

Dear Senators and secretariat

I read the exchange with Senator Joyce and Mr McMillan and Mr Comrie and he seems to be labouring under the delusion that people who overstay their visas or enter without a visa are criminals who have broken the law.

If you read the transcript below and then study the Al Kateb case you will find that is not the case and has not been since 1992. Essentially the government and opposition joined together in 1992 and passed laws to strip all offences and penalty provisions from the migration act and added detention without charge or trial.

Perhaps Andrew Metcalfe in this exchange says it best of all.

Sorry Senator Joyce and co. there is no point trying to turn innocent people into criminals when the law of the land clearly states they have committed no offence.

What they have done is breach a condition of a visa by staying too long or working one hour a week too many, or working to eat. These are not chargeable crimes.

The offence provisions being written out are explained by Jenny Bedlington because they breach the refugee convention which was incorporated into the act at the same time and came into effect in 1994.

What has happened is that Australia has spent upwards of \$2-3 billion locking up people they legislated to lock up for doing nothing illegal and then pretending they are criminals.

What is criminal of course is locking innocent men, women and children into conditions so harsh they are being punished for not breaking the law at all, they are tear gassed on a whim, water cannoned, beaten with batons and locked into isolation cells for days.

Senator Joyce seems to have missed the point that at least 50% of Australians speak another language and 20% of them are mentally ill at some point. They are not under the purview of the DIMIA as they are not immigrants but citizens or residents.

What is criminal is using the birth certificate of a new born baby saying his parents are Afghan citizens and using it to claim he is the baby son of someone else from a different country.

What is illegal is making phoney travel documents and marking them "unable to sign" when they are able to sign but simply don't know the documents are being made or asked for.

See Bakhtiyari, who is well able to sign his own name, he signed for the Afghan passports the children have after all. He signed his own application forms and Australian visa which the committee have.

220 people in illegal detention is pretty terrible really, imagine if other countries locked up 220 Australians who had a legal right to be there?

Thank you

Marilyn

30 It is important to emphasise that the client did not escape from custody. It would have been an offence for him to have done so: see 197A of the Act. He was released from detention pursuant to a court order. Neither was he committing or proposing to commit an offence simply because he was taking steps to avoid being detained. As Gummow J indicated in Al-Kateb at [86] ff, the current Migration Act, unlike its precursors,\*\*\*\*\* does not make it an offence for an unlawful non-citizen to enter or to be within Australia in contravention of, or in evasion of, the Act.

31 Further, as Hayne J observed in Al-Kateb at [207]-[208] the description of a person's immigration status as "unlawful" serves as no more than a reference to a non-citizen not having a "valid permission to enter and remain in Australia". The use of the term "unlawful" does not as such refer to a breach of a law.\*\*\*\*\*

From Hamdan v DIMIA of 2004

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Ms Bedlington—Yes.

CHAIR—That concludes questions in output 1.2.

Proceedings suspended from 1:00 p.m. to 2:09 p.m.

Output 1.3 - Enforcement of immigration law

Senator McKIERNAN—I have some questions about a media release by a parliamentary

colleague from my state, Senator Ross Lightfoot, which was issued on 10 January. There are

allegations contained in the press statement that, 'Despite his strong support for the introduc-tion

of a limited three-year visa, Senator Lightfoot has variously described the illegal arrivals

as queuejumpers, criminals and law breakers.' Could you respond in turn to each of those al-legations

of queuejumping, criminals and law breaking?

Mr Farmer—Which one would you like to start with?

Senator McKIERNAN—Queuejumping.

Mr Farmer—As you know, the minister has made the point a number of times that we

have an offshore humanitarian program to which the government is strongly committed and

that people who arrive illegally are in effect taking the places that would otherwise be used

for offshore places; that is, places for people assessed, for example, by UNHCR as being in

need of urgent protection. So, yes, the minister has used the word

'queuejumpers' and I be-lieve

that is an accurate assessment of the effect of what illegal arrivals are doing.

Senator McKIERNAN—There are two left: criminals and law breakers. Do you want me

to nominate?

Mr Metcalfe—If I were asked to define 'law breaker' and 'criminal' I would regard those

terms as being synonymous. It is of course the fact that it is a requirement under the Migration

Act that persons arriving in Australia who are not Australian citizens hold

the appropriate visa. If a person arrives without a visa, they are liable to be taken into immigration detention.

There is no penalty as such associated with unlawful arrival. The sanction is detention pending resolution of any claims to stay or removal. I imagine some people would regard that as being a breach of the Migration Act.

Senator McKIERNAN—That probably deals with the law breaking element of it. What about the criminal element?

