ADDITIONAL COMMENTS BY THE AUSTRALIAN DEMOCRATS

Introduction

1.1 I support the thrust of the main Committee report, which clearly highlights the seriously flawed nature of this legislation. As the Committee noted, it is difficult to get precise information about what the processes and protections will be for asylum seekers being held in Nauru, Manus Island or anywhere else outside Australia's legal jurisdiction.

1.2 It should be noted that, even if more precise information about procedures was available, there is still no way to legally ensure that such procedures would be carried out fairly or even competently. Major changes could be made by governments in the future regardless of what policy guarantees are put forward now, as these operate completely outside of Australian law.

1.3 In looking at what may occur if offshore processing of asylum seekers expands, as is proposed in this legislation, it is worth putting on the record in more detail what has occurred under the existing legislative regime.

Difficulty of access and visiting Nauru

1.4 As far as I am aware, I am the only Senator to have visited Nauru and met with many of the asylum seekers who were stuck there. I visited Nauru three times on my own initiative in July 2003, January 2004 and May 2005.[1]

1.5 I thank the Nauruan government for issuing me with a visa to do so and in general for helping on these visits. However, many advocates and lawyers who wanted to go to Nauru specifically to assist the asylum seekers were denied a visa. This included people such as Hassan Ghulam, the President of the Hazara Ethnic Society in Australia, who would have accompanied me on one visit. Well known moderate human rights lawyer, Fr Frank Brennan, was also refused entry, as was Julian Burnside QC, even though he was acting as lawyer on behalf of clients in Nauru at the time.

1.6 It is somewhat incongruous that the Australian Parliament is voting on whether or not to allow asylum seekers to be taken against their will to a place such as Nauru, when virtually none of them have been to the place to assess what the conditions are like.

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1 Brief reports on these visits can be found at: http://www.andrewbartlett.com/issuesrefugeesnaurujuly03.htm, http://www.andrewbartlett.com/issuesrefugeesnaurujan04.htm and http://www.andrewbartlett.com/issuesrefugeesnaurumay05.htm.

Refugees have been sent back

1.7 This inquiry provided evidence which makes it very reasonable to conclude that genuine refugees were sent back to the country they had fled as a direct consequence of the lack of protections in the offshore processing regime operating from Nauru.

1.8 This fact alone should be sufficient to merit the total rejection of this legislation, which seeks to put more people in the same dangerous situation. There can be no more serious breach of the Refugee Convention and other human rights laws, (let alone basic human compassion and decency), than to send refugees back to a country where they are at genuine risk.

1.9 The evidence presented by Ms Marion Lê[2] and Assoc Prof Mary Crock[3] show quite clearly the very strong likelihood that many genuine refugees, including unaccompanied children, were in effect sent back by Australia.

1.10 Ms Lê is uniquely placed to assess the adequacy and consequences of the processing of asylum claims of people on Nauru, having acted for 282 people. She and her staff read the case files of all of these people and wrote numerous submissions highlighting flaws in decision making and appeals for reconsideration of the cases. She only received permission to visit Nauru and assist the asylum seekers at the end of 2003, more than two years after the asylum seekers first arrived, by which time many had been persuaded to return home.

1.11 The assessment Ms Lê provided to the Committee was as follows:

> There is also reason to think that the kind and volume of errors and flaws we found wrongly filed in the 282 cases we dealt with would have been found in a significant proportion of the earlier negative decisions which resulted in some 482 asylum seekers being persuaded to return 'voluntarily' to their country of origin.
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> **In fact, on a number of the files I examined of persons rejected in May 2004 we found wrongly filed crucial documents, photos and letters belonging to people who had 'given-up' and returned 'voluntarily.' This appears to indicate that the processing of some of those people who were removed was also fatally flawed.**
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> I am therefore extremely concerned that a significant proportion of those who returned 'voluntarily' after being pressured to do so, were genuine refugees. I have spoken to several Afghans by phone who fled again to Pakistan and Iran from Afghanistan after their return from Nauru and their situations are distressing.
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> **We are, as a Nation, guilty of refoulement.**[4] (emphasis in original)

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2 *Submissions 115 and 115A.*

3 *Submission 66* and *Committee Hansard*, 6 June 2006, pp. 16-21.

