Chapter 8

International humanitarian obligations

8.1 Whether the minister's discretionary powers provide an adequate mechanism for implementing Australia's international humanitarian obligations has been a contentious issue in immigration policy for a number of years. It was subject to close scrutiny by the Senate Legal and Constitutional References Committee in its 2000 report *A Sanctuary Under Review*.[1] On that occasion, and notwithstanding the submission by the then Department of Immigration and Multicultural Affairs (DIMA), that Committee received evidence from a number of organisations claiming that reliance on the discretionary powers to fulfil Australia's international humanitarian obligations was fraught with a number of legal problems and administrative shortcomings.[2]

8.2 This chapter examines the ministerial discretion powers under term of reference (d). It evaluates the claim repeated by DIMIA during this inquiry that the minister's discretionary powers in their current form are appropriate to ensure that Australia meets its obligations under various international conventions. Australia's primary obligation to asylum seekers and other persons in Australia who are deemed in need of protection is to ensure that they are not refouled (returned) to their countries where they may face persecution, torture or death.

8.3 It describes Australia's obligations under various international conventions and identifies major shortcomings with the arguments presented by DIMIA in relation to those obligations. The chapter then outlines a range of criticisms of the current system by human rights and refugee-advocacy groups. These collectively voice concern that reliance on ministerial discretion places Australia at risk of breaching its international legal obligations not to refoule asylum seekers. There is also concern that the current system places unnecessary hardship on those who are required to exhaust a decision making process which has no direct application to them before they can have their humanitarian claims considered by the minister. It briefly revisits the conclusions of *A Sanctuary Under Review*, in particular the recommendation that Australia incorporate its relevant international obligations into domestic law.

8.4 The final section considers some options that could enable Australia to meet its non-refoulement obligations without relying solely on the minister's discretionary powers. It provides a brief overview of complementary protection, and considers the

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1 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000

2 See in particular submissions received by the Senate Legal and Constitutional References Committee from the Human Rights and Equal Opportunity Commission (HREOC), Law Council of Australia, South Brisbane Immigration & Community Legal Service Inc., Legal Aid Western Australia and The Refugee Council of Western Australia

Australian Government's position on this emerging issue, especially the question of whether a new humanitarian visa class would be a suitable additional safety-net to ensure compliance with various international treaties.

Ministerial discretion and Australia's international humanitarian obligations

8.5 Australia, as part of its Onshore Protection Program, has assumed responsibility to extend protection to asylum seekers already in Australia under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (the Refugee Convention).[3] As a signatory to the 1951 Convention, Australia is obliged to consider refugee cases and then provide protection if they pass the test.[4] The basis for the obligation is Article 33 which prohibits member States from returning a refugee to a country where, amongst other things, the life and freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.[5] People seeking refugee status under the Onshore Protection Program do so by applying for a Protection Visa.[6] Non-refoulement obligations apply to persons who may not have a fear of persecution under the terms of the Refugee Convention but who face a real risk of a violation of their fundamental human rights.[7]

8.6 Australia does not have a separate or distinct onshore process for dealing with asylum seekers on humanitarian grounds. Australia's obligation of non-refoulement is principally derived from four conventions:

- Convention Relating to the Status of Refugees (1951) and the Protocol relating to the Status of Refugees (1967) (COR);
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), ratified by Australia on 8 August 1989;
- Convention on the Rights of the Child (CROC), ratified by Australia on 16 January 1991; and
- The International Covenant on Civil and Political Rights (ICCPR), ratified by Australia on 13 August 1980.

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3 UNHCR, Submission no. 36, p.1

4 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.12

5 HREOC, Submission no. 13, p.3

6 The application and determination process for refugee status under the Onshore Protection Program is examined in the Senate Legal and Constitutional References Committee report, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, chapters 3-6

7 HREOC, Submission no. 13, p.3

8.7 A crucial issue with regard to these various conventions is that, with the exception of the Refugee Convention, they have not been incorporated into Australia's domestic law. As stated in *A Sanctuary Under Review*: '…treaties have no direct legal effect within Australia unless they are incorporated into domestic law by an Act of the Australian Parliament'.[8] Accordingly, the Migration Act implements only those obligations contained in the Refugee Convention. This is significant because, as the Human Rights and Equal Opportunity Commission (HREOC) points out, the definition of refugee under the Convention may exclude people who must be protected from refoulement under the CAT, CROC and ICCPR. According to Amnesty International:

> The consequences of non-incorporation into domestic law is that, under the current refugee determination system, there is no legal obligation under Australia's domestic law through which any individual can ensure that he or she is not forcibly removed from this country to another…[9]

Australia's obligations under the CAT, CROC and ICCPR

8.8 The ministerial guidelines specifically identify obligations under the CAT, ICCPR and the CROC.[10] However, as previously indicated, reference to these international treaties does not constitute their incorporation into Australian law and, therefore, does not create enforceable rights and obligations. The non-incorporation of these treaties into domestic law means that any breaches of Australia's non-refoulement obligations are not illegal within Australia.[11]

8.9 It is important to briefly describe Australia's international obligations under each of these Conventions. The obligation of non-refoulement under the CAT is contained in Article 3 which provides that:

> (1) No State Party shall expel, return ('refoule') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> (2) For the purpose of determining where there are such grounds, the competent authorities shall take into account all relevant considerations

8 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.40

9 Amnesty International Australia, Submission no. 23, p.4

10 Guidelines on ministerial powers under sections 345, 351, 391, 417, 454 and 501J of the *Migration Act 1958*, at guideline 4

11 Ms Jane McAdam, Submission no. 35, p.5

> including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[12]

8.10 The CAT is significant because it is the only universal treaty other than the Refugee Convention to explicitly refer to non-refoulement.[13]

8.11 Under the ICCPR, Australia has an obligation not to deliver a person by compulsion into the hands of another state or third party which might inflict harm, or which may expel that person to a third state which might inflict such harm. Australia is also obliged to consider the risk that a person's rights under article 6 (protection of the right of life), and article 9 (protection of the right to security of persons) will be violated.

