The Senate

Legal and Constitutional Legislation Committee

Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

June 2006

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ABBREVIATIONS

ALHR	Australian Lawyers for Human Rights
Bill	Migration Amendment (Designated Unauthorised Arrivals) Bill 2006
Bills Digest	S Harris Rimmer, 'Migration Amendment (Designated Unauthorised Arrivals) Bill 2006', Parliamentary Library Bills Digest No. 138, 22 May 2006
CRC	*Convention on the Rights of the Child*
Department/DIMA	Department of Immigration and Multicultural Affairs
EM	Explanatory Memorandum
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	*International Covenant on Civil and Political Rights*
IOM	International Organisation for Migration
LIV	Law Institute of Victoria
MIA	Migration Institute of Australia
Migration Act	*Migration Act 1958*
Minister	Minister for Immigration and Multicultural Affairs
NCCA	National Council of Churches in Australia
PILCH	Public Interest Law Clearing House (Vic)
PNG	Papua New Guinea
RANZCP	Royal Australian and New Zealand College of Psychiatrists
RCA	Refugee Council of Australia
Refugee Convention	1951 *Convention relating to the Status of Refugees*, as amended by the *Protocol Relating to the Status of Refugees*
RILC	Refugee and Immigration Legal Centre

RRT	Refugee Review Tribunal
UNHCR	United Nations High Commissioner for Refugees
US	United States

RECOMMENDATIONS

Recommendation 1

3.208 In light of the limited information available to the committee, the committee recommends that the Bill should not proceed.

Recommendation 2

3.209 In the event that the Bill proceeds, the committee recommends that the Bill be amended to ensure consistency with previous changes to Australia's refugee determination system including, but not limited to, government responses to the Palmer, Comrie and Commonwealth Ombudsman's reports. In particular:

- **specifying a reasonable time period in which the Minister must determine protection visa applications for asylum seekers detained in offshore processing centres;**
- **specifying that asylum seekers who are found to be refugees after being processed offshore will be resettled in Australia if resettlement in other countries is not available;**
- **applying the principle that children should only be detained as a measure of last resort;**
- **providing for asylum seekers who are detained and processed offshore with access to independent legal advice and legal representatives to assist them in making their protection visa applications, as well as access to community welfare and support organisations;**
- **providing for the Minister to grant a visa to an asylum seeker detained in offshore processing centres regardless of whether they have applied or are eligible for a visa;**
- **providing for the Minister to determine that an asylum seeker detained in offshore processing centres may reside in a place other than a detention centre (for example, community housing);**
- **providing for reports by DIMA to the Commonwealth Ombudsman or Australian Parliament on asylum seekers detained in offshore processing centres; and**
- **providing asylum seekers who are detained and processed offshore with a right to have a negative decision on their protection visa application independently reviewed on the merits.**

Recommendation 3

3.210 The committee further recommends that the review of special measures relating to the treatment and accommodation of women, children and families on Nauru currently being undertaken by the Federal Government be completed.

Recommendation 4

3.211 The committee recommends that the review currently being undertaken by the Federal Government, in relation to special measures for women, children and families on Nauru should include specific consideration of the impact of offshore processing arrangements on children.

Recommendation 5

3.212 In the event that the Bill proceeds, the committee recommends that the Bill be amended to specifically provide for independent scrutiny of offshore processing arrangements by the Commonwealth Ombudsman to ensure that offshore processing arrangements are subject to an equivalent level of independent oversight and scrutiny as onshore processing arrangements.

Recommendation 6

3.213 The committee recommends that the provision for independent scrutiny of offshore processing arrangements by the Commonwealth Ombudsman set out in Recommendation 5 should provide express authority to the Commonwealth Ombudsman for proper access to offshore processing centres located in any 'declared' countries. Given the sovereignty issues involved in any such extra-territorial activities by government officials, this may require the negotiation of appropriate government-to-government agreements.

Recommendation 7

3.214 In the event that the Bill proceeds, the committee recommends that the Bill be amended to specifically provide that the requirement in Part 8C of the *Migration Act 1958* for the Commonwealth Ombudsman to provide reports on persons held in detention for more than two years also applies in relation to all persons held in offshore processing locations.

Recommendation 8

3.215 In the event that the Bill proceeds, and prior to the Bill proceeding, the committee recommends that the Federal Government undertake a full costing in relation to the measures contained in the Bill.

Recommendation 9

3.216 In the event that the Bill proceeds, the committee recommends that the Bill be amended to include a sunset period of eighteen months for review of the Bill's operation and practical effect.

Recommendation 10

3.217 In the event that the Bill proceeds, the committee recommends that the Bill be amended by inserting an express requirement for a public and independent review of its operation and effect at the end of the sunset period referred to in Recommendation 9.

CHAPTER 1

INTRODUCTION

Background and purpose of the Bill

1.1 On 11 May 2006, the Senate referred the provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 (Bill) to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 13 June 2006.

1.2 The Bill proposes to amend the *Migration Act 1958* (Migration Act) to expand the offshore processing regime introduced in 2001, which currently applies to offshore entry persons and transitory persons. Under the Bill, the offshore processing regime will also apply to all persons arriving at mainland Australia (meaning other than at an excised offshore place) unlawfully by sea on or after 13 April 2006. The concept of 'offshore entry person' will be replaced by the concept of 'designated unauthorised arrivals'.

1.3 The Bill will also deem certain air arrivals to be entry by sea so that persons who travel most of the way to Australia by sea but travel the last leg by air, before entering (on or after 13 April 2006) and who become unlawful on entry, will be taken to have entered Australia by sea. According to the Explanatory Memorandum (EM), this is to cover situations where persons are airlifted into Australia at the end of their sea journey.[1]

1.4 The EM states that the Bill 'provides the flexibility to the Government to move a wider group of people to offshore processing centres' which is 'designed to operate as a disincentive to people who arrived on the mainland unauthorised by boat to defeat the existing excision provisions'.[2] Further, 'nearly 9,000 people arrived unauthorised by boat in the two years to June 2001 but, following the legislative changes made in 2001, less then 200 people have arrived although they have targeted areas which [are] not excised'.[3] The EM also claims that '(a)s a rule of thumb, there was a saving of around $50,000 for each person whose unauthorised arrival was avoided. The Government believes that these changes will further reduce the incentive for unauthorised boat arrivals reducing costs further'.[4]

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1 p. 2.

2 EM, p. 5.

3 EM, p. 5.

4 EM, p. 5.

Conduct of the inquiry

1.5 The committee advertised the inquiry in *The Australian* newspaper on 12 May 2006, and invited submissions by 22 May 2006. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to 117 organisations and individuals.

1.6 The committee received 136 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.7 The committee held a public hearing in Canberra on 26 May 2006 and in Sydney on 6 June 2006. A list of witnesses who appeared at the hearings is at Appendix 2 and copies of the Hansard transcripts are available through the Internet at http://aph.gov.au/hansard.

Acknowledgement

1.8 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

Note on references

1.9 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the main provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.

Background to the Bill

2.2 The Bill extends previous legislative amendments to the Migration Act made by:

- the *Migration Amendment (Excision from Migration Zone) Act 2001* (passed 26 September 2001);
- the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (passed 26 September 2001);
- the *Migration Legislation Amendment (Transitional Movement) Act 2002* (passed 4 April 2002).

2.3 The committee also notes the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 which was negatived by the Senate on 9 December 2002 and on 16 June 2003. That bill would have amended the Migration Act to extend the 'excision of the migration zone' to include islands across the north of Western Australia, Northern Territory and Queensland.[1]

2.4 The Republic of Nauru (Nauru) and Manus Island in Papua New Guinea (PNG) were designated 'declared' countries under section 198A of the Migration Act and offshore processing facilities were established on those islands on 19 September 2001 and 21 October 2001 respectively.[2]

2.5 Persons whose refugee status determinations are processed offshore are treated differently to those processed onshore in a number of different areas, including forced removal to a third country such as Nauru or PNG, and different offshore visa categories.[3]

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1 The provisions of the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 were the subject of a Senate Legal and Constitutional References Committee inquiry which tabled its report in October 2002.

2 A comprehensive background to, and discussion of, the Bill is provided in S Harris Rimmer, 'Migration Amendment (Designated Unauthorised Arrivals) Bill 2006', Parliamentary Library Bills Digest No. 138, 22 May 2006 (Bills Digest).

3 See further Bills Digest, p. 3.

Main Provisions[4]

Schedule 1 – Amendments to the Migration Act 1958

Definitions

2.6 Item 1 inserts a definition of *designated unauthorised arrival* in subsection 5(1) in Part 1 of the Migration Act which refers to new section 5F.

2.7 Item 5 amends the definition of *transitory person* by the insertion of subsection 5(1) new paragraphs (d) to (g) into the definition. The new paragraphs provide events upon which a person who has been a transitory person will cease to hold that status. A person ceases to be a transitory person if they have:

- been assessed to be a refugee;
- become the holder of a substantive visa;
- left Australia other than as result of being removed under subsection 198(1A) or taken under subsection 198A(1) from Australia to a country in respect of which a declaration is in force under subsection 198A(3); or
- left a country in respect of which a declaration is in force under subsection 198A(3), to travel to a country other than Australia.

2.8 Item 8 inserts new section 5F, which defines *designated unauthorised arrival*. The EM states that:

> The definition includes those persons who formerly came within the definition of *offshore entry person* ie a person who became an unlawful non-citizen because the person entered Australia at an *excised offshore place* after the excision time for that place (i.e. before the commencement of this Bill). Excised offshore place and excision time are defined at subsection 5(1). The definition will also cover such persons who enter at an excised offshore place after commencement of the Bill where the place is excised at time of commencement. In addition it will cover such persons who enter excised offshore places that may be prescribed after the commencement of the Bill pursuant to paragraph (e) of the definition of excised offshore place.[5]

2.9 The definition also includes persons who enter Australia at a place other than an excised offshore place by sea on or after 13 April 2006 and become an unlawful non-citizen because of that entry.

2.10 New subsection 5F(8) provides for circumstances in which a person is taken to have entered Australia by sea.

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4 The following section is taken directly from the Bills Digest.

5 p. 9.

2.11 Item 6 inserts new subsections 5(4B) and 5(4C) into existing section 5. New subsection 5(4B) provides that a person is taken not to have left Australia if they have been removed under section 198 to another country but refused entry by that country and returned to Australia as a result of that refusal.

2.12 New subsection 5(4C) provides that a person is taken not to have left a country if they have left the country to travel to one or more other countries, been refused entry by each of those other countries and returned to the first country as a result of the refusal or refusals. It also provides that a person is taken not to have left a country if they have left the country for medical treatment in another country or countries and have returned to the first country after having received medical treatment.

2.13 A *transitory person* who is taken not to have left Australia or not to have left a declared country in these circumstances will continue to come within the definition of transitory person.

Exemptions

2.14 Certain persons are excluded from the definition of designated unauthorised arrival. Paragraph 5F(1)(a) excludes a person who is an exempt person under subsection 5F(2).

2.15 New paragraph 5F(1)(c) provides that a person is not a designated unauthorised arrival if the person has, after the entry that made them a designated unauthorised arrival:

- become the holder of a substantive visa;
- left Australia other than as result of being taken under subsection 198A(1) from Australia to a country in respect of which a declaration is in force under subsection 198A(3); or
- left a country in respect of which a declaration is in force under subsection 198A(3), to travel to a country other than Australia.

2.16 New subsections 5F(10) and (11) provide certain circumstances in which a person is taken not to have left Australia or left a country, for the purposes of the definition of designated unauthorised arrival, reflecting the terms of 5(4B) and 5(4C) above.

2.17 Subsection 5F(2) sets out certain classes of person who are exempt from inclusion in the definition of designated unauthorised arrival, including New Zealand citizens, permanent residents of Norfolk Island and persons brought to Australia for *Customs Act 1901* purposes. Paragraph 5F(2)(d) exempts classes of persons declared by the Minister, under subsection 5F(3), to be exempt. Paragraph 5F(2)(e) exempts individual persons declared by the Minister, under subsection 5F(6), to be exempt.

2.18 Subsection 5F(3) also allows the Minister to declare a class of persons to be exempt under paragraph 5F(2)(d). Subsection 5F(4) provides that a class of persons

may be specified in a declaration made under subsection 5F(3) even if ascertaining the membership of the class relies on a discretion being exercised or a particular opinion being held. The EM states that a declaration might describe an exempt class as 'where an officer is satisfied the person would meet the criteria for a particular visa were they able to make a valid application' to assist in ensuring that persons not intended to be subject to the offshore processing regime are not caught.[6]

2.19 Subsection 5F(5) provides that a declaration by the Minister under subsection 5F(3), that declares a class of persons to be exempt under paragraph 5F(2)(d), is a legislative instrument.

2.20 Subsection 5F(6) provides that the Minister may, for the purposes of paragraph (2)(e), declare, in writing, a specified person to be exempt if:

- regulations made for the purposes of the subsection specify criteria that a person must satisfy before the person may be declared to be exempt under this subsection; and
- the Minister is satisfied that the person satisfies those criteria.

2.21 Subsection 5F(7) provides that a declaration by the Minister under subsection 5F(6), that declares a specified person to be exempt, is not a legislative instrument.

Entry by sea

2.22 New subsection 5F(8) sets out circumstances in which a person is taken to have entered Australia by sea, for the purposes of section 5F.

2.23 Paragraph 5F(8)(a) provides that a person enters Australia by sea if the person travels to Australia by sea and enters the migration zone (whether or not by sea). Migration zone is defined in subsection 5(1) of the Migration Act.

2.24 Paragraph 5F(8)(b) provides that a person enters Australia by sea if the person enters the migration zone by air pursuant to subsection 245F(9) as a result of being found on a ship detained under section 245F. Subsection 5F(9) provides that for the purposes of section 5F a person who enters Australia on an aircraft is taken to have entered the migration zone by air only if that aircraft lands in the migration zone.

2.25 Paragraph 5F(8)(c) provides that a person enters Australia by sea if the person enters the migration zone by air after being rescued at sea.

2.26 Paragraphs 5F(8)(b) and (c) are to ensure that persons airlifted to Australia for the last leg of their journey after having travelled by sea do not avoid becoming a designated unauthorised arrival if they would otherwise meet the definition of such a person.

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6 p. 11.

Detention is discretionary

2.27 Item 9 repeals the note after subsection 42(4) and substitutes a 'more accurate' note. The EM states that:

> Before the amendment the note stated that section 189 provides that an unlawful non-citizen in the migration zone must be detained. This did not take account of the fact that for unlawful non-citizens in the migration zone which is also an excised offshore place, detention is discretionary pursuant to subsection 189(3) of the Act.[7]

2.28 Item 17 amends subsection 189(2). Subsection 189(2) applies to persons in Australia but outside the migration zone, where an officer reasonably suspects that the person is seeking to enter the migration zone (other than at an excised offshore place) and would, if in the migration zone, be an unlawful non-citizen. Currently, subsection 189(2) requires an officer to detain such a person. This item amends subsection 189(2) to provide that an officer has a discretion whether or not to detain such a person.

2.29 According to the EM, the amendment brings the detention regime for persons seeking to enter Australia (other than at an excised offshore place) in line with the regime in place for persons seeking to enter at offshore entry places. It will provide officers with the opportunity to detain a person under this section or alternative provisions such as subsection 245F(9) of the Migration Act.[8]

2.30 Item 22 repeals and substitutes a new subsection 198A(4), in relation to the immigration detention of designated unauthorised arrivals being dealt with under section 198A(1). It replaces the reference to an offshore entry person with a reference to a designated unauthorised arrival, consequential to the change made by item 18. Item 22 also adds a provision making clear that the fact a designated unauthorised arrival is in immigration detention (whether pursuant to a mandatory or discretionary power) does not prevent an officer removing the person to a declared country under section 198A.

Visa applications

2.31 Item 10 repeals subsection 46A(1) and substitutes a new subsection which provides that an application for a visa is not valid if made by a designated unauthorised arrival who is in Australia.

2.32 As the EM explains:

> Section 46A forms part of the offshore processing regime for designated unauthorised arrivals. Prior to amendment, section 46A prohibited applications for visas by offshore entry persons in Australia unlawfully (unless the Minister determines that a particular person may apply for a

7 p. 13.

8 p. 15.

> particular class of visa). The concept of offshore entry person is removed from the Act by this Schedule (item 3) and replaced with the new concept of designated unauthorised arrival. The amendment made by this item provides that the bar on visa applications in section 46A applies to designated unauthorised arrivals. Such persons will be prohibited from applying for any visa while the person is in Australia, unless the Minister determines under subsection 46A(2) that the person may apply for a visa of a class specified in the determination. When such a determination is made, the Minister is required to table a statement in each House of the Parliament as set out in subsections 46A(4) and (5).[9]

Offshore processing

2.33 Item 18 amends subsection 198A(1) to replace the reference to offshore entry person with a reference to designated unauthorised arrival. This subsection is the operative provision for the policy of offshore processing. The EM states that:

> Subsection 198A(1) forms part of the offshore processing regime for designated unauthorised arrivals. It allows an officer to take such a person from Australia to a country in respect of which a declaration is in force under subsection 198A(3), for the processing of their refugee claims. In the past, persons taken to declared countries for processing of refugee claims have had these assessed either by the United Nations High Commissioner for Refugees (UNHCR) or by trained Australian officers using a process modelled closely on that used by the UNHCR. Subsection 198A(3) provides that the Minister may declare that a country:
>
> - provides access, for persons seeking asylum, to effective procedures for assessing the person's need for protection;
>
> - provides protection for persons seeking asylum pending determination of their refugee status;
>
> - provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
>
> - meets relevant human rights standards in providing that protection.
>
> This provision ensures that asylum seekers will be dealt with under the offshore processing regime in a manner that meets Australia's international obligations.[10]

Disclosure of refugee claims

2.34 Items 24 to 26 amend existing section 336F to replace references to an offshore entry person with a reference to a designated unauthorised arrival. This section allows the Secretary to authorise officers to disclose identifying information in certain circumstances. Subsection 336F(3) puts certain limitations on the Secretary's

9 pp 13-14.

10 pp 15-16.

ability to give such an authorisation. Disclosure cannot be authorised in respect of persons who have made claims to protection under the 1951 *Convention relating to the Status of Refugees*, as amended by the *Protocol Relating to the Status of Refugees* (Refugee Convention), where disclosure would be to a foreign country in respect of which the claim is made, or a body of such a country.

Reporting requirements

2.35 Item 27 inserts a new Part 8D 'Reports relating to designated unauthorised and transitory persons' plus new section 486R.

2.36 New subsection 486R(1) provides that the Secretary must, in regard to each financial year (commencing the year ending 30 June 2007), provide to the Minister a report not later than 30 September in the next financial year.

2.37 A report under section 486R must include information about: arrangements during that financial year for designated unauthorised arrivals and transitory persons seeking asylum (486R(2)). This includes arrangements for:

- assessing any claims for refugee status made by such designated unauthorised arrivals and transitory persons; and
- the accommodation, health care and education of such designated unauthorised arrivals and transitory persons; and
- the number of asylum claims, by designated unauthorised arrivals and transitory persons, that are assessed during that financial year; and
- the number of designated unauthorised arrivals and transitory persons determined, during that financial year, to be refugees.

2.38 The report will not cover designated unauthorised arrivals and transitory persons who do not seek asylum.

2.39 New subsection 486R(3) provides that because of privacy considerations and provisions under the Refugee Convention concerning the identification of individual asylum seekers, a report made under section 486R must not include:

- the name of any person who is or was a designated unauthorised arrival or a transitory person; or
- any information that may identify such a person; or
- the name of any other person connected in any way with any person covered by the first point above; or
- any information that may identify that other person.

