] accepted that removal of non-citizens following the commission of a criminal offence is not a second punishment.[82] As noted above, the committee understands that technically that is the case. The issue is whether section 501 is being used to avoid the justifiable limitations

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77 Answers to questions on notice, 24 October 2005, p. 2.

78 Answers to questions on notice, 15 December 2005, p. 2.

79 Answers to questions on notice, 5 December 2005, p. 93.

80 Answers to questions on notice, 5 December 2005, p. 93.

81 Joint Standing Committee on Migration, *Deportation of Non-Citizen Criminals*, June 1998.

82 Answers to questions on notice, 5 December 2005, p. 93.

enshrined in section 201 – that is, long term Australian residents should not be exposed to the risk of deportation.

9.70 Responding to criticisms by several witnesses that section 501 is being used in this way, DIMIA argued that, in its view, section 201 has been effectively superseded by section 501:

> Section 501 achieved its current form in 1999, when Parliament approved amendments to strengthen the provisions relating to character and conduct. In his Second Reading Speech, the then Minister indicated that the amendments were designed "to ensure that persons who are found to be of character concern can be removed". Therefore, unlike the deportation power, the exercise of the character power is not subject to restrictions based on a non-citizen's length of residence in Australia, and the section does not specify any period of residence after which a noncitizen falls outside its scope.[83]

9.71 Further:

> As above, section 501 applies to all non-citizens, including those who are permanent residents of Australia. It does not specify any period of residence after which a noncitizen falls outside its scope. Thus, a resident's visa may be cancelled if it is found that they fail the character test. However, a decision to cancel a visa is not made lightly and is only made following a detailed assessment against the considerations set out in the Ministerial Direction.[84]

9.72 The Ministerial Direction does not require consideration of the length of residency but does include consideration of the following factors:

- the extent of disruption to family, business or other ties to Australia that visa cancellation would cause;
- whether a genuine marriage (including de facto or interdependent relationship) with an Australian citizen exists;
- the degree of hardship that would be caused to immediate family members lawfully resident in Australia; and
- the purpose and intended duration of the non-citizen's stay in Australia (including any relevant compassionate circumstances).[85]

9.73 DIMIA also stated that:

> Links with the probable receiving country, including the non-citizen's proficiency in their language and culture, are not factors referred to in the current Ministerial Direction. However, language and cultural barriers are

83 Answers to questions on notice, 5 December 2005, p. 94.

84 Answers to questions on notice, 5 December 2005, p. 94.

85 Answers to questions on notice, 5 December 2005, p. 95.

> factors to be considered in respect of any children, in the context of the best interests of the child, which is a primary consideration.[86]

9.74 Where a visa has been cancelled under section 501, non-citizens who are in Australia have rights of appeal: to the AAT (in cases of delegate's decisions) or the Federal Court of Australia (for both ministerial and delegate's decisions). DIMIA also noted that, in some cases, appeals can lead to extended periods of immigration detention, along with additional factors such as difficulties establishing identity and obtaining travel documentation.[87]

9.75 DIMIA provided the following data on the number of permanent residents who have been detained under section 501 in the past three years:

- 2002-03 - 106
- 2003-04 - 26
- 2004-05 - 49[88]

9.76 The number of permanent residents who have been deported after their visas were cancelled under section 501 for the past three years is:

- 2002-03 - 115
- 2003-04 - 44
- 2004-05 - 74

9.77 DIMIA defended its position as follows:

> Departmental policy requires that, before returning a person to another country, officers are to consider if the person has special needs which require support upon their arrival. For example, if a person has special medical needs, the Department may arrange for the person to be met by medical staff or referred to a medical facility upon their arrival. If a person is destitute then the Department may provide them with a small allowance that will allow the person to obtain accommodation, purchase food and arrange travel back to their preferred destination within the country.
>
> Many people who are removed from Australia arrange to be met by family or friends in the country to which they are being returned. Where a person is to be returned to a country where they have not resided for a long time, they will usually be encouraged to contact any family or friends in that country. They will also often be encouraged to discuss their return with their consulate.[89]

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86 Answers to questions on notice, 5 December 2005, p. 95.