8.12 Finally, HREOC states that like the ICCPR, Australia has an obligation under CROC not to place a child in a situation where the child's rights under articles 4, 6 and 37(a), (b) and (c) are violated.[14]

8.13 Significantly, both the CAT (article 3) and ICCPR (article 7), but not CROC, have mechanisms in place to hear complaints from individuals alleging that their human rights under these treaties have been breached. As part of this procedure, the Australian Government may respond to the findings of UN committees with regard to non-refoulement, and the response to each allegation is considered by the relevant Committee and included in the final written communications. According to HREOC, the Committee usually asks the State party to outline what measures have been taken to implement their recommendations.[15]

8.14 To illustrate the process, HREOC provided the Committee with copies of six communications sent to CAT and three to ICCPR from individuals in Australia which allege their right to non-refoulement would be breached if they were removed from Australia. HREOC noted that while the communications do not specifically relate to the operation of ministerial discretion: 'they relate to the possibility that ministerial discretion has failed to protect these individuals from refoulement'.[16] The communications cover the period December 1997 to September 2003.[17] HREOC also

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12 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, pp.52-53

13 Ms Jane McAdam, *The European Union Proposal on Subsidiary Protection: An Analysis and Assessment*, New Issues in Refugee Research Working Paper No. 74, UNHCR, Evaluation and Policy Analysis Unit, Geneva, December 2002, p.4

14 HREOC, Submission no. 13A, pp.3-4

15 HREOC, Submission no. 13A, p.1

16 ibid.

17 For an example of a communication under CAT, see *Communication No 120/1988: Australia. 25/05/99. CAT/C/22/D/120/1998. (Jurisprudence)*. For an example under the ICCPR, see *Communication No 706/1996: Australia. 04/12/97. CCPR/C/61/D/706/1996. (Jurisprudence)*. Copies of the communications were provided by HREOC as part of Submission no. 13A

told the Committee that it does not monitor individual communications in a systematic way, but does 'look at…communications occasionally [when] they come to our attention through various news and information...'.[18]

8.15 DIMIA advised the Committee that since June 1993 a total of 39 communications to UN Committees have been made by individuals claiming that Australia has not met its international humanitarian obligations. These have given rise to four findings against Australia from the UNHCR (April 1997, July 2001, October 2002 and August 2003) and one ruling against Australia from the United Nations Committee Against Torture (UNCAT) (May 1999).[19]

8.16 The Committee takes special note of the UNHCR document entitled *Concluding observations of the Committee against torture: Australia*, which provides a brief assessment of Australia's combined Second and Third Periodic Report under the Convention. The document expressed concern about, amongst other things, the lack of appropriate review mechanisms in Australia for ministerial decisions in respect of cases coming under article 3 of CAT. Accordingly, it recommended that Australia consider the desirability of providing a mechanism for independent review of ministerial decisions in respect of cases coming under article 3 of the Convention.[20]

Is Australia meeting its international obligations?

8.17 DIMIA stated that one of the justifications for the minister's discretionary powers is that they are the primary mechanism for implementing Australia's non-refoulement obligations under several international treaties, including the CAT, CROC and ICCPR. In particular, the ministerial discretion powers are used:

> …to ensure that relevant international obligations that Australia has are satisfied where the applicant would not otherwise be eligible for the grant of a visa.
>
> While migration legislation includes provisions that embrace Australia's obligations under the Refugees' Convention…there are no migration provisions regarding Australia's international obligations under instruments such as the United Nations Convention Against Torture (CAT) or the International Covenant on Civil and Political Rights.
>
> The ministerial discretion powers under sections 351 and 417 are used to enable Australia to meet those obligations in respect of individual applicants.[21]

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18 Ms Newell, HREOC, *Committee Hansard*, 22 October 2003, p.56

19 DIMIA, Submission No. 24D, Answer to question on notice, J1

20 Office of the High Commissioner for Human Rights, *Concluding observations of the Committee against Torture: Australia. 21/11/2000*. A/56/44, paras.47-53. (Concluding Observations/Comments)

21 DIMIA, Submission no. 24, p.17

8.18 The Committee, however, does not believe that this contentious issue is as straightforward as DIMIA's submission suggests. To begin with, the Committee heard from HREOC that Australia is in 'continuing breach' of article 2 of the ICCPR because it does not have in place a system that, for example, would guarantee the right to be protected from torture: 'If…discretion is exercised there will be no breach to the right to life in the specific circumstances. But the fact that there is no system in place to make sure that that breach does not occur is a continuing breach of…article 2 of the ICCPR'.[22]

8.19 Furthermore, notwithstanding DIMIA's contention that ministerial discretion *is* used as a device to enable Australia to meet its international humanitarian obligations, it could not provide the Committee with figures on the number of occasions the discretionary powers were used specifically for humanitarian reasons under various international treaties.

8.20 DIMIA advised the Committee that it does not collect in a reportable format detailed information on which requests for ministerial intervention cite Australia's non-refoulement obligations under the CAT, CROC and ICCPR. This is because the nature of ministerial discretion – the powers are personal to the minister and the minister does not usually provide detailed reasons for his or her decision – precludes the collection and analysis of data on individual cases considered by the minister:

> The department does not record the grounds on which the minister uses his s417 intervention powers beyond the information contained in statements tabled by the minister in parliament in relations to such cases. The minister determines whether to intervene on a case by case basis, depending on the facts of the individual case.
>
> It is not possible to extrapolate the reasons for the minister's intervention from the class of visa granted. As non-refoulement under CAT and ICCPR require merely that the person not be returned to the country where they face harm, any visa would deliver the outcome by allowing the person to stay lawfully in Australia.[23]

8.21 Ms Philippa Godwin, a Deputy Secretary in DIMIA, told the Committee that successive ministers have held the view that the number of cases that invoke Australia's international obligations is 'very small' and involves quite exceptional circumstances which are hard to quantify in a formal visa decision making process.[24] Another officer from DIMIA, Mr Illingworth, conveyed the view that most of these cases would meet criteria for a protection visa and hence receive 'the most beneficial form of protection'.[25]

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22 Ms Lesnie, HREOC, *Committee Hansard*, 22 October 2003, p.61

23 DIMIA, Submission no. 24B, Answer to question on notice, 5 September 2003, p.22. See also Ms Godwin, DIMIA, *Committee Hansard*, 5 September 2003, pp.69-70

24 Ms Godwin, DIMIA, *Committee Hansard*, 5 September 2003, p.34

25 Mr Illingworth, DIMIA, *Committee Hansard*, 5 September 2003, pp.38-39

8.22 The Committee is of the view that the absence of data stems mainly from the lack of accountability and transparency characteristic of a discretionary process that is non-compellable and non-reviewable. Furthermore, the Committee is not aware of any other research or data that compares the different grounds for protection under the Minister's discretionary powers.[26]

8.23 The evidence presented to the Committee, such as it is, suggests that the exercise of ministerial discretion for humanitarian reasons applies only to small number of cases. The Uniting Church, for example, describes the experience of the Hotham Mission in its dealings with asylum seekers who possess a Bridging Visa E. It claims the Mission:

> …has found it difficult to gain an intervention from the minister when they have raised cases they believed held merit for humanitarian reasons or invoked non-refugee convention protection obligations…The minister appears to use the intervention power more for cases that involve a connection to Australia than in cases where there are primarily…only humanitarian concerns or protection needs.[27]

8.24 Amnesty International told the Committee that following discussions with various NGOs and DIMIA, it had concluded that 'Ministerial Discretion is being primarily exercised on the grounds of public interest and/or family reunion, rather than on Australia's international human rights obligations'.[28] Amnesty International is convinced Australia's human rights obligations are being compromised by inadequate use of section 417 powers for cases that warrant ministerial intervention.