Mr Metcalfe—As I said at the outset, I think many people could regard law breaking and criminality as synonymous.

Senator McKIERNAN—I am now asking you, as deputy secretary of the department, for your definition of criminal activity. Are these people criminals because they come in and do not have the correct documentation? Is that a criminal offence within the Australian law?

Mr Metcalfe—As I said, for an individual to come into Australia there is no offence in the sense that there is the capacity to prosecute, detain or imprison, or fine the person for that act, unless they are involved somehow in organising the unlawful entry to Australia of others. As you know, there are very significant penalties associated with organised illegal entry, but for an individual who arrives without authority it is a breach of the Migration Act in that there is a requirement that they hold a visa.

Senator McKIERNAN—So they are a law breaker, but are they a criminal?

Mr Metcalfe—To me, 'law breaker' and 'criminal' may be exchangeable terms. I do not know whether there is a technical description of a criminal as opposed to a law breaker.

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Senator McKIERNAN—But you would have legal people within the department who would know the difference between the committing of a misdemeanour, the committing of a minor offence and the committing of an offence within Australian law. If you are going to say that the breaching of Australia's borders should be considered a criminal offence, we can pursue that. As you said earlier, there are no charges laid against any people who come in in the manner that we are talking about here, under this category of enforcement of migration law.

Mr Metcalfe—I certainly do not want to be unhelpful, but how Senator Lightfoot may have chosen to express a particular thing may have been interpreted differently by different people. He used the word 'criminal'; he did not use the words 'committing a criminal offence'.

I am obviously aware of the distinction between criminal offences and minor offences, misdemeanours, however described. I am simply offering a possible explanation, but I think

everyone would have to judge the words based upon their understanding of what those words are. You probably need to look at the dictionary to see whether there is a particular term of art or a distinction between law breaker and criminal. Senator McKIERNAN—There probably is. If an individual coming in and seeking the protection of Australia had been guilty of serious criminal offences and the persons judging their application for protection in Australia became aware of those criminal offences, would the record of having committed such a criminal offence have any weight or any bearing on whether or not the protection visa would be offered to the person? Ms Bedlington—It can be taken into account in two ways, Senator. The convention itself has exclusion clauses that enable a government to determine that they do not owe protection obligations to a refugee if they have, for example, committed a serious crime. That is article 33.2 which states that the benefits of protection 'cannot be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'. There is also an article 1(f) that applies for such things as war crimes. So there are two ways in which we can come to a view that we do not owe a person protection obligations in the convention. Then one of the criteria for grant of a protection visa is a character criterion. If they do not meet that criterion, they can also be re-fused a protection visa.

Senator McKIERNAN—Thank you for that explanation, Ms Bedlington. That is helpful.

Why does the department not accept the advice offered in this statement from Senator Light-foot to return the immigrants to their last port of embarkation?

Mr Farmer—I do not have the benefit of Senator Lightfoot's remarks in front of me. Is he basically saying people who are refused protection visas?

Senator McKIERNAN—No.

Mr Farmer—Or people beforehand?

Senator McKIERNAN—In the next sentence it says, 'He makes it clear that he,' being Lightfoot, 'would prefer to see the immigrants returned to their last port of embarkation.'

Mr Farmer—The government has made it clear that it will take very seriously its protection obligations and its responsibility to weigh up whether any individual engages the obligations.

Senator McKIERNAN—Senator Lightfoot responds to the claims that Australia has international obligations to give safe haven to refugees by saying, 'We simply cannot become

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the refuge for all of the world's troubled, dispossessed or religious

zealots who see Australia  
as a natural haven.'

Senator Vanstone—Presumably, he is not inspired by the sonnet at the base of  
the Statue

of Liberty, written, I might remind you, by a female of the species:  
Give me your tired, your poor, your huddled masses, yearning to breathe  
free.

The wretched refuse of your teeming shore, send these, the tempest-tossed,  
to me.

I lift my lamp beside the gold door.

Mind you, I am not sure the United States is lifting its lamp too boldly by  
the golden door any

more either. I found that sonnet quite inspirational myself.

Senator McKIERNAN—Are Australia's international obligations providing a  
refuge for

the world's troubled dispossessed or religious zealots? Is that the aim of  
our international ob-ligations?

Ms Bedlington—As a signatory of the refugees convention, our obligations are  
to not re-foule

a refugee who is in the country and seeks our protection. There are, of  
course, many

millions of refugees elsewhere in the world. As part of our contribution to  
the system of inter-national

protection, we make available places in the humanitarian program for  
resettlement,

but that is a voluntary contribution, if you like, as opposed to an  
obligation under the refugees

convention.