87 Answers to questions on notice, 5 December 2005, p. 95.

88 Answers to questions on notice, 11 November 2005, p. 63.

89 Answers to questions on notice, 5 December 2005, p. 97.

9.78 However, DIMIA admitted that:

> There have been instances where intended support arrangements are not properly effected or break down following the person's return.[90]

9.79 In this context, DIMIA also advised the committee that it is currently developing a new Case Management Framework to provide a nationally consistent service delivery approach for 'holistically managing clients', particularly those who are vulnerable or have complex circumstances. Arrangements will involve departmental case managers who work with the community and other service providers, as well as with DIMIA's overseas missions, to ensure that, as far as practicable, clients with identified special needs are appropriately supported upon removal from Australia.[91]

Committee View

9.80 The committee is mindful of the serious issues raised by the increased use of deportation under section 501. The deportation of a long term Australian resident on character grounds because of a criminal conviction engages significant questions about the development of public policy. The committee is concerned by the apparent disregard for the welfare of Australian residents. As noted above, there is no evidence in the parliamentary record that amendments to section 501 were intended to supersede the criminal deportation provisions, and the committee rejects the proposition that section 201 repealed. To accept the proposition would be in effect to bypass the role of the Parliament in the debate and passage of laws which affect the fundamental rights and interests of Australians

9.81 As such, the committee does not accept the argument that amendments to section 501 implicity supersede the criminal deportation provisions. The abolition of a significant safeguard against deportation of people who are, in all practical senses, Australian is a matter of serious public policy. Section 201 is the current Australian law in relation to criminal deportation of permanent residents and the abolition of the ten year rule, if it is to occur, must be repealed by the Parliament not by administrative practice.

9.82 In addition to *Nystrom*, the committee notes several other high profile cases involving long-term Australian residents who have been deported to countries to which they have little or no connection. The recent cases of Mr Gerard Coleman and Mr Robert Jovicic illustrate the problem.[92]

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90 Answers to questions on notice, 5 December 2005, p. 97.

91 Answers to questions on notice, 5 December 2005, p. 97.

92 See further: 'Terminally ill migrant sues over 'wrongful' detention', *ABC News Online* at http://www.abc.net.au/news/newsitems/200510/s1485243.htm (accessed 19 October 2005); 'Sister's plea for stateless brother', *Sydney Morning Herald*, 24 November 2005; 'Deportee's only home a snowy road', *Sydney Morning Herald*, 25 November 2005.

9.83 There is also likely to be significant expenditure of public funds involved in the deportation of a long term Australian resident in these circumstances that warrants careful investigation.[93] The committee understand that the Commonwealth is appealing the decision in *Nystrom*, as well as decisions in other cases and the cost of this litigation alone should raise public concern.

9.84 While the Committee accepts that DIMIA is reviewing the section 501 deportation processes, this does not address the fundamental issue: the use of section 501 to achieve a policy objective for which it was never intended. The report of the Commonwealth Ombudsman's investigation will provide important insight into the administration of section 501. The committee recommends that it revisit the operation of section 501 in light of that report to ensure the fullest possible examination of the issue.

Recommendation 58

9.85 That the committee further review the operation of section 501 and the report of the Commonwealth Ombudsman investigation into the administration of the cancellation of visas on character grounds. Further, the committee recommends that, as per the Ombudsman's recommendations, the use of Section 501 to cancel permanent residency should not be applied to people who arrived as minors and have stayed for more than ten years.

Failure to monitor after removal or deportation

9.86 As the committee has previously noted, Australia, as a sovereign nation, has the right to determine who is allowed to enter and remain in the country and, when appropriate, remove them.[94] However, when Australia exercises these rights there are no formal processes in place for monitoring returnees. International conventions do not consider the issue of monitoring; rather the basic notion is that persons at risk will not be 'refouled', and therefore those who are returned are deemed not to be at risk.[95]

9.87 However, concerns about the removal of persons who have unsuccessfully claimed refugee status in Australia have prompted the call for the monitoring of removal cases. The committee received evidence arguing that the obligation not to 'refoule' implicitly requires Australia to monitor persons who are removed or deported after their return to another country.

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93 See, for example, 'Court ruling opens door for deportation payouts', *ABC News Online* at http://www.abc.net.au/news/newsitems/200510/s1474824.htm (accessed 5 October 2005).

94 Senate Legal and Constitutional References Committee, *A Sanctuary under Review, An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p. 329.