8.25 This view is more or less supported by former Refugee Council of Australia President, David Bitel, who is currently a Partner with legal firm Parish Patience Immigration Lawyers. He told the Committee that, although his firm had acted for a large number of applicants seeking ministerial intervention under section 417, he could not 'recall one case where ministerial approval has been granted on "humanitarian" grounds'.[29] Because the current system 'involves no meaningful transparency or accountability', there is no way of identifying the number of cases where section 417 powers have been invoked on purely humanitarian grounds.

8.26 Another issue of concern to the Committee that sheds light on the question of Australia fulfilling its international human rights obligations relates to forms of persecution not specified by the Convention, such as gender-based persecution, and how Australia deals with such cases. Dr Mary Crock advised the Committee of the unique problems that confront women in refugee law because their subversive activities 'tend to be very private':

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26 Mr Gee, Amnesty International, *Committee Hansard*, 23 September 2003, p.6

27 Uniting Church of Australia, Submission no. 19, p.8

28 Amnesty International Australia, Submission no. 23, p.5

29 Mr Bitel, Parish Patience Immigration Lawyers, Submission no. 26, p.2

> In many traditional societies [women] will be the back-up people who make the coffee or do the secretarial work while the men are out front actively dissenting and putting their lives on the line. The problem is that, when the women come to claim refugee status, they are told "You weren't a member of a political party; you just made the tea', or 'You weren't raped because you were the sister of this dissident; you were raped because you're a woman and that is what happens to women in situations of disorder'.[30]

8.27 Amnesty International told the Committee that Australia is reluctant to expand the current definition of the Refugee Convention to take on board certain forms of gender persecution – such as female genital mutilation, honour killings, trafficking in certain countries, and domestic violence – and that the former immigration minister, Mr Ruddock, 'quite specifically said that he [did] not see a need to expand the current definition of the convention and he [was] not going to take those cases into consideration'.[31]

8.28 This is despite the argument put to the Committee by one witness that 'gender' should be included as a sixth category in Australia's domestic law definition of refugee. Australia, as well as Canada and the US, have not succeeded in past attempts to remedy the gender bias inherent in their refugee law. As a consequence, these countries still exclude the gender-specific claims of women in their legal definition of 'refugee'.[32]

Recommendation 18

8.29 The Committee recommends that DIMIA establish a process for recording the reasons for the immigration minister's use of the section 417 intervention powers. This process should be consistent with Recommendation 15 about the level of information to be provided in the minister's tabling statements to parliament. This new method of recording should enable the department to identify cases where Australia's international obligations under the CAT, CROC and ICCPR were the grounds for the minister exercising the discretionary power.

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30 Dr Crock, *Committee Hansard*, 23 September 2003, p.30

31 Dr Thom, Amnesty International, *Committee Hansard*, 23 September 2003, p.7. An officer from HREOC, Ms Vanessa Lesnie, advised the Committee that some cases currently coming before Australian courts are exploring the issue of gender persecution. In particular, the courts are exploring whether or not cases involving persecution on the basis of gender fall under 'membership of a social group' and, therefore, may some time in the future attract protection under the Refugee Convention. *Committee Hansard*, 22 October 2003, p.58

32 Ms Blaxland, Submission no. 42, *A Proposal to Add 'Gender' As a Sixth Category in the Domestic Law Definition of Refugee*, Honours thesis, University of Technology Sydney, 2003

Criticisms of reliance on ministerial discretion to fulfil Australia's non-refoulement obligations

8.30 A number of submissions expressed the view that protection from refoulement should not be left solely to ministerial discretion powers which are non-compellable, non-reviewable and non-delegable. To do so places Australia at risk of breaching its international legal obligations not to refoule individuals in fear of torture or other forms of cruel and inhuman treatment.[33] Reliance on ministerial discretion, therefore, always leaves open the possibility of breaches of Australia's convention responsibilities.[34]

8.31 The Committee heard from various stakeholders that because of the complexity, urgency and gravity of issues involved in cases where Australia's non-refoulement obligations under the CAT, CROC and ICCPR are invoked, the Commonwealth should at the very least undertake an assessment of this issue to improve the way Australia fulfils these obligations.

8.32 Mr David Prince captures the general thrust of the criticism by stating that the minister's discretion is 'an inappropriate means for Australia to seek to meet its non-refoulement obligations' and that the discretion powers 'should be reserved to act as "a measure of last resort" for dealing with compassionate and compelling cases that constitute "exceptions to the rule"'.[35] Given that individuals who are covered by the CAT, CROC and ICCPR are not necessarily refugees covered by the Refugee Convention, it is, according to Mr Prince, inappropriate that Australia's only mechanism for dealing with individuals who are at risk of the severest form of inhuman treatment is 'through a non-investigative, non-compellable and non-reviewable discretion' exercised by the minister.[36]

> Unless an applicant falls neatly within the definition of "refugee", the only way that their concerns can be brought before our government is by applying for a visa that they know they cannot achieve – by setting up an artificial pathway to reach the minister's desk. Only then can their extraordinarily serious claims be ventilated, in a context where there is an obligation for the minister to turn his mind to it.[37]

8.33 HREOC takes the issue further by emphasising that asylum seekers who wish to invoke Australia's protection obligations under the CAT, CROC and ICCPR:

> …do not have the benefits of merits review and access to the courts to review unfavourable decisions by [DIMIA]. The decision making process

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33 Dr Mary Crock, Submission no. 34, p.2

34 UNHCR, *Committee Hansard*, 18 November 2003, p.20

35 Christopher Levingston & Associates, Submission no. 6, p.5

36 ibid.