2.40 New subsection 486R(4) provides that a report made under section 486R may include any further information that the Secretary thinks is appropriate.

2.41 New subsection 486R(5) provides that the Minister must table in each House of Parliament a copy of the report provided under section 486R, within 15 sitting days

of that House after the day on which the Minister receives the report from the Secretary.

Bar on court proceedings

2.42 Items 28 to 39 make amendments to sections 494AA and 494AB in respect of prohibitions on instituting, and continuing, certain legal proceedings relating to designated unauthorised arrivals and transitory persons. The term offshore entry persons is now replaced with the concept of designated unauthorised arrivals (see items 3 and 8).

2.43 Item 40 provides that the amendments made by items 28 to 39 apply to the institution of proceedings on or after the day on which item 40 commences. It also provides that these amendments apply to the continuation, after the day on which item 40 commences, of proceedings instituted on or after 13 April 2006 but before the commencement of item 40.

Transitional cases

2.44 Item 41 makes provision for transitional cases affected by the amendments made by this Schedule. Subitem 41(1) provides that a visa application made in certain circumstances is taken, on and after commencement of the item, not to be a valid application for a visa. The circumstances are where a person:

- entered the migration zone (other than at an excised offshore place) during the relevant period;
- made an application for a visa during the relevant period;
- was not granted the visa during the relevant period; and
- is covered by the definition of a designated unauthorised arrival on the commencement on section 5F of the Migration Act (inserted by item 8) because of the entry to the migration zone.

2.45 The relevant period is defined at subitem 40(2) as the period starting on 13 April 2006 and ending immediately before the commencement of this item. The EM states that:

> Persons entering unlawfully by sea at a place other than an excised offshore place on or after 13 April 2006 and before commencement will be able to make visa applications until they become subject to the new regime on commencement. Consistent with the Government's decision that such persons should be subject to the offshore processing regime, any application that has not resulted in the grant of a visa will be rendered invalid on commencement of the Bill. This will include cases where a primary decision has been made to refuse the grant of a visa, and the decision is subject to merits review. It will also include cases where a refusal decision has been upheld on merits review, and the matter is subject

> to judicial review. In all such cases, any visa application will be rendered invalid because no visa has been granted before commencement.[11]

2.46 Item 42 is a saving provision, consequential to the amendments made by items 7 and 24 to 26. Those items repeal references to an offshore entry person in paragraphs 5A(3)(j)(ii) and 336F(5)(c) and subparagraphs 336F(3)(a)(ii) and (4)(a)(ii), and substitute references to designated unauthorised arrival. Item 42 provides that any references to offshore entry person in an instrument of authorisation made under section 336D or 336F are taken to be references to designated unauthorised arrivals. It also provides that such an instrument is taken to authorise access to, and disclosure of, identifying information in respect of a designated unauthorised arrival to the extent that it would have authorised access to, or disclosure of, identifying information in relation to an offshore entry person. This ensures such instruments will continue to have effect as intended, on and after commencement of the Bill.

Compensation for acquisition of property

2.47 Item 43 provides for the payment by the Commonwealth of a 'reasonable amount' of compensation if the operation of the Bill would result in an acquisition of property otherwise than on just terms.

2.48 If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in a court of competent jurisdiction for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines (subitem 43(2)).

2.49 Subitem 43(3) provides that the Consolidated Revenue Fund is appropriated for the purposes of this item.

Regulations

2.50 Item 44 provides a power for the Governor-General to make regulations under the Bill, prescribing matters required or permitted to be prescribed by the Bill; or necessary or convenient for carrying out or giving effect to the Bill (subitem 44(1)) or regulations for matters of a consequential or transitional nature (subitem 44(2)).

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11 p. 23.

CHAPTER 3

KEY ISSUES

3.1 With the exception of the Department of Immigration and Multicultural Affairs (Department), all of the 136 submissions and witnesses appearing before the committee expressed complete opposition to the Bill; the view was that the Bill should be withdrawn in its entirety. Most submissions and witnesses raised similar issues and concerns. Criticisms of the Bill fell into three broad categories, namely:

- that the Bill represents flawed domestic policy in a number of key areas;
- that the Bill breaches Australia's obligations under international law, particularly under the Refugee Convention of 1951; and
- that the Bill represents deficient foreign policy, in terms of a perceived attempt to appease Indonesia over the situation in West Papua.

3.2 This chapter considers the main issues and concerns raised in the course of the committee's inquiry.

Domestic issues

3.3 Many submissions and witnesses pointed to a range of domestic policy issues with respect to the Bill's proposed operation and its likely effect. Some of these issues are discussed below.

Inconsistency with recent positive changes to Australia's migration system

3.4 Some submissions and witnesses argued that the Bill runs counter to the positive changes which the Federal Government is currently implementing to satisfy accepted recommendations made by recent inquiries, such as the Palmer, Comrie and Commonwealth Ombudsman inquiries.[1]

3.5 Key reforms were made under the *Migration and Ombudsman Legislation Amendment Act 2005* and the *Migration Amendment (Detention Arrangements) Act 2005* to ensure certain protections for asylum seekers being held in immigration detention. In particular, these focused on:

- specifying a reasonable time period (that is, 90 days) in which the Minister for Immigration and Multicultural Affairs (Minister) must determine protection visa applications for asylum seekers detained in offshore processing centres;

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1 For example, see Refugee Council of Australia, *Submission 9*, p. 11, Australian Catholic Migrant & Refugee Office, *Submission 18*, p. 2. See further Mick Palmer AO APM, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, July 2005; Neil Comrie AO APM, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, September 2005; Commonwealth Ombudsman, *Administration of s 501 of the Migration Act 1958 as it applies to long-term residents*, February 2006.

- applying the principle that children should only be detained as a measure of last resort;
- providing for asylum seekers to access independent legal advice and legal representatives to assist them in making their protection visa applications;
- providing for the Minister to grant a visa to an asylum seeker detained in offshore processing centres regardless of whether they have applied or are eligible for a visa;
- providing for the Minister to determine that an asylum seeker detained in offshore processing centres may reside in a place other than a detention centre (for example, community housing);
- providing for reports by the Department to the Commonwealth Ombudsman or Australian Parliament on asylum seekers detained in offshore processing centres; and
- providing asylum seekers with a right to have a negative decision on their protection visa application reviewed by an independent tribunal, such as the Refugee Review Tribunal or court.[2]

3.6 The Law Institute of Victoria (LIV) acknowledged 'the strong efforts made by the Department … to improve its processes, operations and image in the wake of the wrongful deportation of Australian citizen, Ms Vivien Alvarez Solon and the wrongful detention of Australian permanent resident, Ms Cornelia Rau'.[3]

3.7 Evidence to the inquiry argued that much of this progress will be undone. The Refugee Council of Australia (RCA) submitted that the Bill 'reflects an indefensible double standard in relation to detention' since '(u)nauthorised asylum seekers will no longer be detained in Australia and under Australian law'.[4] That is:

> As a matter of principle it renders meaningless much of the constructive reform introduced in response to the cultural problems in DIMA, identified in the Palmer and Comrie Reports and noted in successive reports by the Commonwealth Ombudsman, insofar as the significantly improved detention standards being put in place in Australia will not apply to Nauru.[5]

3.8 A Just Australia expressed a similar view. In evidence, Ms Kate Gauthier acknowledged the efforts of the Department:

> We have been really pleasantly surprised by the steps that they have taken. They are working closely and proactively with welfare agencies and going above and beyond their requirements under the new legislation…'[6]

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2 See Law Institute of Victoria, *Submission 90*, p. 4.

3 *Submission 90*, p. 5.

4 *Submission 9*, p. 6.

5 *Submission 9*, p. 6.

6 *Committee Hansard*, 6 June 2006, p. 14.

3.9 However, in this context, she felt it all the more surprising that the current proposal was put forward. A Just Australia's submission explained further that:

> While much has been made by the Government of the reforms introduced to satisfy recommendations made by the Palmer Inquiry, unauthorised asylum seekers will simply no longer be detained in Australia and under Australian law. This in itself gives rise to questions as to detention standards as well as the length and accountability of detention and renders much of the reforms meaningless.[7]

3.10 The National Council of Churches in Australia (NCCA) also argued that key reforms proposed by the Federal Government would not be achievable under the Bill:

> The positive reforms and strict accountability measures proposed for the Australian detention system by the 2005 Palmer Inquiry and accepted by the Australian Government will not be achievable on Nauru. The Palmer Inquiry expressed concern about the exercise of exceptional power, without adequate training and oversight, and with no genuine quality assurance or constraints on those powers.[8]

3.11 In particular, the NCCA pointed out the following significant findings of the Palmer inquiry which, it contended, would no longer be attainable under the measures contained in the Bill:

> the need for adequate mental and other health care for asylum seekers; the benefits of a case management model; the need for quick processing of asylum applications and support for adequate external oversight and professional review of standards and arrangements, including one focusing specifically on health matters to strengthen the existing roles of the Immigration Detention Advisory Group (IDAG) and the Commonwealth Ombudsman. The delivery of such proposed standards for Australian detention centres are most unlikely to be achieved on Nauru.[9]

3.12 The following sections of the committee's report expand on these central concerns.

Incompatibility with the rule of law

3.13 Much of the evidence received by the committee centred on arguments that the Bill undermines the rule of law and, in so doing, denies natural justice to unauthorised boat arrivals. The absence of independent merits and judicial review mechanisms in the Bill was raised as a concern since overview by the Refugee Review

7 *Submission 81*, p. 8.

8 *Submission 89*, p. 5.

9 *Submission 89*, p. 5.

Tribunal (RRT) and the courts is considered to be particularly crucial in promoting accountability within the Department.[10]

3.14 Mr Brian Walters SC from Liberty Victoria explained the importance of the principle of the rule of law in a broad context:

> Where power is being exercised, I do not think we should ever assume that it is always being exercised in good faith. That is why we have the rule of law, because experience has shown that when people have power they will abuse it. Of course we make no specific allegations against anybody, but that principle applies. That principle is critical in assessing appropriate legislation because by having checks and balances we ensure that power is exercised according to the principles that—in this case—parliament wants it to be.[11]

3.15 In his second reading speech, the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs stated that the Bill is intended to address the 'incongruous' situation whereby an unauthorised boat arrival in an excised offshore place is subject to offshore processing arrangements, while an unauthorised boat arrival that reaches the Australian mainland is able to access onshore protection arrangements, 'with the consequential opportunities for protracted merits review and litigation processes'.[12]

3.16 However, on the contrary, many submissions and witnesses argued that the Bill's attempt to overcome this 'incongruous' distinction will, in fact, result in unequal access to independent merits and judicial review. As the Human Rights and Equal Opportunity Commission (HREOC) submitted:

> [HREOC] challenges the implication contained in the second reading speech that this Bill creates a level playing field for all asylum seekers. Rather, it creates an incongruous distinction between asylum seekers processed offshore and asylum seekers processed onshore, resulting in unequal access to independent merits review and judicial review.[13]

3.17 HREOC observed that a consequence of the Bill will be that:

> … the refugee status determination process will distinguish between asylum seekers who are processed onshore (for example, where an asylum seeker applies for [a] protection visa after lawfully arriving on another kind of

10 For example, see Human Rights Law Resource Centre, *Submission 73*, pp 9-10; Edmund Rice Centre for Justice and Community Education, *Submission 83*, pp 3-4; Federation of Community Legal Centres (Vic), *Submission 85*, p. 2; Law Society of NSW, *Submission 133*.

11 *Committee Hansard*, 26 May 2006, p. 16.

12 The Hon Andrew Robb AO MP, Second Reading Speech, *House of Representatives Hansard*, 11 May 2006, p. 8.

13 *Submission 112*, p. 4.

> visa, or the applicant holds a bridging or other visa providing lawful status) and asylum seekers arriving illegally by sea who are processed offshore.[14]

3.18 Moreover, HREOC expressed the view that 'the solution to the situation where one group of people are able to access review rights and the other group is not should be to provide both groups with access to review rights'. By merely expanding the size of the group to whom the rights are denied by discriminating on the basis of means of arrival, the inequity of the situation is further exacerbated and entrenched.[15]

3.19 Mr Walters from Liberty Victoria articulated his organisation's concerns in this regard as follows:

> Under this bill the rule of law both in Australia and in Nauru will be corrupted. Under this bill in Australia we have a situation where Australian officials will be exercising executive power on behalf of the Australian government and the Australian people but their conduct will not be reviewable in any court of law. Take, for example, a situation where someone is sitting for years in Nauru. There will be no writ of mandamus available to ensure the fulfilment of any obligations. Indeed, under this bill there are no clear processes and procedures set out for the determination of refugee claims. If an official were to exercise power capriciously or on the basis of some improper motive, there would be no way of correcting that in an Australian court. That is fundamental to the rule of law. It is … a question of whether we want to retain the rule of law in Australia.[16]

3.20 Mr Walters also made the point that '(i)t is the loss of the rule of law which so often has caused a flow of refugees in the first place'. He stated that Liberty Victoria's fundamental objection is to Australia, 'as it were, taking its legal obligations offshore in a way that is no longer reviewable under Australian courts'.[17]

3.21 Mr Walters stressed the importance of merits review in relation to asylum claims in Australia:

> I have forgotten the exact figures, but something in the order of 80 per cent of claims that have come before the Refugee Review Tribunal have been successful. That means that it is critically important for the proper vindication of people's rights. Without that merits review, there will be no check on particular decision makers and there will be no way for someone who has brought a claim which is in fact valid but has been misunderstood in some way to have that independently checked.[18]

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14 *Submission 112,* pp 4-5.

15 *Submission 112*, p. 5.

16 *Committee Hansard*, 26 May 2006, p. 12.

17 *Committee Hansard*, 26 May 2006, pp 12-13.

18 *Committee Hansard*, 26 May 2006, p. 14.

3.22 A Just Australia and HREOC also emphasised the significance of merits review. A Just Australia stated that 'evidence shows that the RRT is a necessary part of the asylum-seeking determination process. Denying this level of review means many refugees will be denied the protection they need'.[19] HREOC argued that:

> The review mechanisms for independent merits review and judicial review contained in the Australian refugee status determination process provide a vital mechanism for checking the validity of the primary decision about refugee status and reducing the risk of refoulement as a result of a wrong primary assessment.[20]

3.23 Furthermore, HREOC pointed to the 'devastating impacts of wrong decision-making at a departmental level … illustrated by the wrongful detention of Cornelia Rau and the wrongful removal of Vivian Solon' as demonstrating 'the need for transparency and accountability in the process for determining a person's status' under the Migration Act.[21] HREOC recommended that, if the Bill is passed, it should be amended to include a requirement that asylum seekers processed offshore have, at a minimum, access to independent merits review.[22]

3.24 Australian Lawyers for Human Rights (ALHR) noted the legal and procedural difference between processes related to the processing of cases offshore and onshore procedures:

> A major difference is that offshore cases have no access to independent merits review. The explanatory memorandum states that 'Australia's offshore refugee processing regime includes provisions for merits review of refugee decisions'. This is not correct. Neither the Act nor the regulations provide for any 'merits review'. The only 'review' of offshore cases in Nauru or on Manus Island that ALHR is aware of has been carried out by officers of DIMA. It is a misnomer to call a review of a DIMA decision by DIMA 'merits review'. At best it is a reassessment, but it lacks the transparency that is provided for in the independent review system of the Refugee Review Tribunal established under Part 7 of the Act.[23]

3.25 With respect to access to legal advice and assistance for unauthorised boat arrivals taken offshore, the Victorian Foundation for Survivors of Torture noted that:

> Of particular concern … is the lack of any legal representation for asylum seekers sent to Nauru with regards to the preparation of their claims. Without competent advice, people who have virtually no appreciation of the

19 *Submission 81*, p. 12.

20 *Submission 112*, p. 11.

21 *Submission 112*, p. 11.

22 *Submission 112*, p. 11.

23 *Submission 78*, pp 19-20.

> refugee determination system and the bureaucracy that surrounds it, will struggle to present their claims accurately or adequately.[24]

3.26 ALHR asserted that offshore detainees 'are denied access to any knowledge, advice, representation or even communication, which would enable legal action to be commenced or pursued in Australia on their behalf'.[25] Further, not only is legal advice and assistance unavailable offshore, the committee received evidence arguing that, in some cases, it has been actively blocked by the refusal of the Nauruan government to grant Australian lawyers with visas for Nauru.[26]

3.27 Mr Simeon Beckett from ALHR noted that his organisation had attempted to facilitate the provision of lawyers to give legal advice on Nauru after *Tampa*:[27]

> … there were a group of lawyers who wanted to provide pro bono assistance who could get themselves to Nauru. There were numerous applications made to the Nauruan mission in Melbourne and each time they were met with, effectively, no response. … Some people were able to get in, but most of the lawyers who wanted to provide advice to people—to take instructions to mount section 75(v) applications in the High Court or whatever it might be—were blocked at that stage.

3.28 Mr Beckett argued that even if the Department does not oppose such advice being given, it is still necessary to get the Nauruan government to agree to grant visas to allow the lawyers to get into the country so that advice can be provided.[28]

3.29 Associate Professor Mary Crock also addressed the committee on the need for asylum-seekers to have access to legal advice:

> … the absolute bottom line has to be access to legal advice for the people in detention and to some form of oversight of the decision-making process in terms of a real appeal system … Somebody has to be allowed in to give these people assistance.[29]

3.30 Ms Jill Vidler from the Migration Institute of Australia (MIA) indicated that she had also been rejected for a visa to Nauru.[30] Ms Vidler explained that her communications with people on Nauru had been by post, which, she argued, was unsatisfactory.[31]

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24 *Submission 117*, p. 2.

25 *Submission 78*, p. 23.

26 For example, see Australian Lawyers for Human Rights, *Submission 78*, p. 21; Mr Brian Walters SC, Liberty Victoria, *Committee Hansard*, 26 May 2006, p. 17.

27 *Committee Hansard*, 6 June 2006, p. 8.

28 *Committee Hansard*, 6 June 2006, p. 12.

29 *Committee Hansard*, 6 June 2006, p. 18.

30 *Committee Hansard*, 6 June 2006, p. 26.

31 *Committee Hansard*, 6 June 2006, p. 28.

3.31 The committee heard that gaining access to Nauru was not just a problem for lawyers and migration agents who wished to assist asylum-seekers in making claims. Reverend Elenie Poulos of Uniting Justice Australia also indicated to the committee that members of her church had previously tried to go to Nauru to provide support to asylum-seekers, but were rejected for a visa.[32]

3.32 The committee sought the assistance of the MIA to gauge the extent to which applications for visas for Australian citizens to visit Nauru were rejected. The MIA advised that one of its members was granted a visa to Nauru which was later revoked. It advised further that three of its members did not apply for visas to Nauru on the basis that others who had applied for visas had been refused; one did not apply for a visa as the relevant clients did not have funds to support the travel required (telephone contact was used instead).[33]

3.33 An official indicated that the Department had been 'very careful' in dealing with other sovereign countries not to influence the decision-making processes in terms of consideration and issuing of visas. The official advised that the implementation of the measures in the Bill may involve discussions with the Government of Nauru and, as a result, the Nauruan Government 'may then decide that their own view may change toward the question of visa issue'.[34] Further, a representative from the Department noted that it would be a matter of government policy as to whether professional advice, as is available to some asylum seekers in onshore detention centres, would be provided to asylum seekers in offshore processing centres.[35]

3.34 The committee also sought clarification from the Department of Foreign Affairs and Trade as to whether there have been any communications or agreements between the Federal Government and the Government of Nauru in relation to the grant of visas to Australian citizens who have wanted to visit Nauru. However, advice in this regard was not available as at the tabling date of the committee's report.