95 Senate Legal and Constitutional References Committee, ibid p. 330.

The committee's earlier conclusions

9.88 In *A Sanctuary under Review*, the committee expressed the view that an area where monitoring may prove especially useful is in those cases where an individual may not have been subject to persecution on Refugee Convention grounds prior to 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.[96]

9.89 The committee also noted that 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.[97] The committee considered that the most effective and efficient way of ensuring that Australia's 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 Minister's discretionary power under section 417 of the Migration Act, is in place for those in genuine need of protection.[98]

9.90 The committee was conscious of the many concerns raised in submissions and evidence about the fate of returnees and the inadequacy of the present refugee determination system to provide categorical assurance that genuine asylum seekers are not returned to face persecution, death or torture. The committee also understood the dilemma facing the Commonwealth Government, both diplomatically and economically, in devising a system that tests whether Australia meets its international *'non-refoulement'* obligations.[99]

9.91 In conclusion, the committee was of the view 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 expressed the view that the Commonwealth Government should take every opportunity to raise human rights obligations in its dealings with foreign governments and at the UN.[100]

9.92 The committee recommended that the Commonwealth 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.[101]

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96 Senate Legal and Constitutional References Committee, ibid p. 337.

97 Senate Legal and Constitutional References Committee, ibid p. 337.

98 Senate Legal and Constitutional References Committee, ibid p. 342.

99 Senate Legal and Constitutional References Committee, ibid p. 342.

100 Senate Legal and Constitutional References Committee, ibid p. 343.

101 Senate Legal and Constitutional References Committee, ibid p. 343.

9.93 In the Government Response to the committee's report, the Commonwealth Government dismissed the committee's recommendation. It stated that:

> DIM[I]A is in continuous contact, directly or through DFAT or other agencies, with the UNHCR and NGOs in order to gain up-to-date information on the human right situation and the treatment of returnees in relevant countries … A system which monitors individual returnees is considered to be impractical and possibly counter-productive. Where it is assessed as part of the protection determination process that there is no real chance of persecution of the applicant on return, Australia is not responsible for the future wellbeing of that person in their home land merely because at some stage they spent time in Australia.[102]

Concerns raised in the current inquiry

9.94 Similar concerns to those presented to the committee in its 2000 inquiry were again raised by submissions and witnesses in the course of the current inquiry. Some of these arguments are set out below.

9.95 The Refugee Advocacy Service of South Australia (RASSA), was highly critical of the actions of DIMIA in relation to removal of detainees from Australia:

> A person may for instance have had their claim for refugee status rejected, even thought they would still face danger in being returned to their country of origin, on the basis that the danger does not occur for a [Refugee Convention] reason. In our view section 198 of the *Migration Act* should at least be amended so that a person cannot be removed to a situation of danger of death or torture to them, or where their removal would trigger death or torture of a family member.[103]

9.96 The Coalition for the Protection of Asylum Seekers (CPOAS) submitted that the Commonwealth 'has deported asylum seekers to countries of origin or third countries whose governments have not demonstrated their willingness and ability to offer effective protection'.[104] CPOAS also expressed concern about the removal of asylum seekers whose claims have been rejected but who are in need of protection for other humanitarian reasons, and the removal of asylum seekers to a third country where there is a possibility of forced deportation to their home country.[105]

9.97 CPOAS recommended that the Commonwealth should monitor the outcomes of deportation to ensure that where humanitarian concerns arise, including the serious violation of human rights, disappearance, or death of a person removed from

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102 *Government Response to the Senate Legal and Constitutional References Committee Report: 'A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes'*, February 2001, response to Recommendation 11.1.

103 Refugee Advocacy Service of South Australia, *Submission 51*, p. 10.

104 Coalition for the Protection of Asylum Seekers, *Submission 174*, p. 2.

105 Coalition for the Protection of Asylum Seekers, *Submission 174*, p. 2.

Australia. This information should inform the Commonwealth Government's decisions relating to deportation.[106]

9.98 The ASRC also argued that Australia has obligations to undertake a monitoring role after removal:

> Appropriate procedures should be set in place to check that returnees have reached their destination safely, and to ensure that there is no risk of persecution. This monitoring process may be used not only to ensure the safety of the repatriated individual, but also as a mechanism to evaluate whether the Australian immigration system has undertaken thorough and accurate assessments of the protection needs of asylum seekers. HREOC has explained that 'Australia must be confident that its processes are effective and its determination accurate. The only way to be sure of this is to follow up those returned in order to document whether their claims to be at risk prove unfounded as predicted'.[107]