37 Mr Prince, Christopher Levingston & Associates, *Committee Hansard*, 22 September 2003, p.61

> regarding their claims, which…may be literally a matter of life and death, effectively defaults into a non-reviewable, non-compellable exercise of ministerial discretion.[38]

8.34 HREOC provided the Committee with a list of six specific concerns with the current system. The criticisms are comprehensive and inclusive of many of the criticisms raised by various organisations and individuals during the inquiry.

8.35 First, Australia's non-refoulement obligations under the CAT, CROC and ICCPR are not discretionary and subject to few, if any, exceptions. The obligation under article 3 of CAT has been described as 'absolute'. HREOC describes the discretionary process for protection from refoulement as 'fragile' and concludes that it 'appears incompatible with the nature of the obligations Australia has assumed'.[39]

8.36 Second, while HREOC acknowledges that the ministerial guidelines refer specifically to Australia's obligations not to refoule under the CAT, CROC and ICCPR, it maintains that unlike the multiple avenues of appeal available for applicants under the Refugee Convention, the current scheme for non-refoulement 'does not make adequate provision for the possibility of flaws in the decision making process'. The risk of an 'incorrect decision' which attends all administrative decision making underpins the entire system of judicial and merits review. Yet CAT, CROC and ICCPR asylum seekers have no such right of review and little protection in the way administrative decisions are scrutinised.

8.37 Third, as mentioned previously, the exclusive reliance upon the section 417 discretion for CAT, CROC and ICCPR asylum seekers places Australia in breach of its obligation to ensure that there are appropriate systems in place to provide what article 2(3) of the ICCPR calls 'effective remedies' for breaches of human rights instruments. The discretion under section 417 is considered a very limited form of administrative remedy which does not meet the requirement of 'effectiveness' as defined by the ICCPR and as understood by the UNHCR.

8.38 Fourth, relying solely on the discretionary powers under section 417 for Australia's non-refoulement obligations is placing considerable burden on a part of the system that is already stressed by the large number and variety of requests made under section 417. Providing alternative administrative arrangements to enable Australia to fulfil its non-refoulement would ease the burden on the current (over) use of ministerial discretion.

8.39 Fifth, the existing discretionary system is particularly detrimental to CAT, CROC and ICCPR asylum seekers. The current policy of mandatory detention of unauthorized non-citizens means that non-Convention asylum seekers will be detained for an extended period in order to make section 417 requests at the end of a process which has no direct application to them. HREOC is of the view that the often long

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38 HREOC, Submission no. 13, p.7

39 HREOC, Submission no. 13, p.9

periods of arbitrary detention for these asylum seekers is neither necessary nor proportional as required by article 9(1) of the ICCPR and article 37(b) of the CROC.

8.40 Sixth, the requirement under the Migration Act that the minister only exercise his discretion *after* an unfavourable decision of the RRT might preclude the timely consideration of some matters that fall within the 'exceptional or unique circumstances' provided for in the ministerial guidelines. For example, under article 3 of the CROC, which refers to the best interest of the child, a child might have a compelling and urgent reason to be granted a visa on compassionate grounds before activating Australia's non-refoulement obligations (as early as the primary applications stage). This would minimise the risk of the child being exposed to physical and mental harm while in detention. HREOC believes consideration of the exercise of ministerial discretion (including assessment of claims by departmental officers) should be given *prior to* an applicant receiving an unfavourable decision from the RRT, particularly in cases involving Australia's international human rights obligations.

8.41 These concerns are almost identical to those raised by the Refugee Council of Australia which argues that the present system results in the inefficient use of resources because 'it forces people with no claim to [Refugee] Convention status to go through a lengthy and expensive process in order to have their actual claims or protection assessed at the Ministerial level'.[40]

8.42 The concerns raised by HREOC about the inappropriateness of the discretionary powers in enabling Australia to meet its non-refoulement obligations are echoed by other organisations. The Catholic Commission for Justice, Development & Peace (CCJDP), for example, states that:

> It is unfortunate that many people, who are potentially eligible for consideration of their cases on humanitarian grounds under s417, cannot have their particular circumstances considered earlier. They must wait until their claim has failed under the Refugee Convention…Such delay is unnecessary, causes additional suffering for the person making the claim, clogs up the bureaucracy and wastes taxpayer dollars by putting him or her through processes that are not suitable to their circumstances.[41]

8.43 The Uniting Church also holds the view that a non-compellable power 'is not appropriate for assessment of routine…claims such as those arising from obligations under international treaties'. Asylum seekers who require non-refugee convention protection 'require a consistently applied test of their case against a set of clearly defined obligations arising from international treaties'.[42]

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40 Refugee Council of Australia, Submission no. 12, Appendix A, *Position Paper on Complementary Protection*, May 2002, p.3

41 CCJDP, Submission no. 15, p.6

42 Uniting Church of Australia, Submission no. 19, p.5

8.44 The Committee notes that with one exception DIMIA did not respond to the various criticisms advanced by HREOC, the Refugee Council of Australia, the CCJDP and the Uniting Church. It did, however, express a view in relation to the concern that a significant number of CAT, CROC and ICCPR asylum seekers are detained for extended periods in order to make section 417 requests at the end of a process which has no direct application to them. In response to the argument that humanitarian intervention earlier in the determination process would be more efficient and compassionate, DIMIA told the Committee that the current filtering process was probably less resource intensive than the alternative of setting up new visa classes to address international convention obligations:

> You would…end up in a situation potentially of people applying for multiple visa classes for different convention obligations…I think it would open up…whole new areas for people to apply to remain in Australia…The net result could be many thousands more applications and more litigation…and potentially it would be much more expensive than the current system.[43]

Parliamentary scrutiny of Australia's international obligations

8.45 The option of creating an onshore humanitarian stream that would enable Australia to fulfil its international obligations was addressed by the Joint Committee on Migration in its 1999 review of Migration Regulation 4.31B. That Committee's report is relevant to this inquiry because although its primary focus was on possible alternatives to the existing $1000 fee on unsuccessful applicants to the RRT, it assessed the merits of introducing an onshore humanitarian stream to complement the existing reliance on the minister's discretionary powers.[44]

8.46 While noting several likely problems that would follow the introduction of a humanitarian visa class and recommending that the proposal should not be followed, the Committee did not wish to foreclose supporting a humanitarian visa 'at a later time'. It maintained that 'the issue deserves consideration as part of any detailed review of the entire refugee determination process'.[45]

8.47 A review of the refugee and humanitarian determination system was precisely the issue referred to the Senate Legal and Constitutional References Committee by the Senate in May 1999. The Committee's report, *A Sanctuary Under Review*, provided a detailed assessment of Australia's international obligations and the principle of non-refoulement.[46] Under its terms of reference, the report addressed the following specific questions: does Australia meet the obligation of non-refoulement under the

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43 Mr Hughes, DIMIA, *Committee Hansard*, 5 September 2003, p.34

44 Joint Standing Committee on Migration, *Review of Migration Regulation 4.31B*, May 1999

45 Joint Standing Committee on Migration, *Review of Migration Regulation 4.31B*, May 1999, p.41

46 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000

CAT and the ICCPR, and can ministerial discretion be used to give effect to international obligations?