Lack of access to the Australian migration system

3.35 A related concern is that the Bill amounts to an effective 'self-excision' of Australia from the international protection regime for all unauthorised boat arrivals. This is because such unauthorised boat arrivals will no longer have access to the Australian system of refugee processing, with all the reviews and safeguards it entails.[36] The committee received evidence suggesting that such a fundamental shifting of responsibility for the broader human rights of asylum seekers by using a

32 *Committee Hansard*, 6 June 2006, pp. 24-25.

33 *Submission 103A*, p. 1.

34 *Committee Hansard*, 6 June 2006, p. 32.

35 *Committee Hansard*, 6 June 2006, p. 31.

36 For example, see ALHR, *Submission 78*, p. 3; Law Society of NSW, *Submission 133*; Refugee Council of Australia, *Submission 9*, p. 11.

device to 'excise' an entire country from the operation of its own migration system, is unprecedented.[37]

3.36 ALHR, amongst others, submitted that, in doing this, the Bill will result in significant damage to the international protection regime by 'undermining first country of asylum responsibilities and manipulating the principle of burden and responsibility sharing'.[38]

3.37 ALHR argued that the Bill 'reflects Australia's historical reluctance to recognise its responsibilities as a country of first asylum, even when such a role is geographically at its most appropriate'.[39] Further, ALHR submitted that the Bill will result in Australia effectively closing its sea borders and denying persons arriving by sea access to its asylum seeker determination system:

> The effect of this is that persons arriving at Australian sea borders, be they coming directly from their countries of origin, or as secondary movers, are unable to seek and obtain asylum in Australia.[40]

3.38 Mr Simeon Beckett from ALHR discussed, in the context of previous experience with offshore processing on Nauru and Manus Island, how asylum seekers would be removed from the Australian protection regime:

> Once in a third country, a person's refugee status is determined by officers who are not subject to oversight by an independent tribunal or, more importantly, by the courts. The standards applied are below those available in Australia. If past experience in Nauru and Manus Island is anything to go by, independent lawyers, journalists and doctors will be prevented from providing the detainees, and indeed the Australian public, with information about their legal status, condition and treatment. Their detention will be without a time limit, and their ultimate destination, of course, remains unknown. This compares poorly with the 90-day processing in Australia. A real question arises as to whether law-makers are willing to expand DIMA's non-reviewable powers, given the poor record of implementation in the last few years.[41]

3.39 Mr David Manne from the Refugee and Immigration Legal Centre (RILC) agreed:

> … under the proposals in the bill, people who arrive by boat in Australia and apply for refugee status would, in being taken to Nauru, be subject to a

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37 RCA, *Submission 9*, p. 5; Ms Liz Hughes, *Submission 23*, p. 1; Associate Professor Mary Crock, *Submission 66*, p. 1; Mr Neill Wright, UNHCR, *Committee Hansard*, 26 May 2006, p. 2.

38 *Submission 78*, p. 30.

39 *Submission 78*, p. 10.

40 *Submission 78*, p. 8.

41 *Committee Hansard*, 6 June 2006, p. 7.

> system of fundamental unfairness, where the fundamental, basic safeguards guaranteed under the Australian due legal processes would almost completely be denied them—that is, the very basic, fundamental prerequisites considered to be essential for fairness in decision making in Australia would be stripped from people seeking protection if they were taken to Nauru.[42]

3.40 In Mr Manne's view, this is inappropriate since Australia's primary obligation in this area is 'to ensure, and to take the utmost care to ensure, that the assessment about someone's protection needs has adequate safeguards so that we do not send someone back to a situation where they will be persecuted'.[43]

3.41 The Hon Ron Merkel QC, representing the Victorian Bar and the Public Interest Law Clearing House (Vic) (PILCH), made an analogous point in relation to access to Australia's refugee protection regime for those unauthorised boat arrivals who have been removed to a third country and are subsequently found to be refugees:

> There is simply no basis in principle for denying anyone who is seeking access to our refugee protection the culture, the legal system and the review process which has been set in place for very good reasons. So it is in that latter situation that I would say we are undermining the integrity of our system when we use our officers in an unreviewable, unaccountable way to determine what our obligations are to be.[44]

3.42 Mr Merkel continued:

> … once a person is found to be a refugee, they get access to most of what is available to other Australian citizens. But the question of repudiation arises because we are denying them access to that process. We are throwing them outside the system of our protection …
>
> What is important in this process is the recognition that this bill and the minister's declaration do not say that persons found to be refugees in offshore processing will be entitled to Australia's protection in Australia …We have not undertaken any protection obligations to any person found to be a refugee in Nauru. We have thrown them into the black hole. Where they go from Nauru and what might happen to them, whatever they are found to be in Nauru, is something that Australia has wiped its hands clean of … We are passing the buck, but to whom we do not know. That is unacceptable.[45]

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42 *Committee Hansard*, 26 May 2006, pp 26-27.

43 *Committee Hansard*, 26 May 2006, p. 32.

44 *Committee Hansard*, 26 May 2006, p. 51.

45 *Committee Hansard*, 26 May 2006, p. 51.

Detention of children

3.43 Many argued that the Bill will once more remove men, women and children to non-reviewable, indefinite detention – a backwards step in relation to Australian mandatory detention policy.[46] Of particular concern was the potential impact of the proposed measures on children.[47]

3.44 For example, Liberty Victoria argued that the Bill runs counter to changes to the Migration Act brought about the *Migration Amendment (Detention Arrangements) Act 2005* which specify that detention of children should only occur as a last resort. It maintained that the Bill will have the effect of automatically detaining children in places outside Australia, with little or no opportunity for Australia to properly monitor the conditions of that detention.[48]

3.45 ChilOut (Children Out of Detention) argued that the Bill places Australia in serious breach of many of its international obligations with respect to children. ChilOut also highlighted the serious impact of detention on the mental health of children.[49]

3.46 With specific reference to the Bill's possible impact on children, the Immigration Advice and Rights Centre pointed out that the EM:

> … provides no indication that children will be treated any differently from other [designated unauthorised arrivals], meaning that children could be detained for extensive periods in remote processing centres, without access to basic facilities such as education or health.[50]

3.47 The Victorian Foundation for Survivors of Torture noted the adverse impact of detention on families and children:

> The act of mandatory detention and loss of freedom, combined with ongoing conditions of uncertainty and isolation result in a situation that undermines the capacity for families to function as a viable supportive unit.
>
> …
>
> All the risk factors for serious deleterious effects on children prevail under conditions of detention or prolonged uncertainty, particularly for children and their families who have experienced torture and trauma in the past.[51]

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46 For example, ALHR, *Submission 78*, p. 3; ChilOut, *Submission 111*; Victorian Foundation for the Survivors of Torture, *Submission 117*, pp 4 & 5; Anglicare, *Submission 92*, p. 2; Ms Clover Moore MP, *Submission 125*, p. 1; Immigration Advice and Rights Centre, *Submission 101*; pp 4-6.

47 See, for example, Ms Kate Gauthier, A Just Australia, *Committee Hansard*, 6 June 2006, p. 14.

48 *Submission 31*, pp 2-3.

49 *Submission 111*.

50 *Submission 101*, p. 4.

51 *Submission 117*, pp 4 & 5.

3.48 Ms Angela Chan of the MIA also suggested that the broader Australian community would not tolerate children being returned to detention:

> The Australian community as a whole are pretty horrified at the images of children being held in detention, being behind razor wire. Whether they be behind razor wire or whether they be on a remote island, it is just as repugnant. It has become very offensive to many people who really did not understand a lot of what was happening in the refugee area. Then you get additional images of children who suffer mental illnesses because of the detention. We as a community cannot keep allowing the government to introduce bills every time they think we might get an influx of people.[52]

3.49 The Department advised that, in relation to women, children and families on Nauru, special measures are being reviewed in consultation with the Government of Nauru.[53] The Department advised that a team made up of officials from DIMA, the Department of Foreign Affairs and Trade, the Department of Transport and Regional Services, the Department of Finance and Administration and the Department of Prime Minister and Cabinet had visited Nauru to contemplate the options, in terms of services and facilities, that might be available for families and children.[54]

Mental health care issues

3.50 Many submissions and witnesses pointed to the high rates of mental illness among immigration detainees as a result of detention and expressed concern that offshore facilities do not have the capacity to manage mental health care effectively and appropriately.[55]

3.51 According to the Victorian Foundation for Survivors of Torture:

> Detention and failure to find a speedy and durable settlement solution will have adverse mental health effects for those who have escaped persecution and human rights abuses. Amongst the causal factors of such adverse effects are isolation from community support, the ongoing deprivation of freedom, the profound sense of injustice associated with being subjected to the deprivation of liberty in the absence of a crime being committed, the almost complete sense of powerlessness, and the pain of seeing the health and well-being of children deteriorate in detention and/or conditions of prolonged uncertainty… In this context, restricting asylum seekers who have prior experiences of trauma and torture and in particular those found to be refugees, to living on Nauru indefinitely would have deleterious

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52 *Committee Hansard*, 6 June 2006, p. 20.

53 *Submission 118A*, p. 29.

54 *Committee Hansard*, 6 June 2006, pp. 42-43.

55 For example, see Victorian Foundation for Survivors of Torture, *Submission 117*, pp 6-7; Royal Australian and New Zealand College of Psychiatrists, *Submission 128*, p. 2; Asylum Seeker Resource Centre, *Submission 65*, pp 11-12; Edmund Rice Centre for Justice and Community Education, *Submission 83*, p. 3; National Council of Churches in Australia, *Submission 89*, p. 4.

> psychological consequences whether they were held within the confines of the off shore processing centre or allowed to move freely around the island during the days as has been suggested.[56]

3.52 For example, the Royal Australian and New Zealand College of Psychiatrists (RANZCP) argued that serious problems exist in relation to mental health care in offshore locations:

> Nauru, for example, currently has major problems with mental health services and has already been subject to a Commonwealth review pointing to infrastructure problems and staffing difficulties. There are issues with ensuring access to specialist review and transfer to appropriate health facilities. In addition, it will be hard for offshore centres to provide for an emergency mental health response if this is needed. Given that Nauru has chronic difficulties in maintaining functional mental health services for its own residents, having no resident psychiatrist and experiencing an urgent need to train mental health nursing staff, the mental health needs of immigration detainees could not be met. Similar difficulties exist in Christmas Island.[57]

3.53 With specific reference to the Bill, RANZCP submitted that it 'fails to acknowledge the real health issues and responsibilities of any immigration detention system to provide adequate healthcare'. In particular:

> The Commonwealth has a duty of care to immigration detainees, as attested to by the judgement by Justice Finn in the Federal Court of Australia [in *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549], the Palmer Inquiry into the detention of Cornelia Rau, and the report by the Senate Legal and Constitutional References Committee's Inquiry into the Administration and Operation of the Migration Act 1958. To hold immigration detainees in offshore facilities incapable of providing adequate healthcare would constitute a failure of the Commonwealth's duty of care to detainees who are mentally ill.[58]

3.54 In response to questioning by the committee in relation to the mental health care of detainees in offshore locations, a representative from the Department maintained that health and mental health issues are monitored closely in offshore facilities:

> We do monitor very closely health issues and mental health issues for any of the persons on Nauru. Services are available in that area through IOM [International Organisation for Migration], who are providing and facilitating those services on Nauru.[59]

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56 *Submission 117*, pp 6-7.

57 *Submission 128*, p. 2.

58 *Submission 128*, p. 2.

59 *Committee Hansard*, 26 May 2006, p. 57.

3.55 The officer also advised that:

> We will periodically have issues and reports brought to our intention from IOM on individual cases. We will also initiate follow-up action ourselves on individual cases where we are aware of persons who may have particular issues with mental health.
>
> …
>
> We receive reports on persons on the processing centre on Nauru … Those reports will comment on the particular individual's mental state, the prognosis for the future and appropriate action. Often those individuals have experienced highly traumatised previous life circumstances and there are many factors that are contributing to their mental health condition.

3.56 He noted that:

> … the monitoring is always very much on a case-by-case basis because of individual circumstances, which are very different and often need to be handled in different ways.[60]

Independent scrutiny and reporting requirements

3.57 The committee heard evidence and received submissions concerning the need for independent scrutiny and the inadequacy of reporting requirements contained in the Bill in relation to offshore processing arrangements.[61]

Independent scrutiny

3.58 HREOC made strong arguments in support of the inclusion of specific statutory safeguards in the Bill to guard against human rights violations. Mr Graeme Innes AM told the committee that:

> The most effective safeguard to protect against the risk of human rights violations is in independent scrutiny. It is of great concern that this bill does not provide for independent scrutiny of offshore processing centres or independent review of departmental decisions about the refugee status of designated unauthorised arrivals.[62]

3.59 Further:

> [HREOC] has serious concerns that the bill will result in Australia undermining its compliance with human rights obligations owed to some of the world's most vulnerable people. By failing to provide explicit statutory

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60 *Committee Hansard*, 26 May 2006, pp 57-58.

61 See Mr Jonathon Hunyor, HREOC, *Committee Hansard*, 26 May 2006, p. 18; Ms Anna Samson, A Just Australia, *Committee Hansard*, 6 June 2006, p. 9; Associate Professor Mary Crock, *Committee Hansard*, 6 June 2006, pp 18-19; HREOC, *Submission 112*, p. 15; Amnesty International Australia, *Submission 72*, p. 7; A Just Australia, *Submission 81*, p. 8; LIV, *Submission 90*, p. 13.

62 *Committee Hansard*, 26 May 2006, p. 18.

> safeguards to ensure that offshore processing arrangements are subject to independent scrutiny, the bill does nothing to alleviate these concerns. The commission's submission recommends that this bill should not be passed. In the event that the bill is passed, the commission recommends that explicit statutory safeguards are introduced to guard against the risk of human rights violations, as outlined in this statement and in our submission.[63]

3.60 Mr Hunyor from HREOC stated that this scrutiny could be provided by HREOC or the Commonwealth Ombudsman.[64]

3.61 A representative from the Department confirmed that the Commonwealth Ombudsman's jurisdiction does extend to processing on Nauru. However, the committee notes that it would still be a matter for the Government of Nauru as to whether the Commonwealth Ombudsman would be granted a visa to travel to Nauru.[65] The Department also told the committee that the requirement in Part 8C of the Migration Act that the Commonwealth Ombudsman provide reports on persons held in detention for more than two years[66] does not apply in relation to persons held in offshore processing locations.[67]

3.62 HREOC asserted that it has the authority to visit offshore processing facilities. As Mr Innes told the committee:

> It remains the commission's view that we have the authority to monitor offshore processing centres and we would seek to do so once any legislation in this area was passed. But we have not initiated those discussions because I felt that it was difficult to do so in the context of not knowing at this point the exact content of the law which parliament had passed in this regard. We have raised concerns in our submission and in that sense we have flagged them to the government and we would seek to have that dialogue once any law was passed.[68]

3.63 Mr Hunyor explained that this view is based on HREOC's functions, as set out in the *Human Rights and Equal Opportunity Commission Act 1986*, relating to acts and practices done by or on behalf of the Commonwealth:

> To the extent that acts or practices are done by or on behalf of the Commonwealth, it is the commission's view that that is not limited to acts or practices done in the physical geographical area of Australia. It may be a question of fact as to the extent to which certain things that take place in offshore processing centres are done by or on behalf of the Commonwealth

63 *Committee Hansard*, 26 May 2006, p. 18.

64 *Committee Hansard*, 26 May 2006, p. 20. See also LIV, *Submission 90*, p. 13.

65 *Committee Hansard*, 6 June 2006, pp. 30 and 36 .

66 As inserted by the *Migration Amendment (Detention Arrangements) Act 2005*.

67 *Committee Hansard*, 6 June 2006, p. 41.

68 *Committee Hansard*, 26 May 2006, p. 22.

> and that needs to be assessed when we know the arrangements that are being made. But it is focused on those matters. We do not claim a broad remit in relation to anything that goes on in those centres but it relates to acts and practices of the Commonwealth and its agents.[69]

3.64 However in this context, the committee notes that HREOC previously sought the Department's cooperation to visit Nauru as part of HREOC's national inquiry into children in immigration detention, *A last resort?*[70] According to HREOC, the Department challenged HREOC's authority to visit Nauru as part of that inquiry and HREOC took the decision not to proceed with the visit to Nauru at that time because of the practical difficulties of conducting such a visit without the support of the Department.[71]

3.65 The committee further notes the suggestion of the Law Institute of Victoria that a parliamentary committee should be appointed to oversee the operation and effect of the Bill, and that such a committee should be required to report quarterly to Parliament.[72]

Reporting requirements

3.66 Proposed new section 486R requires the Secretary of the Department to report to the Minister each financial year on:

- arrangements for designated unauthorised arrivals, and transitory persons seeking asylum, including arrangements for: assessing any claims for refugee status made by designated unauthorised arrivals and transitory persons; and the accommodation, health care and education of designated unauthorised arrivals and transitory persons;
- the number of asylum claims, by designated unauthorised arrivals and transitory persons, that are assessed during that financial year; and
- the number of designated unauthorised arrivals and transitory persons determined, during that financial year, to be refugees.

3.67 A Just Australia noted these reporting requirements, but described them as 'unacceptable due to the fundamental lack of independence of the examination and the infrequency of the reporting requirements'.[73]

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69 *Committee Hansard*, 26 May 2006, p. 22.

70 HREOC, *A Last Resort? A National Inquiry into Children in Immigration Detention*, tabled in Parliament 13 May 2004.

71 Mr Graeme Innes AM, HREOC, *Committee Hansard*, 26 May 2006, p. 19.

72 *Submission 90*, p. 13.

73 A Just Australia, *Submission 81*, p. 8. See also LIV, *Submission 90*, p. 13; Australian Lawyers Alliance, *Submission 124*, p. 3.

3.68 Amnesty International Australia, while recognising the need for statistical data, also submitted that it was vital to have an individual case reporting system, similar to the Commonwealth Ombudsman's reporting function for all onshore long-term detainees.[74] Amnesty International accordingly argued for a system of reporting on individual cases by an independent body:

> The reports in s486R do not refer in any way to the welfare or decision to continue the detention of individual refugees or asylum seekers. Amnesty International Australia is concerned that the appropriateness and effects of long-term detention on refugees, children and asylum seekers being held in isolated places will not be reviewed or assessed by any independent body.[75]

Retrospective application of the Bill

3.69 In announcing the proposals in the Bill, the Minister indicated that the changes would apply to persons entering Australia at a place other than an excised offshore place by sea on or after 13 April 2006.[76] Consequently, the definition of 'designated unauthorised arrival', specifies that the definition applies to a person arriving after 13 April 2006.[77]

3.70 A number of submissions commented on the retrospective application of the measures in the Bill.[78] The ACT Refugee Action Committee argued that the Bill does not deal with circumstances which should remain unchanged from the time of the Minister's announcement:

> This is not a taxation measure where it is vital that people not be able to re-arrange their affairs between the announcement of a new tax and the passage of the legislation. This is a Bill that affects liberty and the whole future of those fleeing from persecution. It ought not to be made retrospective from the date of commencement to the Minister's announcement.[79]

3.71 HREOC expressed the view that a Bill which will result in the abrogation of important review rights should not apply retrospectively. HREOC recommended that in the event the Bill was passed it should not have retrospective application.[80]

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74 *Submission 72*, p. 7.

75 *Submission 72*, p. 7.

76 The Hon Senator Amanda Vanstone, Minister for Immigration and Multicultural Affairs, 'Strengthened Border Control Measures for Unauthorised Boat Arrivals', Press Release, 13 April 2006.

77 Section 5F, inserted by Item 8 of Schedule 1.

78 See Amnesty International Australia, *Submission 72*, p. 7; ALHR, *Submission 78*, p. 29; ACT Refugee Action Committee, *Submission 95*, p. 2; HREOC, *Submission 112*, p. 15.