9.99 In her submission, Ms Frederika Steen argued that:

> Given the reliance placed in refugee determination on this and additional information about conditions in the country, DFAT should be given the task of monitoring the return of all deportees and be required to report on their safety after return for at least a year. If deportation to countries like Iran and Afghanistan is Government policy, Australia has a civilised country's responsibility to confirm that the former detainees who were refused refugee or humanitarian status are safe from persecution. Ethnic communities in Australia from those source countries are closely and anxiously watching and evaluating Government credibility in dealings with their former country.[108]

9.100 Amnesty International Australia maintained its view expressed previously to the Senate Select Committee on Ministerial Discretion in Migration Matters in 2004 that there should be:

> … a requirement for select returnees to be monitored, to ensure that the integrity decision making is properly tested (where, for example an assessment is made that a particular group will not face persecution in a particular country).[109]

106 Coalition for the Protection of Asylum Seekers*, Submission 174*, p. 4.

107 ASRC, *Submission 214*, p. 41.

108 Ms Frederika Steen, *Submission 224*, p. 11.

109 Amnesty International, *Submission 191*, pp 12-13.

Edmund Rice Centre's study

9.101 Many submissions and witnesses referred to the Edmund Rice Centre's study, *Deported to Danger* (the Edmund Rice Centre's study),[110] which reported on a significant number of persons who were placed into dangerous situations upon their removal from Australia.

9.102 In evidence, Sister Margaret Leavey from the Edmund Rice Centre, elaborated on the details of the Edmund Rice Centre's study:

> The original question … was: what has happened to Australia's rejected asylum seekers? This original question spanned out into five questions. The first was: has the Australian government or its agencies sent rejected asylum seekers to places of danger? 'Places of danger' means that the respondents have no proper identity papers, they are in prison, they are subject to torture, they are unable to work, they have to live in hiding, they fear persecution because of religion or ethnicity, they are in a war zone or they are subject to threats from police. The second question was: has Australia or its agencies increased the dangers to rejected asylum seekers by sending incriminating evidence about them to overseas authorities? The third question was: in managing removals, has the Australian government or its agencies encouraged asylum seekers to obtain false papers and become associated with corruption? The fourth question was: is the manner of conducting asylum seeker removals consistent with Australia's legal obligations? And the fifth question was: is the manner of conducting asylum seeker removals consistent with Australia's traditional values?[111]

9.103 Sister Leavey told the committee that the Edmund Rice Centre's study revealed that 'Australia has deported people to danger, it has increased the dangers to asylum seekers by sending incriminating evidence and it or its agencies have become involved with false papers and corruption'.[112]

9.104 In an answer to a question on notice, the Edmund Rice Centre advised the committee that, for the purposes of its research, it interviewed 40 people in 11 different countries, of 13 different nationalities:

> [T]hey did not know each other, and yet their claims were remarkably similar. Of the 40 interviews only 5 were safe.
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> We also contacted another 10 people whose situation was so dire and dangerous that to include them in our reports would increase the risks to their safety. Whilst their inclusion would have given us a stronger report, we were not prepared to take the risk to their lives.[113]

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110 Edmund Rice Centre for Justice & Community Education, *Deported to Danger*, *A Study of Australia's Treatment of 40 Rejected Asylum Seekers*, September 2004.

111 *Committee Hansard*, 28 September 2005, p. 48.

112 *Committee Hansard*, 28 September 2005, p. 48.

113 Answers to questions on notice, 28 October 2005, pp 1-2.

9.105 Sister Mary Britt from the Edmund Rice Centre pointed to evidence indicating that the lives of returnees can be changed irreparably after removal or deportation:

> We have met people whose lives are in ruins after deportation. But, as some of them said in interviews about other aspects of their experience, Australia does not care. The issue of refoulement came up during the 2000 Senate inquiry, which recommended that a system of informal monitoring of the results of deportation be established to test whether we were in fact meeting our obligations to people seeking our protection. The principle of non-refoulement, which safeguards asylum seekers against being returned to the situation from which they fled, is part of customary international law, and it binds all states, even those who have not signed the conventions which Australia has signed and ratified. The disturbing question of refoulement is again raised by our research. Has Australia been engaged in refoulement in breach of international law? We believe, at least with regard to the 40 people we interviewed, that the government has a case to answer in relation to that principle.[114]