8.48 In its attempt to answer this question, the report noted that the Australian government was exercising its sovereign right consistent with the principles of international law by choosing to give effect to the obligation of non-refoulement under the CAT and the ICCPR through the provision of the ministerial discretion.[47]

8.49 However, consideration of non-incorporation of these conventions into domestic law drew out some major concerns regarding the use of ministerial discretion powers to fulfil non-refoulement obligations. It is significant that each of these concerns has also been raised during the course of this inquiry. Specifically, the report identified four areas of concern:

- Discretion is non-reviewable and non-compellable, and therefore is an unacceptable means for determining the fate of persons claiming protection under an international obligation;
- The circumstances in which the minister is able to exercise the discretionary power is too narrow (only after the relevant review tribunal has made a decision in a particular case);
- The pathway to ministerial discretion is too long, resulting in a number of unintended adverse consequences (prolonged periods of mandatory detention); and
- The absence of a formal mechanism for the referral of cases to the minister.[48]

8.50 The report concluded by observing that some aspects of the present structure of ministerial discretion under section 417 'seem to run counter to the absolute nature of the obligations under the CAT'.[49]

8.51 To summarise, while the report found the discretionary power was a vehicle that *could* be used to facilitate compliance with Australia's obligations under the CAT, CROC and ICCPR, it concluded that the power was not a sufficient safety net to *ensure* compliance with these obligations in so-called 'near miss' refugee cases. A number of organisations had concluded that non-refoulement provisions under the

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47 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.59

48 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, pp.61-64

49 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.64

various international conventions should be clearly and fully incorporated into domestic legislation.[50]

8.52 In light of this finding, recommendation 2.2 states:

> The Committee **recommends** that the Attorney-General, in conjunction with DIMA, examine the most appropriate means by which Australia's laws could be amended so as to explicitly incorporate the non-refoulement obligations of the CAT and ICCPR into domestic law.[51]

8.53 Dr Mary Crock has noted that in reaching its conclusions, the Committee did not recommend the creation of an alternative on-shore humanitarian mechanism to the section 417 discretion.[52]

Complementary protection for refugees

8.54 The Committee heard evidence from HREOC that applications based upon Australia's protection obligations under the CAT, CROC and ICCPR should in principle be treated in a manner similar to those invoking Australia's protection obligations under the Refugee Convention. This is because Australia's non-refoulement obligations are no less important than those under the Convention and, according to HREOC, 'the potential harm flowing from an error in a decision regarding those obligations is equally severe'.[53]

8.55 To achieve this outcome, HREOC and Amnesty International have urged the government to revisit recommendation 2.2 of *A Sanctuary Under Review* by considering the most appropriate means of fully implementing its obligations of non-refoulement. Specifically, HREOC and the Refugee Council of Australia would like to see Parliament institute what is most commonly referred to as a system of 'complementary protection', known also as 'subsidiary protection' in the European Union and, in other countries, 'de facto refugee status', 'exceptional leave to remain', 'B status' and 'humanitarian protection'.

8.56 According to law lecturer, Ms Jane McAdam, complementary protection refers to the role of human rights law in broadening the categories of persons to whom international protection is owed beyond article 1A(2) of the Refugee Convention. The categories, however, specifically exclude protection granted on purely compassionate

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50 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.64

51 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.60

52 Dr Mary Crock, 'A Sanctuary Under Review: Where to From Here for Australia's Refugee and Humanitarian Program?', *The University of New South Wales Law Journal*, vol.23, no.3, 2000, p.282

53 HREOC, Submission no. 13, p.10

grounds such as age, health or family ties because these do not stem from an international protection need.[54]

8.57 The grounds upon which Member States offer complementary protection are varied which leads to different outcomes – for example, in Austria, Luxembourg and Spain complementary protection is simply an obligation not to remove a person, whereas in Sweden, the UK and Italy it requires the grant of a residence permit of some kind.[55]

International developments

8.58 The Committee took note of a number of important recent developments which have resulted in an emerging international consensus on the issue of complementary protection. The Committee believes that recent international trends on this issue have implications for how Australia fulfils its international humanitarian obligations now and in the future.

8.59 Following a two-year consultative process on the future of the 1951 Refugee Convention, known as Global Consultations on International Protection, a number of States, including Australia, affirmed a framework document called *Agenda for Protection* which was adopted by the Executive Committee of the UNHCR in September 2001. According to the Refugee Council of Australia, the Agenda sets out a framework for action by UNHCR, States and other players to further the cause of refugee protection.[56]

8.60 The Executive Committee of the High Commissioner's Programme (EXCOM) Standing Committee meeting of June 2000 identified two categories for cases where there is an international need for protection:

- Persons who shall fall within the terms of the 1951 Convention relating to the Status of Refugees or its 1967 Protocol – for example, cases involving gender-related persecution – but who may not be so recognised by a State as a result of varying interpretation; and
- Persons who have valid reasons for claiming protection, but who are not necessarily covered by the terms of the 1951 Convention.[57]

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54 Ms Jane McAdam, Submission no. 35, p.2

55 Ms Jane McAdam, *The European Union Proposal on Subsidiary Protection: An Analysis and Assessment*, New Issues in Refugee Research Working Paper No. 74, UNHCR, Evaluation and Policy Analysis Unit, Geneva, December 2002, p.9

56 Refugee Council of Australia, Submission no. 12, p.2

57 United Nations High Commissioner for Refugees, Submission no. 36, pp.4-5. The categories are discussed in the EXCOM Standing Committee paper entitled 'Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime', UN Doc EC/50/SC/CRP.18, 19 June 2000

8.61 The Committee's attention was also drawn to a proposal by the European Union on complementary protection which was finalised in September 2001, and which is expected to be adopted in April 2004.[58] Ms Jane McAdam stressed that the proposal was the result of unprecedented regional attention in Europe on the issue of complementary protection, and that it represents:

> …the first supranational codification of [a] complementary protection regime…and a significant contrast to Australia's discretionary system, which is an inadequate and fraught protection mechanism that does not adequately give effect to Australia's international protection obligations.[59]

8.62 In a separate detailed analysis and assessment of the proposed EU Directive, Ms Jane McAdam states that the proposal divides protection into two categories: refugee protection (based on the Convention) and subsidiary protection (based on international human rights instruments). Subsidiary protection takes effect where an applicant: 'can demonstrate a well founded fear of being subjected to torture, inhuman or degrading treatment…a violation of other human rights…or a threat to life, safety or freedom as a result of indiscriminate violence in armed conflict or generalized violence'.[60] The Directive's main objective is:

> …to ensure that the laws and practices of the European Union…member states are harmonised to provide a minimum level of protection to persons determined to be Convention refugees or beneficiaries of subsidiary protection, so as to prevent refugee flows based solely on differing levels of protection in member states' legal frameworks.[61]

Should Australia introduce complementary protection?

8.63 Complementary protection is largely an underdeveloped concept in Australian asylum law.[62] In fact, Australia is one of the few countries in the developed world that does not have a system for complementary protection.[63] According to the UNHCR, most Western and European countries have a mechanism which allows a flexible application of the Convention to provide safeguards for people who do not meet the

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58 Commission of the European Communities Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection, COM (2201) 510 final, Brussels 12 September 2001 (EU Directive), at: http://www.ecre.org/eu_developments/qual.shtml

59 Ms Jane McAdam, Submission no. 35, p.3

60 Ms Jane McAdam, *The European Union Proposal on Subsidiary Protection: An Analysis and Assessment*, New Issues in Refugee Research Working Paper No. 74, UNHCR, Evaluation and Policy Analysis Unit, Geneva, December 2002, p.2

61 Ms Jane McAdam, *The European Union Proposal on Subsidiary Protection: An Analysis and Assessment*, New Issues in Refugee Research Working Paper No. 74, UNHCR, Evaluation and Policy Analysis Unit, Geneva, December 2002, p.1

62 Ms Jane McAdam, Submission no. 35, p.3

63 Mr David Bitel, Parish Patience Immigration Lawyers, Submission no. 26, p.2

strict criteria but are still protected: 'They may receive a lesser range of rights, but at least they receive some kind of protection'.[64]

8.64 By way of background, Australia did have an onshore humanitarian visa system until July 1993. The onshore humanitarian visa class inserted into the Migration Act in 1981, which applied in cases where there were 'strong compassionate or humanitarian' grounds, was abolished when s417 replaced the former 6A(1)(e) humanitarian visa class. According to Dr Mary Crock, the decision not to replace this section of the Migration Act with an equivalent general power to grant visas to individuals with strong compassionate or humanitarian grounds for remaining in Australia, represented 'the first and most significant legislative shifts' in migration law since 1989:

> With one stroke of the legislative pen, the generic power to act with compassion and humanity was removed from mainstream decision making – to be channelled ultimately into the hands of a single politician, the Minister for Immigration.[65]

8.65 A number of submissions argued strongly that Australia should examine the possibility of introducing a system of complementary protection, and look for guidance to the various models already in place in a number of countries. The Committee notes in particular a draft model of complementary protection which has been developed by the Refugee Council of Australia, and published in a draft paper entitled *Complementary Protection: The Way Ahead*. The model, which is endorsed by the National Council of Churches in Australia and Amnesty International, aims to provide '…constructive guidance for those responsible for formulating Australia's policy' to ensure that Australian practice 'is fair, transparent, timely, efficient and legally defensible'.[66]

8.66 According to the Refugee Council of Australia, under the proposed model: 'an applicant's eligibility for complementary protection can be assessed at each stage of the determination process, thereby ensuring that those entitled to protection receive it at the earliest possible time'.[67] Complementary protection would be offered to people who:

- have no nationality or right of residence elsewhere;
- would face torture if returned to their country of origin;

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64 Mr Mignone, UNHCR, *Committee Hansard*, 18 November 2003, p.23

65 Dr Mary Crock, Submission no. 34, p.2

66 Refugee Council of Australia, Additional information, *Complementary Protection: the Way Ahead*, January 2004, 9 February 2004

67 Refugee Council of Australia, Additional information, *Complementary Protection: the Way Ahead*, January 2004, 9 February 2004, p.4

- come from countries where their lives, safety or freedom is likely to be threatened by the indiscriminate effects of generalised violence, foreign aggression or internal conflict;
- come from countries where there is significant and systemic violation of human rights and/or a breakdown in the rule of law; and
- would face serious human rights violations if compelled to return.[68]

8.67 The introduction of this model would require an amendment to section 36(2)(b) of the Migration Act to include a new section which would set out the criteria for the grant of a visa, introduce a new visa subclass, set out any necessary limitations, and stipulate that nothing in this section removes or otherwise affects the exercise of the minister's discretion. It would also require a new regulation to set out the framework for the grant of a visa on the grounds of the need for complementary protection and the rights and entitlements afforded to successful applicants.[69]

8.68 HREOC supported the creation of a specific visa class directed to Australia's international obligations under the CAT, CROC and ICCPR as this would provide for administrative and judicial review as well as the ultimate 'safety-net' of the minister's discretionary power.[70]

8.69 The Committee, however, notes that the creation of a specific humanitarian visa class, as previously reported by the Joint Committee on Migration, is a matter of some contention. Mr David Prince, for example, told the committee that a general humanitarian class of visa is not necessary. However, he does support the introduction of a separate visa sub-class for very serious cases that fall under the CAT and ICCPR and which are considered by the minister. This would remove some of the 'significant inequities' which asylum seekers experience as a result of 'well-meaning but uninformed members of the public or unscrupulous individuals', without challenging the fundamental structure of the current migration system.[71]

8.70 The Refugee Council of Australia argued that although establishing in Australia a separate humanitarian stream with established criteria would be a challenging task:

> …serious consideration should be given to replacing the present process with one which recognises the protection needs of de facto refugees in a transparent and cost-effective manner. The models presented by the

68 Refugee Council of Australia, Additional information, *Complementary Protection: the Way Ahead*, January 2004, 9 February 2004, p.6

69 Refugee Council of Australia, Additional information, *Complementary Protection: the Way Ahead*, January 2004, 9 February 2004, pp.8-9

70 HREOC, Submission no. 13, p.13

71 Mr Prince, *Committee Hansard*, 22 September 2003, p.68

> Scandinavian countries of Denmark and Sweden deserve further attention…from the point of view of program management.[72]

Government views on complementary protection

8.71 Successive governments have not supported the introduction of a system of complementary protection. Government responses to previous committee report recommendations relating to Australia's international humanitarian obligations have supported the view that ministerial discretion under section 417 is an adequate safety-net mechanism to ensure compliance with various international treaties.