79 *Submission 95*, p. 2. See also ALHR, *Submission* 78, p. 29.

80 *Submission 112*, p. 15. See also Amnesty International Australia, *Submission 72*, p. 7.

3.72 In response to a question on notice about the justification for the retrospective application of the Bill, the Department stated:

> The Bill is not retrospective because it will not come into effect until the day after royal assent. However, when the new legislation is enacted, the changes to the Migration Act 1958 will apply, from that enactment date, to any people who arrived by sea without authority from 13 April.[81]

3.73 The committee notes the obscurity of this response given that the Bill quite clearly has retrospective application as from 13 April 2006.

Financial implications

3.74 The EM states that there are no direct financial implications from the Bill as 'it simply provides the flexibility to the Government to move a wider group of people to offshore processing centres'. This statement appears to be based on two grounds.

3.75 Firstly, the measures in the Bill are designed as a disincentive to people who arrive unauthorised by boat on the Australian mainland. The EM states that, 'as a rule of thumb', approximately $50,000 is saved for each person whose unauthorised arrival is avoided. Secondly, the two processing centres currently on Nauru will be rationalised to reduce costs.[82]

3.76 Notwithstanding the lack of any clear evidence to support the calculated cost saving of $50,000 per person, the committee also received evidence that challenged the assertion that the Bill would have no financial implications.[83] Ms Joanna Kummrow from LIV asked the committee to consider other costs associated with the Bill:

> … we would ask the committee to consider the cost of transferring asylum seekers to offshore processing centres, the cost of resourcing those centres, including the cost for health service providers, caretakers and so on, and operating those offshore processing centres.[84]

3.77 Mr Neill Wright from the United Nations High Commissioner for Refugees (UNHCR) expressed his opinion that it would be 'very costly, very expensive, and possibly almost impossible' to provide processing facilities on a Pacific island like Nauru which would be of an equivalent standard to those in detention centres on the Australian mainland.[85]

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81 *Submission 118A*, p. 14.

82 p. 5.

83 See Mr Neill Wright, UNHCR, *Committee Hansard*, 26 May 2006, p. 6; Ms Joanna Kummrow, LIV, *Committee Hansard*, 26 May 2006, p. 36; Dr Penelope Mathew, *Committee Hansard*, 26 May 2006, p. 41; A Just Australia, *Submission* 81, p. 14; Marion Le, *Submission 115*, Attachment D, p. 1.

84 *Committee Hansard*, 26 May 2006, p. 36.

85 *Committee Hansard*, 26 May 2006, p. 6.

3.78 A Just Australia citied Federal Government estimates of approximately $195,000 per asylum-seeker housed in Nauru. This figure compared with $38,000 per person, per year, for detention in the Baxter detention centre, which A Just Australia claim is the highest mainland cost.[86] Dr Penelope Mathew suggested that there should be a full costing done for the measures in the Bill.[87]

3.79 In trying to gauge the types of additional costs associated with conducting processing of asylum-claims offshore, the committee sought an estimate from the Department of how much it would cost to medivac a person from Nauru to Cairns. The Department's response was:

> Medical evacuation from Nauru can be carried out in numerous ways depending on available transport. Nauru to Cairns in one flight would require a charter, but medical evacuation to Brisbane might occur by commercial carrier or charter. The total costs could range between $20,000 for non-charter flights and $100,000 depending on arrangements.[88]

3.80 The committee also received a submission from Ms Marion Le who has represented asylum-seekers who had been processed offshore. Her submission highlighted that, in addition to the costs of processing asylum-seekers offshore, there are additional costs to those who are representing asylum-seekers. Ms Le noted that the Department made it clear that no financial support would be available to her to assist in her work. Community groups and individuals provided assistance for airfares and other costs.[89]

3.81 In providing further evidence to the committee, the Department conceded that 'no direct financial implications' did not necessarily mean that the Bill would not have a financial impact. According to representatives from the Department, there are continuing financial implications of offshore processing, and these are factored into the budget allocation.[90]

3.82 At the Sydney hearing, departmental representatives undertook to provide the committee with a budgetary breakdown, per detainee, for the offshore processing centres. However, in its formal response to the committee's request in this regard, the Department stated that 'there is no budgetary breakdown of costs per Offshore Processing Centre resident'.[91] The committee again notes the unhelpful nature of this response.

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86 *Submission* 81, p. 14.

87 *Committee Hansard*, 26 May 2006, p. 41.

88 *Submission 118A*, p. 12.

89 *Submission 115*, Attachment D, p. 1.

90 *Committee Hansard*, 6 June 2006, p. 37.

91 *Submission 118D*, p. 1.

Extraterritorial processing versus transfer of processing to a third country

3.83 Some argued strongly that the measures contained in the Bill effectively amount to a transfer of responsibility of Australia's responsibilities in relation to processing of refugee claims to a third country, as opposed to extraterritorial processing by Australia. Some submissions and witnesses expressed the view that, even if the procedures were deemed to be a transfer of responsibilities, this would not absolve Australia from its international protection responsibilities.[92]

3.84 For some the intention in the Bill is clear. As the RCA submitted, the Bill legitimises the transfer of asylum seekers to a third party state where they will be denied the full benefits of a functioning and credible determination system. The RCA argued that this is a deflection of responsibility in relation to claims made in Australian territory.[93]

3.85 However, as some submissions and witnesses pointed out, there is uncertainty about this issue because the Bill, and accompanying material, contain little detail as to how processing of claims for asylum will be conducted in offshore processing centres. To that extent, any analysis of this issue can only relate to the likelihood that one or other of the processes would result in a breach of Australia's obligations under international law.[94]

3.86 This distinction is important because, as Mr Wright from the UNHCR stated:

> … the legal and practical concerns stemming from extraterritorial processing on the one hand, and a transfer of responsibilities on the other, differ significantly.[95]

3.87 Mr Wright provided a neat summary of the practical implications of the two distinction between extraterritorial processing and transfer of responsibilities to a third country:

> If extraterritorial processing is the real intent—and I have asked for clarity on that issue—then UNHCR would see the responsibility of Australia as being to ensure that the extraterritorial processing mirrors the standards of processing that are afforded on the mainland of Australia. We believe it would be very costly, very expensive, and possibly almost impossible to provide those standards in the very small island country of Nauru in the Pacific. It is certainly logistically difficult to do that and it does deny certain basic rights to those persons who are there for extended periods. So if it is extraterritorial processing then we feel that what is proposed will not live up the same standards as those on the mainland. If it is a transfer of responsibility, we would have even greater concern because of the lack of

92 See, for example, RCA, *Submission 9*, p. 5.

93 *Submission 9*, pp 5 & 6.

94 Australia's international law obligations are discussed further below.

95 *Committee Hansard*, 26 May 2006, pp. 1-2.

> legal obligations on the part of the Republic of Nauru, which is not a signatory to the convention, and their capacity to fulfil those responsibilities and prevent a breach of the convention under article 33, refoulement, and other articles that they would find it very difficult to take responsibility for.[96]

Difficulties in ensuring effective integration or resettlement

3.88 There were also arguments suggesting that it is unlikely that the Bill will result in durable integration or resettlement of refugees in the longer term since there may be nowhere for them to go if other countries are unwilling to accept them. As Dr Mathew argued:

> The problem as I see it with this bill and with the Pacific solution before it is that the asylum seekers do not have anywhere else to go. If the experience with the Pacific solution tells us anything, it is that Australia would be extremely lucky if any country came forward to take these asylum seekers off our hands. In the end Australia took many of the asylum seekers back from Nauru and PNG on some kind of visa category. So point 1 is that the Pacific solution is not a solution. It was an illusion—the Pacific illusion, if you like—and this bill seems to share the hallmarks of that.[97]

3.89 This was confirmed by the Department who provided figures showing that, since about 2001, of 1,509 asylum seekers held and processed on Nauru, 586 of those were resettled in Australia.[98] A representative from the Department acknowledged that this amounted to some 60 per cent of refugees being resettled in Australia and 40 per cent resettled elsewhere. He also pointed out that these people were resettled in a much shorter period of time than those people resettled under Australia's humanitarian program.[99]

3.90 The Department advised that of the group of 1,509 asylum seekers processed on Nauru, 985 refugees were resettled in six other countries: New Zealand (360), Sweden (19), Canada (10), Denmark (6) and Norway (4)). A further 77 persons found not to be refugees were resettled in four countries (New Zealand (41), Australia (29), Sweden (1) and Canada (6)).[100]

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96 *Committee Hansard*, 26 May 2006, p. 6.

97 *Committee Hansard*, 26 May 2006, p. 40.

98 *Submission 118*, p. 7. However, Dr Mathew pointed out that, pursuant to the Pacific solution, when Australia did take asylum seekers back from Nauru and PNG, it was on categories of visa that offered less protection than was available to asylum seekers already lawfully within Australia: *Committee Hansard*, 26 May 2006, p. 41.

99 *Committee Hansard*, 26 May 2006, p. 66.

100 *Submission 118*, p. 7.

3.91 The Department advised the committee that Australia 'will be making every effort to secure a durable solution for refugees as quickly as possible'.[101]

3.92 However, as Dr Mathew asserted, where there is no prospect of resettlement elsewhere, Australia is duty bound to provide protection itself.[102] Mr Wright from the UNHCR agreed with this argument:

> [The Bill] would appear to deny one of the solutions—that is, the solution of local integration in Australia of recognised refugees. We feel that the prospect of a solution is undermined by the processing taking place off shore in a country where experience has shown that those being processed have spent extended periods in difficult conditions. There is always a tension between doing it fast and doing it fair. If you do it fast it may not be fair; if you do it fair it may not be fast. In this case, I think we have to look at experience in order to make a determination of whether offshore processing affords a better or a lesser standard in relation to what happens on the mainland.[103]

3.93 Mr Wright informed the committee that it was his understanding from advice from the Department that the preference is for persons found to be refugees after offshore processing to be resettled in another country. However, he acknowledged that the Department recognised that 'there would be a default responsibility upon Australia, if that were not possible, to let them come here'.[104] This was confirmed by a representative of the Department in evidence, who stated that:

> [His] understanding of what is on the public record is that it is the government's preference to resettle in a third country any people found to be refugees under these arrangements, but the possibility of any such people being resettled in Australia has not been precluded.[105]

3.94 Moreover, the committee notes the Minister's statement that '(t)he Government's intention is that people found to be refugees will remain offshore for resettlement to a third country'.[106]

3.95 Mr Wright also noted that there may be a practical difficulty in finding willing resettlement countries if those countries perceive Australian practice in this regard as a deflection of Australia's own responsibilities:

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101 *Submission 118A*, p. 36.

102 *Committee Hansard*, 26 May 2006, p. 40.

103 *Committee Hansard*, 26 May 2006, p. 8.

104 *Committee Hansard*, 26 May 2006, p. 6.

105 *Committee Hansard*, 26 May 2006, p. 62.

106 The Hon. Senator Amanda Vanstone, Minister for Immigration and Multicultural Affairs, 'Strengthened Border Control Measures for Unauthorised Boat Arrivals', Press Release, 11 May 2006.

> It is difficult in any event to find resettlement places, given that there is a huge need, in protracted case loads of refugees around the world, for resettlement as a solution. We have these sorts of competing demands and it would be appropriate to assess people's priority for resettlement based on their protection needs—the conditions that they are living in that require them to gain resettlement. So this whole question of, first of all, it being difficult to find resettlement and, secondly, a negative perception by other countries that Australia is not accepting refugees anymore and is just trying to get other countries to accept them, might undermine the prospects for resettlement and create extended periods without a solution.[107]

3.96 The RCA, amongst others, pointed out that reluctance by other countries to accept resettlements would lead to indefinite detention.[108] HREOC agreed that 'the potential difficulty in locating a safe third country willing to accept refugees for resettlement will increase the risk of asylum seekers processed … offshore … being detained for an excessive period of time'.[109]

3.97 Ms Kate Gauthier of A Just Australia noted that when Manus Island and Nauru had previously been used for processing of asylum claims, only 4.3 per cent of people were resettled to countries other than Australia and New Zealand. Ms Gauthier went on to explain that generally in those cases the resettlement was on the basis of family reunions, and she believed it unlikely that similar family reunion circumstances would arise, other than in Australia, under the Bill:

> For family reunion for people from, say, West Papua, the majority of them are going to be in Australia. It is highly unlikely that there are going to be family reunions of West Papuans in Sweden.[110]

3.98 Departmental officials stated that the International Organisation for Migration (IOM), and not the Department, would manage the process of resettling refugees from Nauru to another country:

> [IOM] will assist individuals gaining entry to those countries if they do have a right of entry or a right of residence. There is assistance available to them if they wish to move from Nauru.[111]

3.99 The legislative creation of a new system of constructed potential indefinite detention is a matter of great concern to the committee.

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107 *Committee Hansard*, 26 May 2006, p. 9.

108 *Submission 9*, p. 8; see also Refugee and Immigration Legal Service, *Submission 94*, p. 3; Victorian Foundation for Survivors of Torture Inc., *Submission 117*, p. 3.

109 *Submission 112*, p. 12. HREOC also asserted that if persons are subject to excessively long detention as a result of the particular features of offshore processing arrangements this may constitute a breach of Article 31(1) of the Refugee Convention: *Submission 112*, p. 12.

110 *Committee Hansard*, 6 June 2006, p. 14.

111 *Committee Hansard*, 6 June 2006, p. 33.

Breach of Australia's obligations under international law

3.100 Much of the evidence received by the committee questioned the compatibility of the Bill's measures with Australia's human rights obligations under international law.[112] Most submissions and witnesses who commented on international law issues argued that, if the Bill is passed and all unauthorised boat arrivals are processed offshore, Australia will in fact be in breach of several of its international law obligations.

3.101 Mr Brian Walters SC argued that:

> … the international message is that we will not get up and say openly that we repudiate our obligations under the refugee convention but we will indicate that we will do everything we can to ensure that we place our obligations offshore, transfer them to others who, as in the case of Nauru, do not have those obligations, and give them money, if necessary, to subvert their constitution to make sure that they take on our responsibilities and we will say, 'We've done what we're obliged to do.' The message is that we are being disingenuous as to our obligations. The message is that we do not care about our international obligations and we are not to be trusted on our international obligations. That is a very serious position for Australia to place itself in internationally.[113]

3.102 Mr David Manne from RILC asserted that, in broad terms, what is at stake 'is the very question of whether Australia will continue with its core international obligations to protect vulnerable people who arrive in Australia from being expelled to persecution'.[114] He argued that the Bill's proposals 'represent a radical rejection' of Australia's obligations under international human rights treaties:

> The flagrant violations of the spirit and letter of international human rights obligations are of fundamental importance for at least two main reasons: firstly, because they represent a fundamental repudiation of the rule of law and radically undermine the cornerstone of refugee protection—that is, the principle of nonrefoulement, or nonexpulsion; and, secondly, and far more profoundly, we would say, is what the bill represents in relation to the purpose and the people for whom these very laws and the protection framework were made—some of the most vulnerable people in the world, fleeing from torture, rape, arbitrary detention, extrajudicial killing and the like.[115]

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112 See, for example, Dr Jane McAdam, *Submission 64*; Associate Professor Mary Crock, *Submission 66*, pp 2-3; ALHR, *Submission 78*, pp 12-18 & pp 24-29.

113 *Committee Hansard*, 26 May 2006, p. 15. See also Mr David Manne, RILC, *Committee Hansard*, 26 May 2006, p. 26; Ms Joanna Kummrow, LIV, *Committee Hansard*, 26 May 2006, p. 36; Mr Ron Merkel QC, Victorian Bar and PILCH (Vic), *Committee Hansard*, 26 May 2006, p. 48.

114 *Committee Hansard*, 26 May 2006, p. 26.

115 *Committee Hansard*, 26 May 2006, p. 26.

3.103 A representative from the Department did not agree with the proposition that the Bill would have a significant impact on the operation of, not only Australia's international law obligations, but on the very international law instruments upon which Australia's obligations are derived:

> … different countries choose different ways to deal with people under the convention, according to their own circumstances. For example, some countries choose to resettle people internationally; some do not. The United States, for example, has chosen to intercept possible asylum seeker case loads from Haiti and Cuba and process them in a place that is not on the mainland of the United States. There are quite different practices around the world to respond to particular circumstances. I know of no proposal for everyone to choose this particular policy.[116]

Relevant international law obligations

3.104 In particular, the following international law obligations were identified as being relevant to the regime that the Bill proposes to put in place:

- the requirement in Article 33(1) of the Refugee Convention that a state is not to expel or return a refugee to the frontiers of a territory where the refugee's life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group of political opinion (that is, the fundamental human rights principle of *non-refoulement*);
- obligations under Article 31 of the Refugee Convention that asylum seekers should not be penalised for arriving illegally and Article 16 that relates primarily to the requirement of signatory states to provide access to courts of law in their territory (which includes independent merits review of initial determinations);
- obligations under the *International Covenant on Civil and Political Rights* (ICCPR), including the principle of non-discrimination (Article 26), ensuring effective remedies for current and potential breaches of ICCPR rights (Article 2(3)), and the entitlement to take court proceedings if deprived of liberty by arrest or detention (Article 9); and
- obligations under the *Convention on the Rights of the Child* (CRC), including the obligation to act in the best interests of the child (Article 3(1)) and the principle that children should only be detained as a measure of last resort (Article 37(b)).[117]

3.105 The committee notes that Australia is a party to, and has ratified, all of these international instruments.

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116 *Committee Hansard*, 26 May 2006, p. 63.

117 For example, see Human Rights Law Centre, *Submission 73*; Castan Centre for Human Rights Law, *Submission 80*; Federation of Community Legal Centres (Vic), *Submission 85*; Victorian Bar and PILCH (Vic), *Submission 109*; HREOC, *Submission 112*.

Principle of non-refoulement

3.106 One of the key issues raised by submissions and witnesses was the potential for the proposals in the Bill to result in refugees being returned to countries from which they have fled, contrary to Article 33(1) of the Refugee Convention.

3.107 The committee notes the assurances of a representative from the Department who told the committee that:

> Australia takes seriously its obligation not to *refoule* refugees and does not remove people where this would be in breach of its protection obligations under the Refugees Convention or other relevant human rights instruments.[118]

3.108 The obligation of *non-refoulement* was discussed in three contexts:

- as a result of processing of claims for asylum offshore in a 'declared' country;
- as a result of the inadequacy of processing procedures in a 'declared' country; and
- as a result of actions by the Australian Navy or other Australian officials within, or even prior to reaching, Australian waters.

Refoulement from a 'declared' country

3.109 The committee received evidence from many submissions and witnesses who argued that Australia may not be able to meet its obligation of *non-refoulement* where asylum-seekers are removed offshore to a 'declared' country for processing.[119] Essentially, while the Refugee Convention may, to a limited extent, recognise the concept of 'safe third countries' to which a state can send asylum-seekers for processing claims, the current legislative and administrative components of the excision scheme framework, expanded by the Bill, are not seen as providing adequate substantive or procedural safeguards against *refoulement* from these countries.[120]

The concept of a 'declared' country and safe third countries

3.110 In the second reading speech for the Bill, the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs, stated that:

> It is important to note that the [Refugee Convention] does not prescribe the processes which signatory states must follow to identify refugees. The convention also does not establish an entitlement for asylum seekers to choose the country in which their claims will be assessed or in which

118 *Submission 118*, p. 1.