9.106 The Law Society of South Australia was extremely critical of such removals:

> The circumstances of the persons included in the [Edmund Rice Centre's] study together with the fact that some were subsequently granted protection by other developed countries constitutes an embarrassment and a serious blight on Australia's human rights record. The study shows that the current system is clearly failing and Australia is not meeting its obligation of non-refoulement in some cases. Our view is that the removal of even just one person who is placed into a situation where they are at risk of a serious human rights violation is unacceptable. The consequences of administrative error in this area are potentially tragic.[115]

Government response to the Edmund Rice Centre's study

9.107 In a detailed explanation to the committee, DIMIA rejected the findings in the Edmund Rice Centre's study, as well as the Edmund Rice Centre's evidence presented to the committee in this inquiry:

> The evidence provided to the Committee by the Edmund Rice Centre (ERC) is based on its earlier published report "Deported to Danger". This evidence makes a number of assertions which are not substantiated. The report seeks to identify what it considers to be returns from Australia to dangerous or unsafe situations, but does not clearly acknowledge that the broad concepts of danger or safety it uses do not correlate with international obligations to provide protection. Nor does it indicate why the authors

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114 *Committee Hansard*, 28 September 2005, p. 51.

See also

115 Law Society of South Australia, *Submission 110*, p. 13. See also

Refugee Advocacy Service of South Australia, *Submission 51,* p. 9

Social Issues Executive Anglican Diocese Sydney, *Submission 155*, p. 2

> believe that general disadvantage or hardship experienced by a person after return to their homeland, which are broadly similar to those experienced by many people in these countries, are Australia's responsibility.[116]

9.108 DIMIA also asserted that:

> People in many countries can face generalised dangers, hardships and uncertainty. This does not mean that Australia has obligations to them under the specific terms of the Refugees Convention or other international instruments. Generalised considerations of danger, hardships and uncertainty do not equate to the criteria for grant of a protection visa which are set out in legislation and which must be applied by departmental and Tribunal decision-makers. The fact that an individual may experience some hardship on return does not automatically establish any entitlement to obtain residence in any country of choice.[117]

9.109 DIMIA questioned the objectivity of the findings in the Edmund Rice Centre's study:

> The ERC report does not appear to test the assertions in the report. It relies heavily on the self assessment by individuals themselves to indicate the existence of danger without assessment of whether subjective views have any objectively legitimate basis. Importantly, the report does not disclose the identity of the persons cited as case studies and the ERC has not separately passed this information to the Department. This seriously limits any prospect of exploring the claims in the report and accordingly substantially diminishes any value the report might have as a resource to the Department for identifying any aspects of processing which might be improved. To the extent that there is sufficient information in the report to enable some exploration, the Department has found nothing to substantiate assertions that such people have been removed in breach of any international obligations owed by Australia.[118]

9.110 DIMIA emphasised the point that 'Australia does not return anybody who is found to be a refugee and asylum seekers are not returned if they have a real chance of facing persecution'.[119] The committee notes that the test referred to is that which applies to a refugee status determination under the Refugee Convention, and not the tests which apply under the CAT or ICCPR.

9.111 DIMIA also explained that returnees are not monitored since 'monitoring, by its very nature, would be intrusive and could draw unwelcome attention to the individuals concerned and to those with whom they associate'.[120] Moreover, '(i)t is not

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116 Answers to questions on notice, 5 December 2005, p. 91.

117 Answers to questions on notice, 5 December 2005, p. 91.

118 Answers to questions on notice, 5 December 2005, p. 91.

119 Answers to questions on notice, 5 December 2005, p. 91.

120 Answers to questions on notice, 5 December 2005, p. 92.

general international practice for countries returning failed asylum seekers to their country of origin to monitor those individuals'.[121]

9.112 DIMIA also advised the committee that:

> A thorough internal investigation of two cases that the Department could identify has also not revealed any misconduct or criminal behaviour by Departmental staff. The Department has been looking at the ERC's final document which was released in November 2004. DIMIA officers met with the ERC on Monday, 23 May 2005 and again on Thursday 8 September 2005 to seek further information, which might enable the investigation of any residual matters not covered in the first investigation.
>
> The Department is waiting for information promised by the ERC of contact details of further witnesses.[122]