8.72 During this inquiry, DIMIA expressed serious reservations about proposals for a new humanitarian visa class as part of a complementary protection system. It did so, in the first instance, by drawing the Committee's attention to Australia's past experience with an onshore humanitarian category and to the immigration policies of other countries.

8.73 To begin with, DIMIA argued that Australia's experience with an onshore humanitarian category under section 6A(1)(e) had negative and unforseen consequences. It was unsatisfactory principally because of the sudden and unexpected rise in the number of approvals of entry permits under this provision – from 226 in 1981-82 to 3,260 in 1987. Apparently, at the section was repealed there were in excess of 8,000 applications outstanding.[73] Ms Philippa Godwin told the Committee that the insertion of section 6A(1)(e) into the Migration Act:

> …was an attempt to codify [the] concept of discretionary compassionate circumstances. It essentially just blew out and blew out until it became largely meaningless. Phrases that would raise sympathy in the minds of the Australian community crept in. It lost that exceptional circumstance focus and became a much broader and much less containable concept.[74]

8.74 Later during the same public hearing she expanded on these comments by noting that section 6A(1)(e):

> …started out as a compassionate or humanitarian visa class. All of the information around its creation indicated that it was meant to be used in exceptional circumstances…The difficulty was that it was hard to prescribe objectively what those circumstances were.
>
> Over time, it started to expand. It partly – very significantly – started to expand as a result of challenges to decisions in courts. Someone would get a decision saying, 'No, that is not a compelling or compassionate circumstance', go to court, the court would expand it and say, 'Yes, it is', and

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72 Refugee Council of Australia, Submission no. 12, Appendix A, p.4

73 DIMIA, Submission no. 24, p.43. See also Ms Godwin, DIMIA, *Committee Hansard*, 5 September 2003, pp.63-64

74 Ms Godwin, DIMIA, *Committee Hansard*, 5 September 2003, pp.61-62

> that would then become, in a sense, integrated into the decision or the consideration that case officers had to bring to bear in deciding these cases.[75]

8.75 At the same public hearing, Mr Rizvi, a First Assistant Secretary in DIMIA, speculated at length on the possible negative implications of supplementing the system of ministerial discretion with a humanitarian visa class. He drew the Committee's attention to international comparisons, especially the United States, Canada and Europe which are facing similar demographic challenges to those currently faced by Australia. He was at pains to contrast how Australia deals with migration issues, which has provided an 'extraordinary beneficial impact' to the domestic economy, with the situation in a number of overseas countries, which has 'led to situations where their ability to control and manage migration has been severely undermined'.[76] The three main areas of concern with the situation in Europe are the significant increase in the population of failed asylum seekers, the undermining of public confidence with immigration processes, and a lack of confidence by authorities to manage their immigration programs.

8.76 In response to a question on notice about the possibility of creating a new visa subclass for applicants who would be willing to waive their rights to merits review in order to seek the minister's intervention at the beginning of the determination process, DIMIA told the Committee that the issue: 'has been considered from time to time in the Department since the establishment and subsequent winding up of section 6A(1)(e)'. In the light of the experience with the s6A(1)(e) process, DIMIA repeated its concerns with a new visa subclass:

- making the intervention powers compellable would establish an opportunity for litigation with the potential for the test for intervention being widened and lowered;
- unsuccessful applicants would probably want to restore their access to a merits review process. This would create the potential for misuse of the process by those wishing to prolong their stay and frustrate their removal from Australia; and
- the protection visa process identifies and protects the large majority of individuals owed non-refoulement protection under the CAT and ICCPR.[77]

8.77 It is noteworthy that DIMIA addressed the issue of Australia introducing an onshore humanitarian stream in its submission to the Joint Committee on Migration's 1999 inquiry into Regulation 4.31B of the Migration Regulations. In response to the argument that an onshore humanitarian stream should be introduced to reduce the number of protection visa applicants, DIMIA argued that the creation of a new humanitarian visa class had the potential to generate a number of problems:

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75 Ms Godwin, DIMIA, *Committee Hansard*, 5 September 2003, pp.63-64

76 Mr Rizvi, DIMIA, *Committee Hansard*, 5 September 2003, p.65

77 DIMIA, Submission no. 24E, 5 September 2003

- judicial review might extend the applicability of the class beyond its intended narrow parameters (this had occurred with the previous onshore system);
- the misuse problem with the protection visa system might be duplicated or transferred to the new class;
- the new class would allow people to extend their time in Australia by adding another layer to the process; and
- the class might contribute to the belief that it was acceptable to enter Australia under false pretences.[78]

8.78 The Committee notes that DIMIA was not able to substantiate the claim that introducing special categories of visas will place considerable pressures on Australia's ability to protect its borders, and result in the Minister for Immigration losing his or her control of the migration determination process. In fact, other witnesses rejected these arguments outright. Dr Mary Crock, for example, told the Committee that:

> The criteria for the exercise of such powers can be articulated without opening the floodgates and [government] losing precious control of the migration process. The criteria are to be found in the human rights enshrined in international law…[79]

8.79 The Committee is also not convinced that DIMIA's evaluation of the previous operation of s6A(1)(e) of the Migration Act has direct relevance to the complementary protection systems advocated by the Refugee Council of Australia and HREOC.

8.80 In the light of these developments, the Committee is concerned that Australia is one of the few countries in the developed world that does not have a system of complementary protection. The Committee is left in no doubt that the current Australian practice of relying solely on ministerial discretion places it at odds with emerging international trends.

8.81 The Committee believes that the concerns raised by DIMIA about the old s6A(1)(e) process should no longer be used by the department as an excuse for casting doubts on the suitability for Australia of complementary protection, especially when the concept has not received the attention from government it now clearly deserves.

Recommendation 19

8.82 The Committee recommends that the government give consideration to adopting a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its non-refoulement obligations under the CAT, CROC and ICCPR.