119 See, for example, ALHR, *Submission 78*, pp 15-17; Dr Jane McAdam, *Submission 64*, pp 7-9.

120 See, for example, Mr Angus Francis, *Submission 60*, p. 3.

> protection will be provided. These are issues for sovereign states to settle.[121]

3.111 This view was also expressed by representatives of the Department in the course of the committee's inquiry.[122]

3.112 The Bill provides for asylum-seekers to have claims processed offshore in 'declared' countries. In his Second Reading Speech for the Bill, the Parliamentary Secretary to the Minister stated that:

> The minister may only declare a country where satisfied that it will provide a place of safety for asylum seekers, where their refugee claims can be assessed, and from which resettlement or voluntary return of refugees can be arranged.[123]

3.113 By way of background, ALHR's submission noted that the concept of a 'declared' country was analogous to the term 'safe third country', although the latter term is ordinarily used to describe a country through which an asylum-seeker has already passed.[124]

3.114 HREOC and Dr Jane McAdam, amongst others, acknowledged that a country will still meet its obligations under Article 33(1) of the Refugee Convention if it sends asylum-seekers to a so-called 'safe third country' for processing.[125]

3.115 However, certain conditions must be satisfied for this to occur: any third country must be able to offer 'effective protection' for the asylum-seeker. In her submission, Dr McAdam outlined what was intended by 'effective protection', citing the critical elements determined by the Lisbon Expert Roundtable, Global Consultations on International Protection, in 2001, which included:

> … respect for fundamental human rights ... in accordance with applicable international standards, including ... no real risk that the person would be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Furthermore, protection is only 'effective' if the asylum seeker does not fear persecution in the host State, is not at risk of being sent to another State in which effective protection would not be forthcoming, has access to means of subsistence sufficient to maintain an adequate standard of living, and has his or her fundamental human rights respected in accordance with international standards. The State must comply with international refugee and human rights law in practice (not just in theory), grant access to fair and efficient determination procedures which include

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121 The Hon Andrew Robb AO MP, *House of Representatives Hansard*, 11 May 2006, p. 9.

122 See *Committee Hansard*, 26 May 2006, pp 55 & 56.

123 *House of Representatives Hansard*, 11 May 2006, pp 8-9.

124 *Submission 78*, p. 16.

125 *Submission 112*, p. 10; *Submission 64*, p. 7; see also Castan Centre for Human Rights Law, *Submission 80*, p 18; ALHR, *Submission 78*, p. 17.

> protection grounds that would be recognised in the State in which asylum was originally sought, take into account any special vulnerabilities of the individual, and maintain the privacy interests of the individual and his or her family.[126]

3.116 Section 198A of the Migration Act deals with the process for making a country a 'declared' country. Subsection 198A(3) provides that the Minister may declare that a specified country:

- provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
- provides protection for persons seeking asylum, pending determination of their refugee status; and
- provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
- meets relevant human rights standards in providing that protection.

3.117 Significantly, there are no legislative criteria which must be satisfied before the Minister exercises the discretion to declare a country under subsection 198A(3); nor is it a requirement under subsection 198A(3) of the Migration Act that a 'declared' country be a signatory to the Refugee Convention and therefore under the obligation not to *refoule*.

3.118 However, the Department advised the committee that the Minister declares countries under subsection 198(3) using a number of sources, including:

- publicly available material, such as the US State Department reports on human rights;
- assessment of the Government of Nauru's commitment through the signing of the Statement of Principles (10 September 2001);
- protection provided under the constitutions of Nauru and PNG; and
- consultation with a number of governments and organisations, including the UNHCR.[127]

3.119 As noted in Chapter 2, PNG and Nauru are 'declared' countries for the purposes of subsection 198A(3) of the Migration Act.[128] The committee was advised that Nauru is not a signatory to the Refugee Convention. PNG is a signatory (with

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126 *Submission 64*, pp 7-8. Footnotes omitted.

127 *Submission 118B*, p. 16.

128 The Minister's declaration for Papua New Guinea was made on 12 October 2001, and the Minister's declaration for the Republic of Nauru was made on 2 October 2001 and renewed on 25 November 2002.

some reservations in relation to certain issues) but has not yet passed domestic legislation implementing a refugee status determination process.[129]

Meeting non-refoulement obligations using 'declared' countries

3.120 The committee received a significant volume of evidence arguing that removing asylum-seekers to 'declared' countries may not meet Australia's obligations under Article 33(1) of the Refugee Convention.[130] Many of those objections related to Nauru, as the EM indicates that the offshore processing centre there was being prepared to implement the measures contained in the Bill.[131]

3.121 The primary objection in relation to Nauru was that it is not a signatory to the Refugee Convention, and therefore Australia cannot absolve its own obligations under that instrument by sending asylum-seekers to Nauru for processing.[132] As the UNHCR told the Senate Legal and Constitutional References Committee in its inquiry into the Migration Legislation Amendment (Further Border Protection) Bill 2002:

> … as a signatory to the Refugee Convention, Australia's international protection responsibilities to asylum seekers in … excised areas continue to be engaged following their transfer to a third country for processing. Only when a durable solution is found does this cease.[133]

3.122 Submissions and witnesses to this inquiry agreed overwhelmingly with this analysis. For example, Mr Angus Francis maintained that Australia's obligation not to *refoule* under Article 33 of the Refugees Convention applies irrespective of the designation of persons as designated unauthorised arrivals and the removal of these persons to offshore processing centres.[134]

3.123 Mr David Manne from RILC expressed a similar view:

> Australia does not relieve itself of its protection obligations by seeking to export them or take them elsewhere. We would say that of particular concern in this regard is that, even if it were to purport to do so, what we have here goes to the very heart of the problem, and that is what safeguards

129 Mr Neill Wright, UNHCR, *Committee Hansard*, 26 May 2006, p. 7.

130 For example, see Mr Angus Francis, *Submission 60*, p. 16; Dr Jane McAdam, *Submission 64*, pp 8-9; Asylum Seeker Resource Centre, *Submission 65*, p. 4; Castan Centre for Human Rights Law, *Submission 80*, pp 13-14; Dr Penelope Mathew, *Submission 96*, p. 7; HREOC, *Submission 112*, p. 14; Mr Neill Wright, UNHCR, *Committee Hansard*, 26 May 2006, p. 2; Mr Kerry Murphy, ALHR, *Committee Hansard*, 6 June 2006, p. 11.

131 See EM, p. 5.

132 For example, see Mr David Manne, RILC, *Committee Hansard*, 26 May 2006, pp 30-31; Dr Penelope Mathew, *Committee Hansard*, 26 May 2006, p. 40.

133 *Submissions 30 and 30A*.

134 *Submission 60*, p. 3.

> are there in reality and in law to ensure that the non-refoulement principle is upheld—that is, that people are not refouled.[135]

3.124 In its submission, RILC also described the transfer of asylum-seekers to Nauru and PNG as a 'misuse' of the safe third country concept:

> Use of the concept of the safe third country to transfer asylum seekers to transit camps in countries such as Nauru or PNG where they have no right of entry, to which they have no connection and which have no capacity to facilitate their resettlement is a serious and dangerous misrepresentation and misuse of the concept of the 'safe third country.'[136]

3.125 Dr Penelope Mathew agreed:

> I think what is fundamentally wrong with it is that it seeks to use the somewhat controversial concept of a safe third country—that is, the idea that Australia can rely on protection elsewhere to avoid its responsibilities in a manner which does not conform with accepted practice, which operates to the detriment of refugees and diminishes rather than extends protection as intended by the refugee convention.[137]

3.126 Significantly, in relation to Nauru not being a signatory of the Refugee Convention, submissions and witnesses pointed out that Nauru is not bound by the obligation of *non-refoulement* in Article 33(1).[138] Further, it was argued that there is no way for Australia to effectively bind Nauru to this obligation via contract. Therefore, Australia would be in breach of its obligations under Article 33(1) if it were to send asylum-seekers to Nauru for processing of their claims.

3.127 Mr Wright from the UNHCR expressed that organisation's concerns about Nauru not being a signatory to the Refugee Convention:

> Since Nauru was not a signatory to the refugee convention, there are no guarantees provided by Nauru, that UNHCR is privy to, that it is obliged under international law to provide effective protection, despite the provisions of section 198A of the Australian Migration Act. The bill therefore heightens the risk of refoulement, contrary to article 33 of the refugee convention.[139]

3.128 Mr David Manne from RILC argued that Nauru, as a sovereign state, was able to determine who enters and who stays within its territory:

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135 *Committee Hansard*, 26 May 2006, pp 30-31.

136 *Submission 91*, p. 2.

137 *Committee Hansard*, 26 May 2006, p. 40.

138 For example, see Centre for Multicultural Pastoral Care, *Submission 99*, p. 4; Asylum Seeker Centre (Inc), *Submission 100*, p. 2; Mr David Manne, RILC, *Committee Hansard*, 26 May 2006, p. 31; Mr Simeon Beckett, ALHR, *Committee Hansard*, 6 June 2006, p. 10.

139 *Committee Hansard*, 26 May 2006, p. 2.

> Nauru as a sovereign nation exercises, as do all sovereign nations, authority over those people within its territory. As a consequence, it is Nauru that decides under what circumstances people are to go there and for how long they are able to stay. If at any point Nauru decides, quite properly, to exercise its sovereign right to decide that someone should no longer stay there, it is entitled to do so. What we know about Nauru is that it is not a signatory to the Refugees Convention and does not guarantee any protection to refugees at all, let alone, in our submission, have the resources to do so.[140]

3.129 In its joint submission, the Victorian Bar and PILCH stated that obligations under the Refugee Convention were non-assignable. In addition, even if they were assignable, they were not obligations which could be assigned to a non-contracting party of the Refugee Convention.[141]

Refugee status determination procedures

3.130 A further concern raised during the committee's inquiry was that the processing regime in offshore centres may be so manifestly inadequate, that it exposes asylum-seekers to a significant risk of *refoulement.*

Uncertainty about the process

3.131 A number of submissions and witnesses expressed their uncertainty as to what the process with respect to offshore refugee status determination will involve, since no clear procedures are set out in the Bill itself.[142] A representative from the Department responded to this concern by asserting that the offshore refugee assessment process was modelled closely on the process used by the UNHCR and 'was developed in close consultation' with the UNHCR.[143] He also stated that, to date, assessment of refugee claims on Nauru has been undertaken by both the UNHCR and the Department.

3.132 However, in relation to the specific measures proposed in the Bill, representatives from the UNHCR informed the committee of their lack of involvement in the consultation and development process.[144] They also noted that the UNHCR had not received a formal request to participate in facilitating or implementing the measures contained in the Bill:

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140 *Committee Hansard*, 26 May 2006, p. 31.

141 *Submission 109*, p. 1.

142 For example, see Amnesty International Australia, *Submission 72*, p. 7; ALHR, *Submission 78*, p. 18; Victorian Bar and PILCH (Vic), *Submission 109*, p. 9; Mr Neill Wright, *Committee Hansard*, 26 May 2006, p. 1; Mr Brian Walters SC, Liberty Victory, *Committee Hansard*, 26 May 2006, p. 12.

143 *Committee Hansard*, 26 May 2006, p. 56.

144 *Committee Hansard*, 26 May 2006, p. 6.

> We have received no formal request for participation of UNHCR. We have had informal discussions with regard to whether UNHCR would consider participation in determination, review or resettlement. As I said, at this stage we want to wait and see what shape this bill takes and whether it is enacted before we look at the implications of its practice. We have seen that Australia can carry out its responsibilities and has demonstrated that in the past, and we do not see a reason at this time for the UNHCR to welcome or formally participate in the process of implementing this bill. So we have expressed a disinclination to do so. But the doors are not all closed on this; let us wait and see what happens with the bill.[145]

3.133 Mr David Manne from RILC supported this view:

> I note that the UNHCR's submission to this committee notes the comment that what is proposed is to use a UNHCR model of assessment. The UNHCR state that they are not really sure what that means in this context and are not able to comment on it, because they do not even have the information themselves. This is cause for serious concern in that context. I note that the UNHCR have gone on to state that they do not take the reference to UNHCR-style processing as a suggestion that UNHCR will assess the applications themselves. In fact, I note that they are disinclined to participate.[146]

3.134 Dr Jane McAdam addressed the committee on the appropriateness of using a determination procedure based on a UNHCR model. Noting that her impression was that determination procedures would operate in a similar manner as they had in the past, Dr McAdam said:

> … the immigration department says it is considering perhaps whether it can do it better, but I am not yet sure of what substantive changes are being considered. One of the issues is that UNHCR's processing is being held up here as a model of processing, but I think this fails to appreciate that UNHCR, by its nature, is a very different entity from a state. UNHCR has a protection mandate. It undertakes refugee status determination. However, it does not have an independent body to which it can turn for review. This is in contrast to states, which do have levels of merits and judicial review. UNHCR is intended to step in where states do not have functioning refugee status determination procedures. Australia does have such procedures. It therefore seems at odds with having a state system for protection—which is really the ideal—that we would be reflecting back to or adopting procedures which are those of an organisation which lacks those levels of review.[147]

3.135 Mr Kerry Murphy of ALHR also expressed concerns about comparing the procedure for determining refugee status with the UNHCR model:

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145 *Committee Hansard*, 26 May 2006, p. 8.

146 *Committee Hansard*, 26 May 2006, p. 28.

147 *Committee Hansard*, 6 June 2006, pp 3-4.

> I just think that the legislation is procedurally flawed in that it is making the model the lowest common denominator—namely, the UNHCR refugee status determination process—rather than the more sophisticated, albeit flawed, Australian model.[148]

3.136 In response to questioning by the committee in relation to the role of the UNHCR in offshore processing assessments, a representative from the Department told the committee that:

> It is not necessarily our expectation. In the various discussions we have had with them, we have said that the door is open to them to do that … if it would allow them to have more assurance about the process, we would be perfectly happy to consider models which involve them in the primary decision making or review. Certainly, we would be perfectly happy for them to be involved in the process of resettling any people should the need arise. At this stage they have said they regard their previous involvement as a one-off and they cannot see a role for themselves, for the time being at least, in the current arrangements.[149]

Preserving the integrity of the process

3.137 Mr Manne from RILC stressed the importance of ensuring that refugee status determination procedures are properly carried out:

> In that context, we note that this matter is not of theoretical importance but, rather, of fundamental importance, because it goes to the cornerstone principle of refugee protection—that is, the non-refoulement or non-expulsion principle that, under any fair and proper system of assessment, there must be necessary safeguards to ensure that there is a proper assessment of whether or not a person is owed and needs protection. What we do not have here is any proper information about what those safeguards will be. We do know what they will not be. What they will not be are basically the fundamental safeguards under the Australian legal system which are considered to be the basic prerequisites of fair and just decision making in this country.[150]

3.138 Representatives from HREOC argued that the assessment process requires clarification. As Mr Innes explained:

> If the processing is to be carried out by Australia in Nauru then it is not as problematic, but if the processing is to be carried out by third countries, particularly countries which are not signatories to the refugee convention, then that is a much greater concern.[151]

148 *Committee Hansard*, 6 June 2006, p. 10.

149 *Committee Hansard*, 26 May 2006, p. 65.

150 *Committee Hansard*, 26 May 2006, p. 28.

151 *Committee Hansard*, 26 May 2006, p. 21.

3.139 During the course of the committee's hearings in relation to the inquiry, it became apparent that the departmental view was that offshore assessment processes to be undertaken by Australia 'are administrative matters developed and implemented by the Department'.[152] The committee learned that the Department has procedural guidelines which set out the standards for offshore processing, including, for example, what level of compliance is required and what appeal mechanisms will be available.[153]

3.140 A representative from the Department elaborated:

> The document … is the core document for use by decision makers in conducting legal determination offshore. There are no more detailed, specific instructions that go into further levels of specificity about the process. The concept behind the process was that when we were looking at a situation where the UNHCR had agreed to the request from the government of Nauru to conduct refugee assessments for the first group taken to that location, and Australia was going to be conducting assessments for the subsequent groups, we attempted to model our process as close as possible on the UNHCR process so that, from the perceptions of the people who were in the processing centre there, there was no feeling that somebody was getting a different treatment from their neighbour. The process is one that is modelled on a UNHCR field determination process. It is very heavily orally based, face-to-face contact with individuals, and there is not a huge amount of specificity about the detail of the conduct of that process.[154]

3.141 The representative noted that some of the procedures which will take place offshore are similar to those that take place for onshore processing:

> It focuses on the protection obligations assessment element of our work, which is essentially the same judgment that has to be made offshore as onshore, whether a person is a refugee in terms of the refugees convention. To that extent, the principles and the training that apply to decision making onshore apply to the decision making offshore, and the officers who are doing the work offshore were people who had been trained and experienced in the onshore process. So, to that extent, the framework of instructions and training and law that go to that point of refugee decision making were applied offshore.[155]

3.142 Several witnesses expressed serious apprehension in relation to this issue. Ms Anna Samson from A Just Australia noted that all these procedures will be exercised under Nauruan law:

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152 *Committee Hansard*, 26 May 2006, p. 56.

153 *Committee Hansard*, 6 June 2006, p. 11.

154 *Committee Hansard*, 6 June 2006, p. 32.

155 *Committee Hansard*, 6 June 2006, p. 33.

> … it will not be done under Australian law, so the extent to which the Australia government and DIMA will be able to set those standards is questionable.[156]

3.143 Mr Kerry Murphy from ALHR noted that these procedural guidelines have not been previously publicly available:

> I think this is one of the major concerns that our organisation has: we have an onshore system for which the procedures are set out and which is independently reviewable; offshore it is a mystery and nobody really knows what goes on. It is basically the department saying 'Trust us'—the same department that has appeared in numerous inquiries and had difficulties in its own reform. Whilst we would encourage the reform of the department, I would not say at the moment that we would be inclined to give them unreviewable powers.[157]

3.144 The committee notes also that the Department has advised that offshore processing arrangements are 'currently under review to identify any measures which could be taken to strengthen the process'.[158]

Increased risk of refoulement

3.145 Mr Hunyor from HREOC argued that uncertainty about the process is one of the more problematic areas of the Bill and could ultimately lead to an increased risk of *refoulement*:

> … the concern that [HREOC] raises is that a process is being set up that has significant shortcomings, namely, the uncertainty as to the actual process that is going to be followed but particularly the absence of merits review. That heightens the risk in reality of decisions being made that are wrong, resulting in refugees being returned—or refoulement.[159]

3.146 Further, Mr Hunyor expressed the view that, where offshore asylum claim processing was inadequate, it would only be by 'good fortune' that Australia did not breach its obligations under the Refugee Convention.[160]

3.147 In relation to PNG, the committee understands that it is a signatory to the Refugee Convention, although it has made reservations in respect of seven

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156 *Committee Hansard*, 6 June 2006, p. 11.

157 *Committee Hansard*, 6 June 2006, pp 11-12.

158 *Submission 118A*, p. 20.

159 *Committee Hansard*, 26 May 2006, p. 22.

160 *Committee Hansard*, 26 May 2006, p. 22.

provisions.[161] Mr Wright stated that, in the opinion of the UNHCR, Papua New Guinea was doing its best to fulfil its obligations under the Refugee Convention.[162]

3.148 The Department informed the committee that '(o)ver the period since the establishment of the offshore processing arrangements in PNG and Nauru, the practical outcome has been that no person awaiting a refugee assessment or found to be a refugee has been returned to their homeland against their will'.[163]

Refoulement directly from Australian waters

3.149 The committee also received evidence relating to the implications of the actions of the Australian Navy in removing from Australian waters boats with asylum-seekers on board.[164]

3.150 Mr John Gibson from the RCA referred to 'Operation Relex', describing the rules of engagement as requiring the Australian Navy, irrespective of whether claims for refugee status were made, to tow vessels out to the open sea.[165] In its submission, the RCA also referred to actions by the Australian Navy in providing information and intelligence to the Indonesian Navy in order to assist it to intercept boats.[166]

3.151 Witnesses were unequivocal that such actions, if they were applied to boats carrying asylum-seekers which were within Australian waters, and who were coming directly from a territory where they had or were being persecuted, would amount to *refoulement* and would be in breach of Australia's obligations under Article 33(1) of the Refugee Convention.[167]

3.152 Mr David Manne from RILC expressed serious concerns that no guarantees had been given by the Federal Government that a proper assessment process would be applied prior to boats being removed from Australian waters:

> We would have hoped that … there would be a guarantee of a proper assessment process to assess what people's protection needs were before taking any steps whatsoever to send them back to a place where they could be persecuted. Our concern at the moment is that those guarantees have

161 See UNHCR, *Submission 75A*, p. 1.

162 *Committee Hansard*, 26 May 2006, p. 4.