9.113 The Edmund Rice Centre vigorously defended the findings in its report and was highly critical of the Commonwealth Government's reaction to it. The Edmund Rice Centre informed the committee that:

> … DIMIA staff have apologized to the Edmund Rice Centre on two different occasions over the Minister's response to the *Deported To Danger* Report. They had travelled to Sydney to deliver this apology. This was after the Minister had claimed – incorrectly – in the Senate that the Edmund Rice Centre had not cooperated with the Department. This was after the Centre sent the Minister both the interim and final reports prior to any publication on our web-site and before their presentation in Geneva. Also after the Minister wrote a critical letter to The Australian claiming that the evidence presented in our reports was 'rumour and innuendo masquerading as fact' the Edmund Rice Centre was visited in Sydney by DIMIA staff to apologise for the Minister's claims stating that she had been 'poorly advised' and that the Department had evidence of our meetings in Sydney, Canberra and Geneva. When I asked if we could have that apology on the public record I was informed – in the presence of a witness – 'You have got to be joking'.[123]

9.114 The Edmund Rice Centre emphasised that its study was put through the Ethics Committee of the Australian Catholic University and was overseen by some of Australia's leading barristers and lawyers. Further:

> The Edmund Rice Centre unequivocally and in the strongest terms remains adamant that Australia is refouling refugees as the evidence suggests, and as the cases coming into our office each week continue to suggest.[124]

9.115 The Edmund Rice Centre staunchly maintained the veracity of its findings:

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121 Answers to questions on notice, 5 December 2005, p. 92.

122 Answers to questions on notice, 5 December 2005, p. 92.

123 Answers to questions on notice, 28 October 2005, p. 1.

124 Answers to questions on notice, 28 October 2005, p. 2.

> The Australian Government does not know what happens to people removed or deported from Australia. It does not do the work that we have done. It is therefore not in a position to assert that the findings of the Reports are not valid. We have the evidence that suggests that serious risks are being taken with the lives of people removed from this country. Australia must do better than this.[125]

9.116 Moreover, as Sister Mary Britt from the Edmund Rice Centre told the committee:

> Last year - it may have been earlier - Minister Ruddock publicly said, 'What happens to people after they have left Australia is not our concern.' It is my concern and it is the concern of thousands of Australians because it has to do with the way we have treated these people.[126]

Committee view

9.117 The committee reiterates its views in *A Sanctuary under Review* in relation to the monitoring of returnees, particularly noting that some form of monitoring of returnees may be the only way in which Australia can be certain that its refugee determination processes are correctly identifying genuine refugees and humanitarian cases. The committee again acknowledges concerns about the fate of returnees and the inadequacy of the present migration system to implement Australia's international obligations under Refugee Convention, CAT and ICCPR. On the other hand, it must also be accepted that there are practical impediments to the Commonwealth implementing a system that formally monitors returnees after they have left Australia.

9.118 The committee strongly supports the findings and recommendations of the Senate Foreign Affairs, Defence and Trade Committee's inquiry into the circumstances of Ms Vivian Solon. Most importantly, this committee agrees that in many cases Australia has a moral obligation to protect the welfare of removed or deported persons, even where there may not be a strict legal obligation to do so. Significantly, the FADTC recommended that DIMIA should review its removal processes to ensure that formal and proper procedures are in place for the reception of people being removed from Australia who have welfare and health needs. It also emphasised the importance of clarifying exactly where responsibility for a removed or deported person formally ends. This committee repeats that recommendation.

Recommendation 59

9.119 The committee recommends that, in order to comply with its 'non-refoulement' obligations and to ensure the welfare of persons removed or deported from Australia, the Commonwealth continue to enhance the scope of its informal representations to foreign governments, encourage monitoring by

125 Answers to questions on notice, 28 October 2005, p. 2.

126 *Committee Hansard*, 28 September 2005, p. 56.

Australian overseas missions, and continue to develop strong relationships with local and overseas-based human rights organisations.

Recommendation 60

9.120 The committee recommends that the Commonwealth Government review and clarify its removal and deportation processes to ensure that formal and proper procedures for welfare protection are in place for the reception of persons being removed or deported from Australia.