1.12 This assessment was backed by evidence from Assoc Prof Mary Crock, who has been specifically researching asylum seeker children, in particular unaccompanied children. Her evidence clearly showed that children processed through Nauru were far more likely to be sent back to their country of origin than those processed in Australia.

> I can tell you that I have studied the children who made it to Australia. According to government statistics there were about 290 between 1999 and 2003. I have also had a look at and managed to interview and speak with some of the unaccompanied minors who were sent to Nauru. I can tell you that the experiences and outcomes for those two groups were dramatically different. According to the statistics that I received in January this year from the International Organisation for Migration, which finally gave me statistics after three years, 55 children—that is, individuals who were under the age of 18—who had no apparent family with them were registered coming onto Nauru. This is a global phenomenon. It is not particular to Australia. There were 55 children on Nauru. IOM's statistics also showed me that, of those 55, 32 were returned to Afghanistan in 2002 and 2003. That suggests that they were either rejected as refugees or it got to the point where they could not stand it any longer. IOM made it clear that only nine of those 32 were still children when they left. They were also at pains to tell me that they followed all the usual procedures in making sure that the child was met at the other end by a responsible adult. Not a single child in Australia was returned. There is your difference. It is day and night.[5]

1.13 The federal government and the Department of Immigration make repeated statements suggesting that the proportion of asylum seekers found to be refugees was very similar regardless of whether they were assessed in Australia or in Nauru.

1.14 For example, DIMA's submission stated:

> For people in the Offshore Processing Centres **who chose not to voluntarily return to their homeland**, the overall refugee approval rate for the OPC caseload was 94%. In comparison, there was an 89% approval rate under Australia's onshore protection visa process for unauthorised arrivals who applied for protection visas between mid-1999 and mid-2005.[6] (emphasis added)

1.15 This statistic is grossly misleading. To start with, to leave out those who chose to 'voluntarily' return ignores the enormous pressure to return to their homeland that was placed on those whose initial asylum claims had failed. According to Elaine Smith, who corresponded with hundreds of the refugees on Nauru over many years,

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4 *Submission 115A*, p. 3. Footnotes omitted.

5 *Committee Hansard*, 6 June 2006, p. 17.

6 *Submission 118*, p. 6.

'Weekly meetings were held by Australian officials to urge people to go home. This message was given time and again.'[7]

1.16 To give just one example from correspondence she received from April 2003:

> Every time they are saying all the cases have been closed and here you people have not any future, so go back. We heard that the camp will be finished. And by force we will be send back.[8]

1.17 This is totally consistent with my own experiences on my visits to Nauru. While the International Organisation for Migration (IOM) who run the camps there will not be part of any involuntary removals, the Australian officials made it quite clear a number of times that they were capable of conducting such an action themselves.

1.18 If those who 'voluntarily' returned are counted, the percentage of claims approved drops to 70%.

1.19 In addition, as Marion Lê's submission details, DIMA's figures of people approved include the 282 people[9] who had been fully rejected by DIMA's processes but were finally able to start receiving migration agent assistance from Ms Lê from December 2003.

1.20 Attachment D of Ms Lê's submission outlines in detail how she had to use FOI to obtain the case files for all the asylum seekers, and even that process took enormous time and resources, with the final documents not being made available until 16 months after the initial applications. Upon finally accessing and examining the case files, 'a significant number of examples of flaws in the decision making process' were found, some very serious.[10]

1.21 It took almost two full years, but eventually all 282 people were accepted into Australia, the vast majority as recognised refugees, with a small number receiving humanitarian visas. It is very likely that all but perhaps a few of those people would not have had their refugee claims recognised without the work of Ms Lê and her staff, who in effect performed the role of independently reviewing the cases.

1.22 Once these cases, which were all rejected by the Australian government's formal process, are also taken out of DIMA's figures, the percentage of favourable outcomes drops down to only 52% (780 out of a total of 1509 processed).

1.23 There has been, and remains under this proposed legislation, no legal mechanism to ensure that any review can take place. The re-consideration of

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7 *Submission 53*, p. 6.

8 *Submission 53*, p. 5.