163 *Submission 118A*, p. 22.

164 For example, see Mr David Manne, RILC, *Committee Hansard*, 26 May 2006, p. 33; Mr John Gibson, RCA, *Committee Hansard*, 26 May 2006, p. 53; RCA, *Submission 9*, pp 2-3; Amnesty International Australia, *Submission 72*, p. 5; Castan Centre for Human Rights Law, *Submission 80*, p. 15; A Just Australia, *Submission 81*, p. 10; Dr Penelope Mathew, *Submission 96*, p. 2.

165 *Committee Hansard*, 26 May 2006, p. 53.

166 RCA, *Submission 9*, pp 2-3.

167 See, for example, Dr Penelope Mathew, *Committee Hansard*, 26 May 2006, p. 45; RCA, *Submission 9*, pp 2-3.

> simply not been given. That raises the very real prospect, in the absence of guarantees, that we are looking at a situation where the Australian Navy, for example, could be put in the completely impossible position, in our view, of somehow having to determine on the face of it whether or not someone should be sent back to a situation of persecution. There are no guarantees or no proper measures that have been guaranteed to ensure that that would not occur. For example, there are no proper measures to ensure an assessment to work out whether that person needs to come to Australia to have their claims assessed.[168]

3.153 Mr Gibson of the RCA expressed the view that the Australian Navy was not equipped to make such assessments, nor should Australian armed forces be required to make such an assessment.[169]

3.154 A departmental representative confirmed that Operation Relex was still happening in Australian's northern waters.[170] Representatives from the Department acknowledged that, as part of a whole of government effort in respect of protecting Australian borders, situations would arise where Australian Defence, Customs or other officers may intercept a boat and push it back from Australian waters.[171] However, a departmental official went on to state that any action to turn a boat around would be scrutinised by the People Smuggling Task Force:

> If there was any evidence or suggestion of any asylum claims then such action could not and would not be taken. Such action would be overseen by a group called the People Smuggling Task Force, which is an [Interdepartmental Committee] with representation across a number of agencies. That task force looks very closely to that issue before any action is taken to turn around a boat.[172]

3.155 Departmental representatives indicated that a distinction might be drawn between the situation where asylum-seekers were coming directly from a territory of persecution and events which occurred in 2001, where boats carrying asylum-seekers were turned away from Australia:

> The situation in 2001 had to do with people who were coming to Australia as secondary movements – it was not a question of first flight – and there was a possibility of returning them to Indonesia, where arrangements had been made for them to be looked after and for them to stay while any protection claims were heard there. I think the situation is different for any

168 *Committee Hansard*, 26 May 2006, p. 33.

169 *Committee Hansard*, 26 May 2006, p. 53.

170 *Committee Hansard*, 26 May 2006, pp 60-61.

171 *Committee Hansard*, 26 May 2006, p. 61.

172 *Committee Hansard*, 26 May 2006, p. 61.

> people who might be coming to Australia from a neighbouring country as a matter of first flight.[173]

Prohibition on imposing a penalty for illegal entry or presence in a state

3.156 The committee received submissions and evidence as to how various aspects of the offshore processing regime may be regarded as a 'penalty', which would be in breach of Article 31(1) of the Refugee Convention.[174]

3.157 Article 31(1) of the Refugee Convention states that contracting states shall not impose penalties, on account of illegal entry or presence, on a refugee who comes directly from a territory where their life or freedom was threatened, provided the person presents themselves without delay to the authorities and shows good cause for their illegal entry or presence.

Definition of penalty

3.158 Dr Jane McAdam's submission noted that the prohibition in Article 31 extends, not only to persons who are ultimately determined to be refugees, but also to persons claiming asylum in good faith.[175] Dr McAdam stated that while the term 'penalty' is not defined in Article 31, a number of factors indicate the term should be broadly interpreted in this context, such as the United Nations Human Rights Committee's interpretation of penalty in other international instruments, and conclusions of the UNHCR's Executive Committee:

> The term 'penalties' is not defined in article 31, prompting the question whether it encompasses only criminal sanctions, or whether it also extends to administrative penalties (such as administrative detention). Following the Human Rights Committee's reasoning that the term 'penalty' in article 15(1) of the ICCPR must be interpreted in light of that provision's object and purpose, article 31 warrants a broad interpretation reflective of its aim to proscribe sanctions on account of illegal entry or presence. An overly formal or restrictive approach is inappropriate, since it may circumvent the fundamental protection intended. Thus, measures such as arbitrary detention or procedural bars on applying for asylum may constitute 'penalties'. This is supported by Executive Committee Conclusion No 22 (1981), stating that asylum seekers should 'not be penalised or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful'.[176]

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173 *Committee Hansard*, 26 May 2006, p. 61.

174 For example, see Dr Jane McAdam, *Submission 64*, pp 10-11; Asylum Seeker Resource Centre, *Submission 65*, p. 6; LIV, *Submission 90*, p. 8; Mr Neill Wright, UNHCR, *Committee Hansard*, 26 May 2006, p. 2; Mr Jonathon Hunyor, HREOC, *Committee Hansard*, 26 May 2006, p. 24; The Hon Ron Merkel QC, Victorian Bar and PILCH (Vic), *Committee Hansard*, 26 May 2006, p. 48.

175 *Submission 64*, p. 10.

176 *Submission 64*, pp 10-11. Footnotes omitted.

3.159 A representative from the Department stated that what is intended by 'penalty' in Article 31(1) of the Refugee Convention are 'criminal and civil penalties or sanctions that would ordinarily be imposed for illegal entry to another country'. According to the Department this interpretation 'is supported by leading academic commentators on the [Refugee Convention]'. [177]

Imposition of a penalty

3.160 Submissions and evidence were provided to the committee as to specific conduct under the Bill that would amount to a penalty for the purposes of Article 31(1) of the Refugee Convention.

3.161 Mr Jonathon Hunyor of HREOC stated that the 'potential risk of excessive detention, the removal of access of independent merits review and judicial review, and the unavailability of a legal adviser or assistance in [offshore processing centres]' were suggestive of a penalty.[178] HREOC noted that, since aspects of the offshore processing arrangements of unauthorised boat arrivals are less favourable than the onshore processing arrangements and this distinction is made on the basis of mode of entry, it is also arguable that:

> … as offshore processing arrangements may produce less favourable treatment for asylum seekers processed offshore as compared to asylum seekers processed onshore, these arrangements may constitute a penalty, in breach of Article 31(1) of the Refugee Convention.[179]

3.162 Dr McAdam described the offshore processing procedure being 'markedly inferior' to onshore processing because of the denial of access to independent merits review and judicial review; the detention of children and their families; and the lack of a durable solution for recognised refugees. All of these factors, Dr McAdam concluded, may be regarded as a penalty for unlawful arrival.[180]

3.163 The Hon Ron Merkel QC told the committee that the Bill does impose a penalty, namely, mandatory deportation:

> With respect, we would say that mandatory deportation is a penalty. It is involuntary. It involves the use of coercive power to ensure people are detained in Australia till deported. There is a requirement that they go to a location which is against their choice and, within that location, Australia has no contractual or enforceable obligations as to how they are to be treated, merely a declaration by the minister as to his state of mind on a particular state of affairs. We say that, in any person's terms, is penalising those persons for arriving in the way they did. If those kinds of outcomes

177 *Committee Hansard*, 26 May 2006, p. 55.

178 *Committee Hansard*, 26 May 2006, p. 24. See also Dr Jane McAdam, *Submission* 64, p. 11.

179 *Submission 112*, p. 13.

180 *Submission 64*, p. 11. Footnotes omitted.

> were offered to Australian citizens, I do not think there would be any difficulty in saying, 'This is a penalty.'[181]

3.164 Mr Wright of the UNHCR noted that the 'interpretation of the bill as a penalty is, in UNHCR's view, compounded by the [EM] explicitly stating that it is meant as a deterrent'.[182]

3.165 Mr Wright also made the observation that the measures proposed by the Bill may be inconsistent with UNHCR procedures:

> Whilst UNHCR must, under its charter and its mandate, try to pursue the best possible opportunity for an effective initial determination and an effective review and appeal process for refugees, clearly that is going to be very difficult if there is a transfer of responsibilities and perhaps the courts of Nauru were to take on the responsibility for the access to the courts. Also, the bill in its current format talks about the review mechanism not being independent but being carried out by a second DIMA official. That brings into question whether or not it is truly independent and whether it strengthens the likelihood of the system being effective not only in doing the initial determination but in doing a review that is required under international law or any appeals to the initial determination or review. So we feel it just weakens the whole mechanism for determination and for review and appeal.[183]

3.166 Dr Penelope Mathew's submission highlighted how different categories of visa being granted to asylum seekers processed offshore may also constitute a penalty.[184] However, as noted by Dr Mathew in her submission, the Bill does not clarify the kinds of visas which would be applicable to designated unauthorised arrivals. Until this is made clear it is difficult for the committee to make an assessment as to whether the kinds of visas granted could, in fact, constitute a penalty.

3.167 The Department's view is that offshore processing arrangements do not constitute penalties within the meaning of Article 31(1), because they are not a criminal or civil penalty or sanction that would ordinarily be imposed for illegal entry into another country.[185]

Arbitrary detention

3.168 Many submissions and witnesses argued that forcible removal of persons to offshore facilities to be held pending refugee status determination and resettlement has the practical effect of placing people in detention. As HREOC noted:

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181 *Committee Hansard*, 26 May 2006, p. 48.

182 *Committee Hansard*, 26 May 2006, p. 2. See EM, p. 5.

183 *Committee Hansard*, 26 May 2006, p. 10.

184 *Submission 96*, pp 7-8.

185 *Committee Hansard*, 26 May 2006, p. 55.

> The Bill does not address the possibility of excessive or indefinite detention in OPCs. There is no maximum time period for offshore processing of claims for asylum and no maximum time in which a person who is determined to be a refugee must be resettled in a third country.[186]

3.169 Further:

> The potential for asylum seekers to be detained for an excessive period of time raises serious concerns that the detention may, by reason of its indeterminacy, breach Article 9(1) of the ICCPR which provides that no one shall be subjected to arbitrary arrest or detention.[187]

3.170 However, the Department maintained on numerous occasions throughout the course of the committee's inquiry that persons taken to declared countries are not detained. For example, a representative from the Department stated that:

> People who are on Nauru are not in detention. They are residing on Nauru under conditions established under special visa arrangements with the Nauru government.[188]

3.171 At the second hearing, department officials stated that:

> The individuals are in Nauru under a visa arrangement subject to the conditions attached to that visa in Nauru
>
> …
>
> anyone lawfully in Nauru is free to leave. If they wish to return to their country of residence, they can.
>
> …
>
> Yes, they are free to leave [Nauru].[189]

3.172 The committee sought further information from the Department on the types of special visas which would be provided to asylum-seekers on Nauru. The committee was told that the visas specify 'where [asylum seekers] might live, the times at which they may move around the island and the circumstances in which they may move within the community around the island'.[190] Departmental officials also indicated that asylum seekers may be in a 'closed' or 'open' processing centre.[191] In a closed centre a person is able to move outside the centre, provided they are accompanied by an IOM official:

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186 *Submission 112*, p. 7.

187 *Submission 112*, p. 7.

188 *Committee Hansard*, 26 May 2006, p. 57.

189 *Committee Hansard*, 6 June 2006, p. 33.

190 *Committee Hansard*, 6 June 2006, p. 34.

191 *Committee Hansard*, 6 June 2006, p. 34.

> They are certainly not under guard. They are simply accompanied by an official. There is a bus that will take them down to the internet cafe, will take them swimming, will take them to educational institutions and will take children to school. It is simply facilitating movement around the island. The preference of the government of Nauru is that they be accompanied.[192]

3.173 Under closed centre arrangements asylum seekers are not free to go anywhere they like on Nauru.[193]

3.174 Open centre arrangements have operated since mid-2004:

> … the people in the [open] centres were able to move around freely in the community between the hours of eight in the morning and seven at night. There were a couple of places that they were not able to go: the airport, and the presidential and government offices. That was pretty much the restriction on them.
>
> …
>
> They were not accompanied under open centre arrangements, no.[194]

3.175 A representative from the Department indicated that under the Bill, initially, women, children and families would be housed in open centre arrangements. Single men would be subject to 'slightly more restrictive conditions'.[195]

3.176 The Department's view that asylum seekers are not 'detained' on Nauru was challenged by a number of submissions and witnesses.[196] For example, A Just Australia noted that '(c)learly, the detention issue is proved by the fact that asylum-seekers who have attempted to leave – or escape – the camps were arrested and placed in Nauruan police cells'.[197]

3.177 While acknowledging that the Federal Government, and the Department in particular, has been proactive in making very significant reforms to the detention regime in Australia, Ms Kate Gauthier of A Just Australia expressed disbelief at the Department's claim that people in offshore processing centres would not be in detention:

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192 *Committee Hansard*, 6 June 2006, p. 34.

193 *Committee Hansard*, 6 June 2006, p. 34.

194 *Committee Hansard*, 6 June 2006, p. 34.

195 *Committee Hansard*, 6 June 2006, p. 34.

196 For example, see Mr Graeme Innes AM, HREOC, *Committee Hansard*, 26 May 2006, pp 24-25; Ms Tania Penovic, Castan Centre for Human Rights Law, *Committee Hansard*, 26 May 2006, p. 34; Ms Kate Gauthier, A Just Australia, *Committee Hansard*, 6 June 2006, p. 14; Ms Angela Chan, MIA, *Committee Hansard*, 6 June 2006, p. 27; A Just Australia, *Submission 81*, p. 15.

197 *Submission 81*, p. 15.

> We have read the submissions from DIMA and the answers that they gave to questions on notice saying that it is not detention and that children will not be detained because they are going to be let out during the day. These arguments are, in a word, ridiculous … I hope you have all looked into the conditions of the processing centres, seen the photographs and read the reports of what Nauru as a country is like. In essence, the entire island, which is only 10 times the size of Central Park, becomes the detention centre itself. The conditions for children are going to be appalling.[198]

3.178 Ms Tania Penovic from the Castan Centre for Human Rights Law made a similar observation, with particular emphasis on the impact of detention on mental health:

> I would like to reiterate the acknowledged and well-documented impact of detention on mental health. I am aware that DIMA is saying that this is not detention because these people are free to move around the island, but I do not think there is any serious, credible argument that can be accepted that these arrangements are not detention. These people are subject to security checks, their movement is confined, they have a 7 pm curfew. According to UNHCR guidelines, this is detention. The parliament of this country has accepted that long-term detention has harmful mental health impacts and bears upon a large number of human rights concerning the right to health and rights under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights. This government recognised this last year in its amendment of detention arrangements, and I believe that this legislation would be a radical departure from this position. It would cancel out all the good work that has been done in the last year.[199]

3.179 Ms Angela Chan of the MIA described Nauru as a 'large detention centre by any other name'.[200]

Discrimination

3.180 Some submissions and witnesses argued that the Bill potentially breaches Article 26 of the ICCPR which provides that all persons are equal before the law and are entitled to the equal protection of the law without any discrimination.

3.181 For example, as Dr Mathew told the committee:

> In offering a lesser system we are actively discriminating between different classes of asylum seekers, and I do not know why. The basis for discrimination in this bill is that people are unlawful arrivals by sea. Why should that determine whether they get access to the RRT and judicial

198 *Committee Hansard*, 6 June 2006, p. 14.

199 *Committee Hansard*, 26 May 2006, p. 34. See also Associate Professor Mary Crock, *Committee Hansard*, 6 June 2006, p. 20.

200 *Committee Hansard*, 6 June 2006, p. 27.

> review while lawful arrivals get that sort of treatment and unlawful arrivals by plane get it?[201]

3.182 This view was supported by many others, including HREOC and A Just Australia.[202]

3.183 Reverend Elenie Poulos, representing Uniting Justice Australia and the National Council of Churches in Australia, acknowledged that the Bill has been described as clearing up the anomaly that exists between asylum-seekers who arrive by boat on an excised area, and those asylum-seekers who arrive by boat on mainland Australia. However, Reverend Poulos stated it was an anomaly which the organisations she represented 'would prefer done in exactly the opposite way – that is, that everyone who arrives here is processed on shore'.[203]

Foreign policy concerns

3.184 The committee received considerable evidence suggesting that Indonesia's reaction to the granting of refugee status to the West Papuan asylum seekers provided the impetus for the Bill; and that such political considerations are inappropriate in the context of granting asylum to those who seek it, and contrary to Australia's overarching international law obligations.[204]

3.185 The committee heard that the Bill appears to be a direct response to 'appease' Indonesia over the grant of protection visas to the 42 West Papuans who arrived in Australia in January 2006.[205]

3.186 Many also submitted that yielding to such external pressure compromises Australia's commitment to protecting basic human rights in a broader sense.[206]

3.187 ALHR told the committee that this Bill differs from the first incarnation of the Pacific solution which was designed to deter so-called 'secondary movement' (that is, those refugees who had bypassed other countries in which they might have sought and obtained effective protection):

> The character of this Bill is different to those that have gone before it in a number of respects. It is not framed or justified in terms of border protection or national security, though it is described as seeking to 'further strengthen border control measures'. It does not purport to address the

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201 *Committee Hansard*, 26 May 2006, p. 44.

202 *Submission 112*, pp 7-8; *Submission 81*, p. 19.

203 *Committee Hansard*, 6 June 2006, p. 24.

204 Asylum Seeker Resource Centre, *Submission 65*, p. 8; Associate Professor Mary Crock, *Submission 66*, pp 2-3; Dr Richard Chauvel, *Submission 69*, Attachment A; A Just Australia, *Submission 81*, p. 6; Victorian Bar and PILCH (Vic), *Submission 109*, p. 3.

205 For example, see RCA, *Submission 9*, p. 10.

206 For example, see Liberty Victoria, *Submission 31*, p. 3.

> problem of 'irregular' or 'secondary' movement, elements of which are internationally acknowledged to be problematic. It does not even pretend that these measures are for the purposes of 'national security or public order' or designed to preserve the 'integrity' of Australia's protection regime.[207]

3.188 Accordingly, in ALHR's view, the Bill creates a bad example to other countries suggesting that it is acceptable to place political considerations ahead of legally binding human rights and refugee protection obligations which is extremely damaging to the international protection regime.[208]

3.189 Mr Brian Walters SC from Liberty Victoria offered a comprehensive explanation of the dangers of such an approach:

> Once we allow our response to our fundamental system of government, our rule of law and our protection of human rights to be determined by any foreign pressure, we are then losing any moral credibility in the future. We have freely signed up to the refugee convention and we have done that and adhered to that for years. We have encouraged other countries to do the same. We have taken a moral stance that is important. Once we say, 'We won't do that because it has caused friction locally' for some reason, it is encouraging the kind of treatment that gives rise to refugees in the first place.[209]

3.190 Moreover, he warned of the possible flow-on effects:

> On an issue like this, if we show that kind of weakness, we are just allowing that pressure to be brought to bear by other countries for their own reasons at other times. We have a region which, as we have heard from an expert, generates some refugees … and it cannot be thought that in the future there will not be more … If we allow a country, because it feels embarrassed by us adhering to our international human rights obligations, to feel free to place pressure on this country and to see that that pressure will produce results, we will just get more of that pressure and our position will become increasingly inconsistent and difficult to justify. In the end, we will lose both independence as a sovereign nation and our human rights credibility—and where we want to encourage other states to recognise the human rights of Australians, we will not get a sympathetic voice.[210]

3.191 Mr David Manne from RILC articulated a similar point of view:

> … if political considerations come into the protection equation in that way, it is completely contrary to the spirit and intent of international protection and could well have the effect of making finding a durable solution of resettlement, whether on Nauru or elsewhere, almost impossible. Firstly,

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207 *Submission 78*, p. 7.