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78 Joint Standing Committee on Migration, *Review of Migration Regulation 4.31B*, May 1999, p.32

79 Dr Mary Crock, Submission no. 34, p.4

Monitoring of returnees

8.83 Amnesty International argued that there should be a process of informal monitoring of returnees, consistent with recommendation 11.1 of *A Sanctuary Under Review*.[80] This stems from Amnesty's experience where many asylum seekers forcibly removed from Australia and other countries are 'not heard of again – either through assimilation into local society or for more sinister reasons'.[81] Amnesty International is concerned that the current lack of monitoring of returnees 'may result in a risk assessment culture which may not be as in-depth as it otherwise could be, where the consequences of forcible removal to certain countries is not fully appreciated'.[82]

8.84 The Committee acknowledges the rising level of concern among certain community and religious groups over 'Reports of death, disappearance, imprisonment and torture, of fear-filled lives spent in hiding, privation and despair' which have allegedly filtered back to Australia about people removed after their claims for protection on refugee or humanitarian grounds were disallowed.[83] The level of community disquiet resulted in 2002 in a coalition of religious groups, the Coalition for the Protection of Asylum Seekers and leaders from major religious denominations, petitioning the Federal Government 'to heed the reports of terrible things happening to some deportees and cease sending people to countries where protection of their safety and rights is very problematic'.[84]

8.85 As a result of this petition, the Coalition for the Protection of Asylum Seekers has undertaken a study 'designed to clarify the situation behind this widespread disquiet'. To date, the study has involved interviews with 20 people from the following countries: Iran, Syria, Iraq, Afghanistan, Nigeria and Zimbabwe. It has also drawn on eight other authenticated accounts as well as reliable accounts from deportee contacts and expert respondents in Australia.[85] The study's preliminary findings express concern that Australia is sending, or attempting to send, refugees to places which are not safe, a situation which places Australia is in breach of its non-refoulement obligations under international law.

Conclusion

8.86 The Committee heard from a number of refugee advocacy groups that protection from refoulement should not be left solely to the minister's discretionary

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80 Recommendation 11.1 states: 'The Committee recommends that the Government place the issue of monitoring on the agenda for discussion at the Inter-Government/Non-Government Organisations Forum with a view to examining the implementation of a system of informal monitoring', p.343

81 Amnesty International Australia, Submission no. 23, p.6

82 Amnesty International Australia, Submission no. 23, p.7

83 Coalition for the Protection of Asylum Seekers, Submission no. 29C, p.1

84 ibid.

85 Coalition for the Protection of Asylum Seekers, Submission no. 29C, p.2

powers under sections 351 and 417 of the Migration Act, given that the powers are non-compellable, non-reviewable and non-delegable. There is a serious risk that Australia is in continuing breach of Article 2 of the ICCPR because it does not have appropriate systems in place to provide 'effective remedies' for breaches of human rights instruments. It also seems likely that the discretionary process is an inadequate mechanism for offering protection from refoulement because it is incompatible with the obligation under Article 3 of the CAT, which is considered to be 'absolute'.

8.87 The Committee heard from various witnesses that reliance on the discretionary powers places considerable burden on Australia's migration system and results in non-Convention asylum seekers being detained for extended periods in order to request the minister's intervention at the end of a determination process which is not relevant to them.

8.88 The Committee accepts the general thrust of these criticisms and concludes that Australia continues to be at risk of breaching its international legal obligations under the CAT, CROC and ICCPR not to refoule individuals in fear of torture or other forms of cruel and inhuman treatment. The Committee, therefore, cannot accept assurances from DIMIA that the minister's discretionary powers always enable Australia to meet those international obligations in respect of individual applicants. This assessment from the department contradicts the weight of evidence before the Committee.

8.89 The Committee is concerned that DIMIA's assurances could not be supported by any data or analysis on the number of occasions the discretionary powers are used specifically for humanitarian reasons under various international treaties. The Committee believes that nothing short of a major overhaul of the current use of the minister's discretionary powers and improvements to standards of reporting would alleviate this area of concern. While taking note of DIMIA's observation that most people who might have claims under international conventions are picked up in a 'positive protection visa decision',[86] the Committee would like to point out that this situation overlooks those individuals who are not covered by the Refugee Convention and who are at risk of the severest form of inhuman treatment if they are returned to their own country.

8.90 The Committee believes the government should consider criticisms aired during this inquiry and, in line with its recommendations, investigate ways to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its non-refoulement obligations under the CAT, CROC and ICCPR. The aim of such an investigation should be to establish an alternative process for non-Convention refugees that would assist Australia in addressing administrative problems arising from reliance on section 417 powers and in better managing the refugee determination process. The Committee believes that whilst addressing these problems, the government should also examine the feasibility of complementary protection models

86 Ms Godwin, DIMIA, *Committee Hansard*, 5 September 2003, p.33

such as the one proposed by the Refugee Council of Australia, the National Council of Churches in Australia and Amnesty International.[87]

8.91 In considering the question of which system would best enable Australia to meet its international humanitarian obligations, the Committee examined recent international developments on the issue of complementary protection, in particular the UN consultative process which resulted in a framework document called *Agenda for Protection*. The document, which was affirmed by a number of countries including Australia, was adopted by the Executive Committee of the UNHCR in September 2001.

8.92 While the Committee finds that support for the concept of complementary protection is widespread amongst Australia's peak non-governmental bodies concerned with refugee and asylum seeker issues, it is reluctant to recommend any particular system of complementary protection for Australia. The Committee's view stems from the varied experience with complementary protection in Europe and Australia's past experience with the section 6A(1)(e) process.

8.93 The Committee takes seriously the practical and policy challenges being experienced by European countries which have implemented complementary protection. These challenges are readily acknowledged by even the most ardent supporters of complementary protection, but they are not considered to be insurmountable.[88] Having said that, the Committee does not wish to overstate the relevance to Australia of the European experience.

8.94 The Committee concludes that in the future complementary protection might be a significant and positive development towards eliminating the risk of Australia being in breach of its international human rights obligation. Complementary protection has the potential to enable migration and humanitarian programs to be delivered with certainty and transparency, and to assist non-Convention asylum seekers who are in genuine need of humanitarian protection. However, the Committee finds that complementary protection is a relatively undeveloped concept in the Australian context. It is for this reason that the Committee recommends that the Government give consideration to a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its international humanitarian obligations.

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87 Additional information, Refugee Council of Australia, *Complementary Protection: the Way Ahead*, January 2004, 9 February 2004.

88 Jane McAdam, *The European Union Proposal on Subsidiary Protection: An Analysis and Assessment*, New Issues in Refugee Research Working Paper No. 74, UNHCR, Evaluation and Policy Analysis Unit, Geneva, December 2002