9 This figure does include the two male refugees who are still on Nauru.

10 See list of examples of 'identifiable flawed processing', *Submission 115*, Attachment A.

previously rejected Nauru cases that the government agreed to do in 2004 and 2005 occurred because of political and public pressure, not as a right at law. This is a completely inadequate way to ensure people are properly treated, particularly when they are in the extremely vulnerable and powerless situation of being an asylum seeker.

Avoiding responsibility

1.24 By forcing asylum seekers to be kept on Nauru, it has also enabled the Australian government to suggest that what happens to them there is not Australia's responsibility. While in a legal sense there is partial truth in this, it is clearly wrong and immoral to set up and resource a system of offshore processing without taking responsibility for how it operates and for its outcomes.

1.25 However, the Australian government's attitude to date has shown that they do not believe it is warranted to have any form of scrutiny as to what happens to asylum seekers on Nauru.

1.26 Experience has shown the Human Rights and Equal Opportunity Commission has felt unable to perform a role in assessing conditions on Nauru, as the following exchange with the Human Rights Commissioner, Mr Graeme Innes, during the Committee's public hearing indicates:[11]

> **Senator BARTLETT**—Is it the case under Pacific solution 1, for want of a better term, that the Commission was not permitted to visit the facilities at Nauru?
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> **Mr Innes**—The Commission asserted at that time its authority to visit those facilities, particularly as part of the *A last resort?* Inquiry conducted by my predecessor. That assertion was challenged by the department of immigration. The decision was taken that it would be difficult, in practical terms, for the commission to carry out its function without the support of the department in that regard, so the issue was not proceeded with. But the commission continues to assert that it does have authority in that regard.
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> **Senator BARTLETT**—So wasn't the practical outcome specifically that, when the comprehensive inquiry investigation was being done into children in detention, the Australian government did not provide support and that, in practical terms, the government made it impossible or inappropriate for the commission to investigate children in detention on Nauru at the time?
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> **Mr Innes**—The commission took a decision that it would not be practical for it to investigate the situation on Nauru at that time without the support of the department to do so.
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> **Senator BARTLETT**—So it was as a result of the department's view?
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> **Mr Innes**—Yes.

11 *Committee Hansard*, 26 May 2006, p. 19.

1.27 Another example worthy of note involved the Joint Parliamentary Committee on Migration, of which I am a member. In 2005 the Committee sought to visit Nauru to examine the conditions asylum seekers were kept in. The Immigration Minister, Senator Vanstone, did not support a visit, saying that 'the operations and activities of the Offshore Processing Centres managed by IOM in Nauru would not fall within the Committee's area of responsibility.'[12]

1.28 This unwillingness of the Australian government to support or facilitate visits to Nauru, even for Parliamentary Committees or the Human Rights and Equal Opportunity Commission, shows how lacking the commitment to transparency is.

Experiences of others

1.29 Given that so few people, including Parliamentarians, have visited the asylum seekers and their camps on Nauru, it is appropriate to outline a few of the submissions and other material provided to this Inquiry which detail first-hand experiences and give an indication of what the refugees experienced while being kept on Nauru for so long.

1.30 It is an unfortunate aspect of this Inquiry, as with many Senate Inquiries into related issues in recent years, that the asylum seekers themselves have had little opportunity to have their voices heard. The human impact that will occur as a direct consequence of this legislation should be considered, before Australia goes once again down the path of sending asylum seekers to be contained on Nauru. Looking at the experiences of those asylum seekers sent to Nauru since 2001 is an important part of this.

1.31 Submissions 51 from Dr Jen Harrison and 122 from Marianne van Galen both give their impressions and experiences on visits accompanying me to Nauru.

1.32 Submission 53 from Elaine Smith is also valuable in giving a voice to many of the asylum seekers. Ms Smith corresponded with over 100 detainees while they were on Nauru between 2002 and 2005. Her submission states that her aim was to support them as a friend, not as a legal adviser. However, there would be few people who did more than her to provide support and a vital connection to many isolated asylum seekers. A few of her assessments based on her experience follows:

> For them Nauru was a hot desolate prison where they were constantly told there was no hope of being accepted as refugees and they should go home.
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> …
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> Isolation on Nauru meant no contact with journalists or lawyers for years. It meant extreme heat, poor conditions and constantly being told there was no hope. People suffered mental and physical damage which went virtually untreated.