208 ALHR, *Submission 78*, p. 4.

209 *Committee Hansard*, 26 May 2006, p. 14.

210 *Committee Hansard*, 26 May 2006, pp 14-15.

> people who have arrived in Australia initially are seen as being Australia's responsibility first and foremost but, secondly, the obstacle would be even greater if they are seen as people who could cause diplomatic problems or tensions. That is the serious point in it—that politicising the situation and importing national interest or foreign relation elements into the protection equation is not only contrary to principle but also likely to threaten people's very ability to get resettlement in other countries.[211]

3.192 Mr Manne contrasted the Bill's approach with the approach taken with the original Pacific solution:

> … the current proposal is far worse than the so-called Pacific solution insofar as the Australian government have recently branded and vilified West Papuan refugees, who are partly the subject of this new proposal. In vilifying them on political and racial grounds, they propose to export them to another place and somehow, if they are found to be refugees, to find resettlement elsewhere. This policy and proposal, in our view, is to in effect cast people into indefinite exile, having branded them to be political trouble, and would quite possibly make any form of resettlement illusory, meaningless and ineffective.[212]

3.193 Ms Frederika Steen from the Romero Centre also made a pertinent point:

> There is a contradiction in our regional relationships. Australia has assumed the moral high ground, leadership and prime responsibility for law and order and good governance in the Pacific, yet it proposes to outsource the holding and processing of asylum seekers simply because it does not want to do so itself. It is prepared to pay impoverished Pacific nations to be the landlords of non criminal asylum seekers transported there and detained against their will, and allow in external hired help like the International Organisation for Migration to administer the detention centre.[213]

3.194 Mr Erskine Rodan from LIV noted that the Bill 'is foreign policy dressed up as administrative law'. He argued that foreign policy should not be conflated with domestic policy and international law issues:

> From our point of view it is bad law. It may be difficult law. You also have to look at it this way: we have always tried to have a good relationship with Indonesia, but there are times when we as a nation have to say to them: 'Back off our domestic policies and our international obligations. We have those; you look after your own area.' That is a foreign policy issue.[214]

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211 *Committee Hansard*, 26 May 2006, p. 32.

212 *Committee Hansard*, 26 May 2006, p. 27.

213 *Submission 121*, p. 4.

214 *Committee Hansard*, 26 May 2006, p. 37.

Committee view

3.195 Overwhelmingly, the view among those who provided evidence to the committee was that the Bill should be opposed in its entirety. Indeed, the committee notes that every submission and witness, besides the Department, expressed opposition in absolute terms to the Bill and its broader policy objectives.

3.196 In particular, the committee notes concerns raised in relation to uncertainty about how the proposed arrangements will actually work; domestic policy issues such as the Bill's broad incompatibility with the rule of law; the potential breach of Australia's obligations under international law in a number of key areas; and arguments that the Bill is an inappropriate response to what is essentially a foreign policy issue.

3.197 Despite the volume of evidence received, the committee has been significantly hampered by the absence or limited availability of critical information to assist with its deliberations in this inquiry. This is primarily due to the Bill and associated documentation providing only a minimalist framework for the proposed system. As a result, the committee has been forced to rely on information provided by the Department since the Bill was referred for inquiry to 'fill in the gaps'.

3.198 However, the committee's deliberations have been frustrated by the fact that crucial information relating to a number of key elements of the Bill has not been made available by the Department, or has only been made available after questioning. Moreover, the committee has not been assisted in its understanding of the full impact of the measures contained in the Bill by the brevity and, in some cases, contradictory or sophist nature of some of the information provided by the Department.

3.199 In this context, the committee understands that the Department has not been in a position to provide certain information since a number of relevant reviews and development processes are apparently currently taking place. The committee notes that some of the issues currently under review or development relate directly to the practical operation and effect of some fundamental aspects of the Bill. As such, an assessment of that information is crucial to a thorough consideration of the Bill. Without that information the committee is unable to form a conclusive view on the appropriateness or otherwise of certain measures, including how refugee status determination procedures will work in practice, how women and children held in offshore locations will be treated,[215] and whether access to proper legal assistance for persons on Nauru will be guaranteed.

3.200 Given the evidence received and compounded by the lack of information before it, the committee considers that it is preferable that the Bill not proceed.

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215 However, in this context the committee notes, and fully endorses, the Federal Government's commitment to the principle enshrined in the Migration Act, by virtue of the *Migration Amendment (Detention Arrangements) Act 2005*, that children should only be detained as a measure of last resort.

3.201 In the event that the Bill does proceed, however, the committee believes that certain conspicuous weaknesses with respect to its operation and effect must be considered and addressed. The Bill should be amended to include explicit statutory safeguards to protect against potential human rights violations, to ensure that Australia is able to more adequately comply with its international law obligations in this regard, and to uphold the rule of law.

3.202 Of particular significance is the fact that, as currently drafted, the Bill omits appropriate scrutiny and oversight of the procedures it seeks to put in place. The committee considers that it is entirely inappropriate that initial refugee status determination decisions made by departmental officials are only internally reviewable. Decisions made by the Department should have, at the very least, the same quality of merits review applicable to them, regardless of geographic location. The committee considers that the Bill should contain a review mechanism equal to the procedural independence and the level of investigation by the RRT.

3.203 The committee also holds the view that the reporting requirements contained in the Bill are inadequate since they do not provide for any independent oversight of offshore processing arrangements. The committee believes that independent scrutiny of offshore arrangements should take place to ensure that such arrangements are subject to the same level of oversight as exists in relation to onshore processing arrangements. This is crucial in order to alleviate concerns about the Bill's impact on the human rights of asylum seekers and refugees, and to assist in ensuring accountability and transparency in Australia's migration system. The committee is of the view that the Commonwealth Ombudsman would be best placed to oversee offshore processing arrangements. In order to undertake this role, the Commonwealth Ombudsman should be granted full and proper access to offshore processing centres. In making this recommendation, however, the committee is aware of the added difficulties associated with any attempt by an Australian law to guarantee access to people who are physically located in another country.

3.204 The committee notes that the requirement in Part 8C of the Migration Act that the Commonwealth Ombudsman provide reports on persons held in detention for more than two years[216] does not apply in relation to persons held in offshore processing locations. The committee does not believe that a distinction based on location is appropriate in this regard and considers that the requirement in Part 8C should apply equally to all relevant persons.

3.205 The committee also considers that continued oversight by a parliamentary committee would be useful in helping to provide an additional layer of accountability.

3.206 The committee acknowledges concerns raised in relation to the Bill's retrospective application and the lack of any clear rationale for the provision. Further, the committee urges the Federal Government to undertake a full costing of the Bill to

216 As inserted by the *Migration Amendment (Detention Arrangements) Act 2005*.

ascertain the real financial implications of the proposed measures. The committee is not satisfied with the assertion that the policy has 'no direct financial implications', which seems implicitly unlikely given the obvious costs associated with transporting officials, asylum seekers, and health and other professionals, to a remote island with little infrastructure in the middle of the Pacific Ocean.

3.207 Finally, the committee recommends that a sunset clause should be included in the Bill and that an independent review of the Bill's operation and effect should take place at the end of the sunset period.

Recommendation 1

3.208 In light of the limited information available to the committee, the committee recommends that the Bill should not proceed.

Recommendation 2

3.209 In the event that the Bill proceeds, the committee recommends that the Bill be amended to ensure consistency with previous changes to Australia's refugee determination system including, but not limited to, government responses to the Palmer, Comrie and Commonwealth Ombudsman's reports. In particular:

- **specifying a reasonable time period in which the Minister must determine protection visa applications for asylum seekers detained in offshore processing centres;**
- **specifying that asylum seekers who are found to be refugees after being processed offshore will be resettled in Australia if resettlement in other countries is not available;**
- **applying the principle that children should only be detained as a measure of last resort;**
- **providing for asylum seekers who are detained and processed offshore with access to independent legal advice and legal representatives to assist them in making their protection visa applications, as well as access to community welfare and support organisations;**
- **providing for the Minister to grant a visa to an asylum seeker detained in offshore processing centres regardless of whether they have applied or are eligible for a visa;**
- **providing for the Minister to determine that an asylum seeker detained in offshore processing centres may reside in a place other than a detention centre (for example, community housing);**

- **providing for reports by DIMA to the Commonwealth Ombudsman or Australian Parliament on asylum seekers detained in offshore processing centres; and**

- **providing asylum seekers who are detained and processed offshore with a right to have a negative decision on their protection visa application independently reviewed on the merits.**

Recommendation 3

3.210 The committee further recommends that the review of special measures relating to the treatment and accommodation of women, children and families on Nauru currently being undertaken by the Federal Government be completed.

Recommendation 4

3.211 The committee recommends that the review currently being undertaken by the Federal Government, in relation to special measures for women, children and families on Nauru should include specific consideration of the impact of offshore processing arrangements on children.

Recommendation 5

3.212 In the event that the Bill proceeds, the committee recommends that the Bill be amended to specifically provide for independent scrutiny of offshore processing arrangements by the Commonwealth Ombudsman to ensure that offshore processing arrangements are subject to an equivalent level of independent oversight and scrutiny as onshore processing arrangements.

Recommendation 6

3.213 The committee recommends that the provision for independent scrutiny of offshore processing arrangements by the Commonwealth Ombudsman set out in Recommendation 5 should provide express authority to the Commonwealth Ombudsman for proper access to offshore processing centres located in any 'declared' countries. Given the sovereignty issues involved in any such extra-territorial activities by government officials, this may require the negotiation of appropriate government-to-government agreements.

Recommendation 7

3.214 In the event that the Bill proceeds, the committee recommends that the Bill be amended to specifically provide that the requirement in Part 8C of the *Migration Act 1958* for the Commonwealth Ombudsman to provide reports on persons held in detention for more than two years also applies in relation to all persons held in offshore processing locations.

Recommendation 8

3.215 In the event that the Bill proceeds, and prior to the Bill proceeding, the committee recommends that the Federal Government undertake a full costing in relation to the measures contained in the Bill.

Recommendation 9

3.216 In the event that the Bill proceeds, the committee recommends that the Bill be amended to include a sunset period of eighteen months for review of the Bill's operation and practical effect.

Recommendation 10

3.217 In the event that the Bill proceeds, the committee recommends that the Bill be amended by inserting an express requirement for a public and independent review of its operation and effect at the end of the sunset period referred to in Recommendation 9.

Senator Marise Payne

Committee Chair

DISSENTING REPORT BY THE AUSTRALIAN LABOR PARTY

1.1 Labor Senators do not support the Bill. While Labor Senators agree with the majority report's consideration of the evidence presented in the course of the committee's inquiry, they oppose the Bill and its broader policy objectives in absolute terms. Labor Senators note that the overwhelmingly view among all those who provided evidence to the committee was that the Bill should be opposed, and consider that the appropriate conclusion should be that the Bill be rejected in its entirety; at a fundamental level, the Bill cannot be saved by any of the suggested amendments contained in the majority report's recommendations.

1.2 At the outset, Labor Senators express the view that the Bill represents a flawed and completely inappropriate response to what is essentially a foreign policy issue.

1.3 Labor Senators agree with concerns raised in relation to uncertainty about how the proposed arrangements will work in practice and the lack of accountability mechanisms; domestic policy issues such as the Bill's flagrant incompatibility with the rule of law and the principles of natural justice; and the clear breach of Australia's obligations under international law in several significant areas. The Bill also represents a complete 'about-turn' with respect to a number of recent reforms, including the principle that children should not be held in detention.

1.4 Labor Senators explicitly endorse the comments in the majority report in relation to the absence or limited availability of vital information to assist with the committee's deliberations in this inquiry. Not only is the Bill highly deficient in terms of details about how its measures will be practically implemented, but the Department has also been particularly unhelpful in providing information and documents that apparently form the underlying policy basis for important aspects of the offshore processing regime.

1.5 The Department has appeared reluctant to provide this information, and when information was given, answers have been brief, legalistic, contradictory and often obscure in relation to a number of matters relating to the operation of fundamental aspects of the Bill. Labor Senators believe that this has obstructed the committee's consideration of the Bill.

1.6 In light of these arguments, Labor Senators recommend that the Bill not proceed.

Recommendation 1

1.7 Labor Senators recommend that the Bill should not proceed.

Senator Patricia Crossin **Senator Linda Kirk**

Deputy Chair

Senator Joseph Ludwig

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.
>
> **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.**
>
> 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.
>
> **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?
>
> **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.
>
> **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?
>
> **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.
>
> **Senator BARTLETT**—So it was as a result of the department's view?
>
> **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.
>
> …
>
> 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

> …
>
> 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

MINORITY REPORT BY AUSTRALIAN GREENS

1.1 The Australian Greens strongly support the committee report, however, because we believe that the principle and policy that this bill would implement is fundamentally flawed, we can only agree with recommendation one, that the bill not proceed.

1.2 Recommendations 2 to 10 are clearly aimed at improving accountability of the offshore processing system and mitigating some of the cruelties being established by this bill and we support these aims, however, the Australian Greens do not believe a bad law in conception can be made acceptable simply by ameliorating the worst aspects of it.

1.3 The idea that Australia should try and shirk its responsibilities under international law by sophistry and deception is morally repugnant.

1.4 Mr Brian Walters SC told the inquiry 'The message is that we are being disingenuous as to our obligations. The message is that we do not care about our international obligations and we are not to be trusted on our international obligations. That is a very serious position for Australia to place itself in internationally.'

1.5 In its current form this bill lacks virtually all safeguards and checks and balances. The government is essentially saying 'trust us and the Department of Immigration to do the right thing'. The scandals of Cornelia Rau and Vivian Solon, as well as the dreadful treatment of asylum seekers in detention, both onshore and offshore, does not give The Australian Greens confidence in either the Department of Immigration or the government.

1.6 The Australian Greens concur with Mr Brian Walters SC representing Liberty Victoria and his statement to the Inquiry, 'where power is being exercised, I do not think we should ever assume that it is always being exercised in good faith. That is why we have the rule of law, because experience has shown that when people have power they will abuse it.'

1.7 The Australian Greens believe that even if adequate safeguards and checks and balances were inserted into this bill, it should be opposed because the concepts and policy it is seeking to implement are abhorrent and inflict cruel and unusual punishment on innocent people who seek our protection.

1.8 The politicisation of the refugee determination process is at the heart of what is wrong with this bill. In her submission to the inquiry, Associate Professor Mary Crock stated: 'the fact that the Refugee Convention is based on a case by case assessment of the protection needs of persons seeking asylum underscores the non-political nature of refugee protection'. The bill is a significant departure from this principle because it allows the construction of an entirely new refugee processing system in response to the criticism from another government of Australia's refugee processing system outcomes.

1.9 Offshore processing and official discrimination toward asylum seekers based on their mode and place of arrival was originally implemented for political reasons. It involved shipping asylum seekers to a small island nation that is essentially bankrupt and dependent on Australia for survival. Nauru was essentially bribed by our government to participate in a scheme designed to reap political gain for the Howard government by exploiting xenophobia, presenting asylum seekers as a threat and repelling this threat, while pretending to abide by the Refugee Convention.

1.10 Whether this policy broke only the spirit or also the letter of the Refugee Convention is still a matter for debate. What is clear is that hundreds of people suffered terribly for many years. Children lost childhoods. People lost their minds. Families were split up. Some who returned to Afghanistan lost their lives. Most were eventually found to be refugees and, ironically, many were eventually settled in Australia.

1.11 Two refugees remain on Nauru after four and a half years. One arrived when he was 21 and is now 26. The other recently turned 30. Although found to be genuine refugees, adverse ASIO security assessments keep them imprisoned on Nauru possibly indefinitely. ASIO refuses to tell these men or their lawyer the reasons for their adverse assessments.

1.12 When questioned about this practice Mr Brian Walters SC said:

> Security is, and has been in history, too frequently the excuse for overriding human rights. It was the excuse for the emergency decree and the enabling act in 1933 in Germany. It was security: it was the burning of the Reichstag, a terrorist act. Too often security questions are raised and they say, 'You can't question that.' That was the reason Dreyfus was tried in secret—so no-one could see that in fact a crime was being committed against him by the security authorities. History is replete with examples. We need to be very suspicious of claims of security, and we must have them independently assessed. Where someone has their rights interfered with on security grounds, they are entitled to know why and to have that independently checked. One of the fundamental principles of the rule of law is the principle that, if someone's liberty is violated, they are entitled to know the reason and they are entitled to have that independently assessed. That has been recognised in our system of law for over 300 years. It is a serious concern. One of the problems that we have is that all of this is happening off shore, at arms length, a long way away from our system, and people are able to say we do not have responsibility for what we have in fact caused.

1.13 These men will remain on Nauru indefinitely, despite serious mental health concerns, until another country is found that will take them.

1.14 The government's stated intention is to try and get third countries to accept for resettlement those found to be refugees. However, as several submissions noted, including A Just Australia and Dr Penelope Mathew from ANU College of Law, only 4.3% of the refugees from the original offshore processing went to countries other than Australia and New Zealand.

1.15 The Australian Greens are appalled at the prospect that genuine refugees will be left in limbo on Nauru, for years and possibly indefinitely, violating the important international requirement of finding durable protection solutions for refugees.

1.16 The Australian Greens are also opposed to the policy that Australia should seek to send refugees that it has processed to third countries rather than settle them in Australia. This policy disrupts the important concept of 'burden sharing', as noted by Australian Lawyers for Human Rights. Not only this, but The Australian Greens consider it an abrogation of international responsibilities that a wealthy capable country with a relatively tiny number of asylum seekers arriving, should try to palm off its international responsibilities to protect asylum seekers to other, often poorer countries.

Politicisation of refugee processing:

1.17 This bill represents a further politicisation of refugee processing. It is clearly a direct response to the pressure from the Indonesian government. Many submissions were critical of this aspect of the bill. The bill represents an immigration policy change to solve a foreign policy problem. It results in punishing refugees in an attempt to placate the Indonesian government. Several witnesses questioned whether this response would 'heal' the diplomatic rift between Australia and Indonesia. A Just Australia asked Senators to consider what would happen once West Papuans are granted refugee status on Nauru?

1.18 The Minister for Immigration has the power under subsection 5F to exempt individuals, including classes of persons (groups), from being designated as 'designated unauthorised arrivals' and shipped off to Nauru. This means the government can choose to discriminate between one set of arrivals and another.

1.19 The Department of Immigration confirmed that under section 198A of the Act, the Minister could exempt East Timorese asylum seekers from offshore detention while other asylum seekers such as from West Papua would go to Nauru. Mr Bob Correll, Deputy Secretary said, 'There is a discretionary removal provision in the bill; it is provision 198A. So under the provisions of the bill there is the capacity for that sort of call to be made on an individual basis.' He also said 'in relation to the conflagration that is currently being looked at, the government is looking at that from an overall policy position. It would be a matter of government policy for the way it handled it. A decision could be, as part of that policy, to handle it in the usual way. That could be a decision. Or it could be a decision to handle it differently, given the circumstances that applied in that country.'