Senator McKIERNAN—But is it not possible to screen these people to make sure  
that the

religious zealots are not allowed in, to satisfy Senator Lightfoot?

Mr Farmer—Do you mean extreme Anglicans or what?

Senator McKIERNAN—He has not explained that to me. I do not think there were  
too

many Anglicans on the recent boats.

Mr Farmer—We have just let in the new Dean of Ballarat. I have met him. He  
seemed

pretty good. I am just not sure what question you are asking us, Senator.

Senator McKIERNAN—Senator Lightfoot is very concerned about this matter and  
he has

been on the airwaves. I do not like trying to quote people from the airwaves  
on their com-ments,

but I have with me a media statement which has been released by Senator  
Lightfoot,

who talks about Australia becoming a haven for religious zealots and it is  
concerning him. I

am concerned that he is concerned, and I wonder why the department cannot  
screen these

refugees to ensure that these religious zealots are screened out of the  
process. Why is the de-partment

letting them in?

CHAIR—I am concerned that we are all concerned, but I am not exactly sure  
how it is

pertains to estimates, I would venture to say, Senator McKiernan.

Senator McKIERNAN—We are dealing with 1.3, which is enforcement of  
immigration

law.

Mr Farmer—I think one answer to your question is that we have  
responsibilities and then

criteria against which we try to implement those responsibilities. That  
would mean that we

allow people to visit Australia or to come here to live permanently or on a temporary basis and we have criteria. I might be wrong, but I do not think that religious zealotry features in the criteria. The government has made it clear that, as part of Australian multiculturalism, we acknowledge religious freedom but, secondly, have an expectation that people of various backgrounds will come to Australia and participate in our society in a peaceful, harmonious and tolerant way.

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typically Indonesian fishermen and the passengers are others - they are Afghans or Iraqis -

and separating out the one from the other is not very difficult.

Senator COONEY—But who is going to do it?

Mr Farmer—On a practical basis, the authorities that work on this do it quite easily and

have done it quite a lot over the last few months.

Mr Metcalfe—Before we leave this subject, I might just provide some amplification

around the evidence I gave in relation to the requirements of the refugee convention and a

person who themselves is a refugee but who was involved in the organising of illegal entry. I

draw your attention to article 31 of the convention, which says:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refu-gees

who, coming directly from a territory where their life or freedom was threatened in the sense of

Article 1, enter or are present in their territory without authorization, provided they present themselves

without delay to the authorities and show good cause for their illegal entry or presence.

Senator COONEY—I suppose if they are Indonesians who are bringing them down they

are probably people hired to form the crew rather than the plotters and planners of the

scheme. I do not know, but that would seem to -

Mr Farmer—Yes, that is it.

Senator COONEY—I suppose the others are back in wherever they are.

Mr Metcalfe—It is certainly fair to say that the principal organisers are not the crew and

they are not in Australia.

Senator COONEY—I suppose as far as the Iraqis and the Afghans go - and it is a point

that is made again and again - if we have sanctions on Iraq and the Talibans in Afghanistan, it

is a bit hard to say that there is not likely to be a lot of refugees from those places. We might

have a talk about it again in May, if that is all right.

Mr Metcalfe—I will look forward to that.

CHAIR—We have a great deal to talk about in May.

Senator McKIERNAN—I do not want to spend a great deal of time on the trip to Indone-sia.

I understand things are still at a preliminary stage, but it would be a useful opportunity for

the committee to be given a short briefing on what was achieved.

Mr Farmer—The Minister for Foreign Affairs went to Indonesia on, I believe,

24 January.

During his visit, President Wahid said that he would welcome a visit to Indonesia by Mr Rud-dock to pursue discussions on the question of cooperation against people smuggling. Mr Rud-dock responded very quickly to that expression of interest, and the Indonesians welcomed the visit by him. He went there at the beginning of last week to meet his counterpart, Professor Mahendra, who is the Minister for Law and Legislation and includes in his portfolio the Im-migration Service. The minister met with senior officials from the Immigration Service and from the police. I accompanied the minister and I called on the Army Assistant for Intelli-gence, Rear Admiral Just Menko. It was really a visit of about 24 hours to Indonesia. The principal point of discussion in this area was agreement by the ministers on the desirability of a framework agreement between Indonesia and Australia on cooperation against people traf-ficking. The minister has agreed that officials should begin work on that framework agree-ment quickly. I think that is a very significant outcome from the visit, and we will begin that quite soon. Another area of note was the advice from Indonesian Minister Mahendra of a number of instances where Indonesian officials had taken action against illegals. The minister