12 Letter from Senator Vanstone to Chair of the Joint Parliamentary Committee on Migration, August 2005

> …
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> Holding vulnerable people in isolation allows for the possibility of unfettered coercion and manipulation.[13]

1.33 Ms Smith's submission also contains many direct descriptions of the feelings, living conditions and experiences of the asylum seekers.

1.34 For completeness, a series of articles by senior journalist from The Age, Michael Gordon, are also worth consulting. In March 2005, Michael Gordon became the first journalist to be given complete access to the detention camp on Nauru, more than 3 and a half years after the camps were set up.

- The Forgotten, March 28, 2005;[14]
- Home is where the Broken Heart is, April 16, 2005;[15]
- Heading for breakdown on Ali's Isle, April 16, 2005;[16]
- Nauru Nine win Freedom, May 29, 2005;[17] and
- Living Hell built for two, 11 March 2006.[18]

Two refugees left in limbo

1.35 The most telling example of the consequences of Australia forcing refugees to be assessed outside any legally enforceable framework is the plight of the two men still stuck on Nauru after more than 4 and a half years – Mohammad Sagar, now aged 29, and Muhammad Faisal, aged 26. Even though they have both been found to be refugees, they have received an adverse security assessment from ASIO which they are unable to appeal or have reviewed. They are unable to even find out what the adverse security assessments are based on.

1.36 Neither I nor anyone else is able to comment on whether this ASIO assessment is justifiable. However, given the serious and fundamental flaws involved in some of the refugee assessments by DIMIA officials which, as outlined earlier in my remarks, were only uncovered years later when Marion Lê, was able to access the

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13 *Submission 53*, p. 1.

14 Currently accessible at http://www.theage.com.au/news/World/The-forgotten/2005/03/27/1111862253907.html.

15 Currently accessible at http://www.theage.com.au/news/Immigration/Faces-of-despair/2005/04/15/1113509922376.html.

16 Currently accessible at http://www.theage.com.au/news/Immigration/Naurus-forgotten-faces/2005/04/15/1113509926210.html?oneclick=true.

17 Currently accessible at http://www.theage.com.au/news/Immigration/Nauru-nine-win-freedom/2005/05/28/1117129935388.html.

18 Currently accessible at http://www.theage.com.au/news/national/living-hell-built-for-two/2006/03/10/contentSwap2.

files, it is not unreasonable to suggest that that mistakes of fact or reasoning may have been made in the ASIO assessment.

1.37 Were it not for the fact that the Australian government forced these men to Nauru, they would have been able to at least appeal the ASIO assessment through the Administrative Appeals Tribunal (AAT). Instead, while found to be refugees by Australia, they cannot come to Australia because of a security assessment they are unable to appeal or even know the contents of. It is hard to see any other country accepting them as refugees under such a situation, a fact proven by the failure of the Australian government's efforts to date in this area. Of course, being refugees, they cannot return to their country of origin.

1.38 Their future is one of indefinite and potentially permanent limbo, marooned on an isolated island remote from any meaningful support, all as a direct result of the Senate's decision to pass flawed legislation in September 2001.

Conclusion

1.39 This Inquiry has demonstrated conclusively the highly flawed nature of this legislation. Many refugees, including children, have almost certainly been returned to danger as a result of the same processes this legislation seeks to reinforce. The responsibility for this outcome lies with the Senate for passing laws in 2001 which enabled this to occur.

1.40 Not only must the Senate not make the same mistake again, it should seek to reverse the legislative changes which mean that even under current law many asylum seekers can subjected to this highly unsatisfactory situation.

Recommendation 1

1.41 Reject the legislation.

Recommendation 2

1.42 As this inquiry has clearly demonstrated the major inadequacies and dangers in processing asylum seekers offshore, the Parliament should also move to repeal the changes made to the Migration Act in 2001 which still allow offshore processing to occur, outside the protection and accountability of Australian law, and in breach of international human rights law.

Senator Andrew Bartlett

Australian Democrats