1.20 The Law Institute of Victoria expressed concern about the repercussions of this provision in its submission:

> 'The LIV also notes that the proposed legislation provides the Minister 'an additional power to declare that specified persons or classes of persons are exempt'. The stated purpose of this power is to provide 'flexibility to avoid the regime being extended to those not intended to be covered by the changes'. This power also suggests that the Minister will have discretion as

> to whether the new measures should be imposed on certain groups of asylum seekers. This discretionary power indicates that the proposed legislation will be used to penalise some asylum seekers and not others – possibly based on their nationality and the nature of their refugee claims.
>
> The LIV suggests that if applied in this manner, the proposed legislation would give rise to discrimination of a kind that is entirely inappropriate to the legal framework for Australia's immigration and border control.'

1.21 This outright politicisation of refugee processing contravenes Article 31 of the Refugee Convention and is therefore opposed by The Australian Greens.

Human rights concerns:

1.22 Nauru is not a signatory to the Refugee Convention. Nor is it a signatory to other important conventions protecting human rights. In the past, lawyers, journalists and politicians have not been granted a visa to visit Nauru. Under this bill, neither the Ombudsman nor HREOC would be guaranteed access to monitor conditions.

1.23 The Department of Immigration could only say that visas to Nauru, including visas for lawyers, were a matter entirely for the Nauruan government. Senator Mason summed the situation up succinctly when he asked the government officials at the inquiry whether Nauru "Was Australia's Guantanamo Bay?"

1.24 The Australian Greens are opposed to processing people in a location where there are no obligations to abide by critical international conventions and where independent observers, including lawyers are actively prevented from inspecting operations. The revelations from the initial processing on Nauru, as well as from our own detention centres in Australia mean that independent inspection of such facilities is critical and the parliament would be negligent if it allowed this kind of operation to occur without independent safeguards and oversight.

Mental health concerns:

1.25 The fact that long-term immigration detention has a seriously damaging affect on a person's mental health is well established. The isolation of Nauru is likely to exacerbate this damage. The Dutch psychiatrist Dr Maarten Dormaar, who worked in Nauru in mid-2002 reported: 'I seldom or never encounter an asylum seeker who still sleeps soundly and is able to enjoy life. Mental health, or psychiatry for that matter, is basically not equipped to improve their situation in any essential respect.'

1.26 The Department of Immigration indicated that the final report on health matters in Nauru was addressed to the Minister and therefore they were not able to release it. This report is widely considered to be the reason that the 25 of the final 27 detainees on Nauru were brought to Australia.

1.27 The Australian Greens believe that to institute a policy to send more asylum seekers to Nauru, in the knowledge that those detained on Nauru are highly likely to be mentally harmed, is a culpable action and contravenes the Commonwealth's basic duty of care and moral obligations.

Cost:

1.28 The Department reported to the Committee that flights to Nauru (there is no regular service at the moment) cost between $20,000 and $100,000. Each detainee would be flown to and from Nauru at least once, possibly more times if medical evacuation is necessary. It is well documented that other costs associated with running a detention centre increase exponentially on remote islands.

1.29 The Government has not provided the parliament with a figure for the costs associated with this proposal despite repeated requests.

1.30 A Just Australia noted in its submission that $240 million had been spent on Nauru, or approximately $195,000 per asylum seeker.

1.31 The Australian Greens object to the misuse of taxpayers money on an unnecessary and politically motivated policy. This funding would be better spent on settlement services or dealing with issues that create refugees in the first place.

Impact on families:

1.32 The Australian Greens are concerned about the impact of this legislation on families in particular the ability of family members to live together and be reunited when geographically separated. The committee heard from Mr Kerry Murphy from Australian Lawyers for Human Rights about the difficulties that single men already have in trying to bring the rest of their family to Australia and how these difficulties will be exacerbated by this legislation.

> **Mr Murphy**—I want to add something about family reunion. I understand the visa the department was proposing would result from the offshore processing was the 451 secondary movement visa, which they would rename. That visa has a period of five years residence in Australia. But you cannot actually apply for any other visa once you are on that visa in Australia unless you apply for a protection visa. That protection visa cannot be decided until 54 months after you have been granted the 451 visa. The 451 visa does not provide for family reunion in terms of sponsoring family members from elsewhere. At the moment I have a number of clients in our office—Afghan and Iraqi gentlemen—who have been separated from their wives and children for six and seven years. They are now trying to bring them over in the process. They have been grinding through the temporary protection visa process. This visa is going to reinforce the stress that is caused for those people and make it even more difficult for them to resettle in the Australian community.

1.33 This legislation will mean that for families where some members of the family are already in Australia if other family members seek to be reunited with the rest of their family and arrive in Australia by boat they will not be able to be reunited with the rest of their family. They will be taken to a remote island and if they are found to be refugees the government will seek to find another country to resettle them so they may never be reunited with their other family members.

1.34 The other impact this legislation will have on families relates to the ability of family units to be housed together. The government was not able to inform the committee about how arrangements for family units to live together would be facilitated.

Impact on children:

1.35 Associate Professor Mary Crock supplied the committee with a very disturbing statistic regarding unaccompanied children. According to IOM, "32 of the 55 unaccompanied children on Nauru were returned to Afghanistan in 2002-2003. At least one of these was subsequently killed. Of 290 such children who made it to Australia, none were returned over this period.

1.36 This information should cause all parliamentarians to stop and think of the consequences of this bill on children.

Naval interceptions:

1.37 Many submissions and witnesses expressed concern about the Australian government's policy of requiring the Navy to intercept vessels carrying asylum seekers at sea, and where possible, turn these boats around.

1.38 Although not contained within this bill, The Defence Minister, Brendan Nelson MP, announced that the Australian Navy would increase patrols and actively co-operate and conduct joint patrols with the Indonesian military as part of the policy of appeasing Indonesian over the granting of refugee visas to West Papuans.

1.39 Experts in the field, such as Mr David Manne of the Refugee and Immigration Legal Centre, said it would be impossible to conduct a proper assessment on the seas as to the bone fide of the refugee claims and therefore there was a high level of danger that Australia would return refugees to persecution.

1.40 Mr Manne told the Inquiry:

> That raises the very real prospect, in the absence of guarantees, that we are looking at a situation where the Australian Navy, for example, could be put in the completely impossible position, in our view, of somehow having to determine on the face of it whether or not someone should be sent back to a situation of persecution. There are no guarantees or no proper measures that have been guaranteed to ensure that that would not occur. For example, there are no proper measures to ensure an assessment to work out whether that person needs to come to Australia to have their claims assessed.

1.41 Dr Penelope Mathew, from the ANU College of Law stated in her submission: 'Rather than returning refugees to places of persecution, the parties to the Refugee Convention have agreed to provide them with protection of their fundamental human rights. To do otherwise is to become complicit with the persecutory regimes from which refugees have fled.'

1.42 The Australian Greens are opposed to the interception and return of asylum seekers by the Navy and recommends that this policy end immediately.

Papua New Guinea:

1.43 The original basis for the policies of mandatory detention, offshore processing and naval interceptions is the idea that asylum seekers arriving without a valid visa are illegal or 'queue jumping'. Article 31 explicitly states that asylum seekers should not be penalised for arriving illegally.

1.44 Senator Bob Brown asked the Department how a West Papuan should seek protection in Australia through proper channels. The Department's answer was to either flee into Papuan New Guinea or travel to Jakarta and apply at our embassy – clearly an untenable option for West Papuans facing persecution from Indonesian authorities.

1.45 Papua New Guinea while a signatory to the Convention has made significant formal reservations on a number of provisions. As a result the Papua New Guinea Government does not accept convention obligations covering: wage-earning employment (Article 17 (1)), housing (Article 21), public education (Article 22 (1)), freedom of movement (Article 26), refugees unlawfully in the country of refuge (Article 31), expulsion (Article 32) and naturalisation (Article 34).

1.46 While UNHCR is working with the PNG government, evidence to the committee showed that UNHCR in fact have only five staff in PNG and that PNG has as many as 10,000 Papuan refugees.

1.47 There is significant evidence that West Papuan refugees in PNG are not safe from intimidation and in some cases attacks by Indonesian military and militias.

1.48 Indonesia is not a signatory to the Refugee Convention and the return of West Papuans to Indonesia to face persecution would be a significant breach of the prohibition on refoulement contained in the Convention.

1.49 Since the invasion of West Papua in 1961, the Indonesian military occupation has resulted in large numbers of deaths, injuries and significant human rights abuses.

1.50 A brief period of autonomy that seemed possible following the collapse of the Suharto dictatorship has failed and been closed off by the Indonesian military.

1.51 Some analysis has suggested that the systematic abuse of human rights amounts to genocide.

1.52 Regardless, there is no doubt that the level of conflict over West Papuans expressions of their right to self-determination is creating the conditions under which many West Papuans have little choice but to seek refuge in neighbouring countries.

1.53 While this legislation seeks to deflect Australia's responsibilities to assist those seeking refuge it will do nothing to address the underlying cause of why West Papuans are seeking to come to Australia.

1.54 In fact, the knee-jerk appeasement of Indonesia displayed in this legislation will only serve to reinforce the Indonesian military's grip on West Papua in turn increasing the flow of refugees.

The Australian Greens recommend:

1) **that the Bill should be opposed in its entirety on the basis that offshore processing of asylum seekers is fundamentally flawed, the policy contravenes the letter and spirit of the Refugee Convention and amounts to cruel and unusual punishment of innocent people, and is based on an appalling foreign policy decision designed to appease the Indonesia government;**

2) **that the government ends the policy of the Australian Navy intercepting and returning boats of asylum seekers on the open sea because of the high danger of *refoulement* (in the case of West Papuans direct *refoulement*) of refugees;**

3) **that the government acknowledge that Papua New Guinea does not have the capacity to process large numbers of asylum seekers nor offer all refugees a durable protection solution. Therefore Australia should not return asylum seekers arriving in Australia via Papua New Guinea until they have undergone a full protection visa determination process on the Australian mainland.**

4) **that the Australian Government immediately bring the two remaining refugees on Nauru to Australia and permanently close the offshore processing camps on both Nauru and Manus Island.**

Senator Bob Brown **Senator Kerry Nettle**
Australian Greens

APPENDIX 1

SUBMISSIONS RECEIVED

1	Mr Ben Leeman
2	Mr G. Osboldstone
3	Ms Frances Harvey
4	Ms Daisie Barham
5	Mr Dennis Ryle
6	Mr Brendan C Joyce
7	Ms Sue Cleveland
8	Mr Robert Gunter
9	Refugee Council of Australia
10	Ms Dorothy Babb
11	Mr Bruce Hogben
12	Mr David Ellemor
13	St Hilary's Anglican Church Kew
14	Mr Richard Aspland
15	Ms Kerry Gonzales
16	Mr Sean McManus
17	Mr Huw Luscombe
18	Australian Catholic Migrant and Refugee Office
19	Ms Jenny Richardson
20	Ms Rosalind Berry
21	Ms Anna Foley
22	Ms Rebecca Dickson
23	Ms Liz Hughes

24 Ms Di Jeffs

25 Mr Mike and Mrs Nancy Murphy

26 Dr Trish Carroll

27 Ms Sue Christophersen, Dr William Christophersen, Dr Fleur Christophersen and Dr Richard Horton

28 M. Cesare

29 Project SafeCom Inc.

30 Ms Daniela Giorgi

31 Liberty Victoria

32 Quaker Peace and Legislation Committee

33 Mr Peter Hurrey

34 Ms Sally Putnam

35 Ms Jean Jordan

36 Mt Gambier Catholic Parish

37 Mr Peter C. Friis

38 Ms Kath Morton

39 Ms Anita Coles

40 Ms Rosamund Rose

41 Lorien Vecellio

42 Ms Kerrie Donaldson

43 Ms Kate Greenwood

44 Ms Nicola Hughes and Mr Ross Baird

45 Mr David Hopkins

46 Mick Jeffery and Fidrin Lusi

47 Ms Michelle Thomas

48 Mr John Greenwell

49	United Nations Youth Association of Australia
50	Ms Mary J de Merindol
51	Dr Jen Harrison
52	Ms Dianne Hiles
53	Ms Elaine Smith
54	Ms Mary Lou and Ms Robin Friday
55	Ms Denise Dalton
56	Jesuit Refugee Service (Australia)
57	Mr Matthew Thorpe and Mrs Joanne Thorpe
58	Mr Geoffrey Edward Hacquoil and Mrs Winifred Ruth Hacquoil
59	Ms Sue Hoffman
60	Mr Angus Francis
61	Ms Pamela Curr
62	Mr Mark Ciaran Seddon
63	Springvale Monash Legal Service
64	Dr Jane McAdam
65	Asylum Seeker Resource Centre
66	Associate Professor Mary Crock
66A	Confidential
67	NSW Council for Civil Liberties
68	Ms Diane Gosden
69	Mr Richard Chauvel
70	Ms Wendy Hebbard
71	Ms Bette Devine
72	Amnesty International Australia

73	Human Rights Law Resource Centre
74	Oxfam Australia
75	United Nations High Commissioner for Refugees
75A	United Nations High Commissioner for Refugees
76	Melbourne Catholic Migrant & Refugee Office
77	Conference of Leaders of Religious Institutes (NSW)
78	Australian Lawyers for Human Rights
79	St Vincent de Paul Society
80	Castan Centre for Human Rights Law
80A	Castan Centre for Human Rights Law
81	A Just Australia
82	Ms Linda Jaivin
83	Edmund Rice Centre for Justice and Community Education
84	Australia West Papua Association
85	Federation of Community Legal Centres (Vic)
86	Mr Ross Daniels
87	Dr Klaus Neumann
88	Legal Services Commission of South Australia
89	National Council of Churches in Australia
90	Law Institute of Victoria
91	Refugee and Immigration Legal Centre
92	Anglicare (Sydney)
93	Mr Philip Hudson
94	Refugee and Immigration Legal Service Inc (QLD)
95	ACT Refugee Action Committee

96	Dr Penelope Mathew
96A	Dr Penelope Mathew
97	Legal Aid Queensland
98	GetUp
99	Centre for Multicultural Pastoral Care
100	Asylum Seekers Centre
101	Immigration Advice and Rights Centre Inc
102	Public Interest Law Clearing House (Vic)
103	Migration Institute of Australia
103A	Migration Institute of Australia
104	Refugee Advice and Casework Service (Australia)
105	Mr David Hill
106	Federation of Ethnic Communities Councils of Australia
107	Mr Roger Landbeck
108	Mr Nicholas Poynder
109	Public Interest Law Clearing House (Vic) Inc and the Victorian Bar
110	Ms Halina Rubin
111	ChilOut
112	Human Rights and Equal Opportunity Commission
112A	Human Rights and Equal Opportunity Commission
113	Ms Helen Leeder
114	Mr Herman Wainggai
115	Ms Marion Le
115A	Ms Marion Le
116	ICJ Australia

117	Victorian Foundation for Survivors of Torture Inc (Foundation House)
118	Department of Immigration and Multicultural Affairs
118A	Department of Immigration and Multicultural Affairs
118B	Department of Immigration and Multicultural Affairs
118C	Department of Immigration and Multicultural Affairs
118D	Department of Immigration and Multicultural Affairs
119	B.G. Hepworth
120	J.J.C. Smart AC and E.M. Smart
121	Ms Frederika Steen
122	Ms Marianne van Galen
123	Ms Frances Harvey
124	Australian Lawyers Alliance
125	Ms Clover Moore MP
126	Confidential
127	Law Society of South Australia
128	Royal Australian and New Zealand College of Psychiatrists
129	Mr Hassan Ghulam
130	Ms Marilyn Shepherd
130A	Ms Marilyn Shepherd
131	Mr John Stanhope MLA
132	Ms Natasha Hayes
133	Law Society of New South Wales
134	Ms Barbara Ashby
135	UnitingJustice Australia
136	Mr Michael Brisco

TABLED DOCUMENTS

Documents tabled at public hearings

26 May 2006 - Department of Immigration and Multicultural Affairs

- Onshore Protection Interim Procedures Advice No. 16, 'Refugee Status Assessment Procedures for Unauthorised Arrivals Seeking Asylum on Excised Offshore Places and Persons taken to Declared Countries', September 2002

6 June 2006 - Department of Immigration and Multicultural Affairs

- Information Paper, 'Illegal Departure, Voluntary Return and Imputed Political Opinion in relation to Iraq', April 2002; and letter from Acting Secretary to Principal Member of the RRT, May 2002

6 June 2006 - A Just Australia

- GetUp petition

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, Friday 26 May 2006

United Nations High Commissioner for Refugees

Mr Neill Wright, Regional Representative

Mr Henry Domzalski, Senior Regional Protection Officer

Liberty Victoria

Mr Brian Walters SC, President

Human Rights and Equal Opportunity Commission

Mr Graeme Innes AM, Human Rights Commissioner and Commissioner Responsible for Disability Discrimination

Mr Jonathan Hunyor, Legal Officer

Ms Frances Simmons, Associate to President von Doussa

Castan Centre for Human Rights Law

Ms Tania Penovic

Ms Azadeh Dastyari

Refugee and Immigration Legal Centre

Mr David Manne, Coordinator and Principal Solicitor and Registered Migration Agent

Law Institute of Victoria

By Teleconference

Mr Erskine Rodan, Council Member

Mr Paul Fisher, Victoria Legal Aid, Civil Law Service

Ms Joanne Kummrow, Acting Manager, Advocacy and Practice

Dr Penelope Mathew, Faculty of Law, Australian National University

Refugee Council of Australia

Mr John Gibson, President

Victorian Bar/Public Interest Law Clearing House (Vic)

The Hon Ron Merkel QC

Department of Immigration and Multicultural Affairs

Mr Bob Correll, Deputy Secretary

Mr Peter Hughes, First Assistant Secretary, Refugee Humanitarian and International Division

Mr Robert Illingworth, Assistant Secretary Onshore Protection Branch, Refugee Humanitarian and International Division

Ms Robyn Bicket, Chief Lawyer, Legal Division

Ms Vicki Parker, A/g Assistant Secretary, Legal Framework Branch, Legal Division

Mr Dean Hulmes, A/g Director, Offshore Processing Liaison Section, Offshore Asylum Seeker Management Branch, Border Security Division

Mr Robert Hoitink, Assistant Secretary, Border Intelligence and Unauthorised Arrivals Branch, Border Security Division

Sydney, Tuesday 6 June 2006

Dr Jane McAdam, Faculty of Law, University of Sydney

A Just Australia

Ms Kate Gauthier, National Coordinator

Ms Anna Samson, Campaign Officer

Australian Lawyers for Human Rights

Mr Simeon Beckett, President

Ms Eve Lester, Victoria Convenor

Mr Kerry Murphy, Member

Associate Professor Mary Crock, Associate Dean, Post Graduate Research, Faculty of Law, University of Sydney

Uniting Justice Australia – Uniting Church in Australia

Rev Elenie Poulos, National Director (also on behalf of the National Council of Churches in Australia)

Ms Alicia Pearce, Research Officer

Migration Institute of Australia

Ms Angela Chan, Member

Ms Jill Vidler, Member

Department of Immigration and Multicultural Affairs

Mr Bob Correll, Deputy Secretary

Mr Peter Hughes, First Assistant Secretary, Refugee Humanitarian and International Division

Mr Robert Illingworth, Assistant Secretary, Onshore Protection Branch, Refugee Humanitarian and International Division

Ms Robyn Bicket, Chief Lawyer, Legal Division

Ms Vicki Parker, A/g Assistant Secretary, Legal Framework Branch, Legal Division

Mr Robert Hoitink, Assistant Secretary, Border Intelligence and Unauthorised Arrivals Branch, Border Security Division

Mr John Okely, Assistant Secretary, Offshore Asylum Seeker Management Branch, Border Security Division