Responses to questions on notice?

The relationship between on-shore and off-shore refugee visas

In response to a question from Senator Santoro, you indicated that you have done some research on the government's policies on places in the refugee program (p.34). I have attached a list of your articles and books available through the Parliamentary Library. Could you possibly indicate whether there is anything in that list that is particularly relevant to this question, or is there anything else that you could provide to the Committee by way of information on this point?

Following is an excerpt from pp 124-125 of my 1998 book

7.2 THE OFF-SHORE REFUGEE AND HUMANITARIAN PROGRAM

The vast majority of people given residence in Australia on refugee or humanitarian grounds are brought in from overseas. Australia has had a substantial overseas program for many years, upon which it has founded its international reputation as a caring and generous country. According to the Department's published statistics, of the 5.5 million migrants who have come to Australia since the end of the Second World War, more than 560 000 people arrived under humanitarian programs, initially as displaced persons and more recently as refugees: see http://www.immi.gov.au /package/facts201.htm. In recent years the humanitarian intake has been set at approximately 13,000 per annum. In 1997-98 the humanitarian program was set at 12,000 places: 10,000 places for people overseas and 2,000 to cover people in Australia who are found to be refugees. Apart from those granted refugee status within the country, this part of the immigration program is divided into three main categories: refugee, special humanitarian and special assistance. The first of these is focussed on persons overseas who are outside their countries of origin and who would suffer persecution if returned. The relevant visa classes include the cl 200 (refugee), the cl 201 (in-country special humanitarian program), the cl 203 (emergency rescue) and the cl 204 (women at risk). These visa classes are designed to cater for people who either meet the definition of refugee or who are perceived to be in situations of particular need. The second category covers people who have fled situations of war or general civil strife and who have suffered from a gross abuse of human rights but who may not meet the definition of refugee: see, for example, cl 202 (global special humanitarian program). The final category was introduced in 1991-92 and includes sub-programs designed to offer assistance to particular groups (people in particularly vulnerable situations overseas) who have strong familiar or other connections with Australia. For example, special assistance is (or has been) given to East Timorese from Portugal (former cl 208); citizens of the former Yugoslavia (cl 209); members of certain minority groups within the former Soviet empire (cl 210); certain Burmese (cll 211 and 213) and Sudanese (cl 212); and certain Cambodian nationals (former cl 214).

The prevailing feature of the different categories of refugee and humanitarian visas is the extent of the government's control over the selection and admission of applicants. The Minister can stop the issue of visas when the program is fully subscribed; the

criteria for entry can be changed to adjust to immediate needs; and the options available to unsuccessful applicants to challenge an adverse ruling are few. Judicial review is not excluded, but applicants cannot obtain reasons for a decision and in practice they require someone in Australia with sufficient resources to bring an action. While the overseas refugee and humanitarian program has generated little controversy, it has been criticised in recent times for its failure to cater for people in greatest need of resettlement. The emphasis on selecting people with connections with Australia is evident in the sharp decline during the 1980s in the percentage of people admitted as refugees compared with those visaed on general humanitarian grounds. The number of persons granted entry on refugee or humanitarian grounds declined from 21,917 in 1981/82 to 10,411 in 1989/90. Over the same period, the humanitarian component grew from 1,701 in 1981/82 to 10,411 in 1989/90, while the number of refugees fell from 20,216 in 1981/82 to 1,537 in 1989/90: Joint Standing Committee on Migration Regulations (1992) at 36. The result has been a corruption of the humanitarian program so that it has become a quasi-family reunion category. The Australian Law Reform Commission has also criticised the government for its failure to achieve a better gender balance in the people visaed overseas as refugee and humanitarian cases. Statistics suggest that almost twice as many men are chosen as women. This issue is taken seriously by the government and the Department. Note, for example, that the "women at risk" category has been enlarged and efforts have been made to ensure that quotas are filled: see ALRC (1994) at Ch 11. The concerns expressed in the ALRC Report centre on the use of selection criteria unrelated to need, such as "settlement potential." These appear to be creating a bias in favour of male applicants that is not redressed by the sub-program Women at Risk that has operated from 1990 to target women in special need of protection: see also Nolan (1996).

During the hearing you also agreed to take on notice a question from Senator Ludwig on how the criteria for the exercise of discretionary powers could be articulated (p.37).

The Articulation of discretionary powers:

B EUROPEAN UNION

1 Eligibility

The European Union is poised to adopt a 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,[2] to harmonize complementary forms of protection (termed 'subsidiary protection') in the EU.

This Directive forms part of the European Commission's 'building blocks' in the first step towards a Common European Asylum System. It seeks to provide a minimum level of protection to refugees and beneficiaries of subsidiary protection, so as to prevent refugee flows based solely on differing levels of protection in Member States' legal frameworks.[3] It distinguishes between the criteria that qualify an individual as a 'refugee' as opposed to a 'person eligible for subsidiary protection', elucidating among other things acts to be considered as 'persecution' within the meaning of the Refugee Convention (article 11), the reasons for persecution (article 12), actors of persecution and serious harm (article 9), and actors of protection (article 9A). It specifically excludes from the ambit of the Directive persons 'who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds'.[4] Regulation of this additional category of protected persons will remain at the discretion of individual States and their national laws.

Article 2(e) of the EU Directive provides that a 'person eligible for subsidiary protection' means:

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[2] 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 (2001) 510 final (Brussels 12 September 2001) (original version); Council of the European Union Doc 10576/03 ASILE 40 (Brussels 19 June 2003) (amended version). All references relate to provisions contained in the amended version, unless otherwise specified.

[3] 'Explanatory Memorandum' in EU Directive (original version) 3.

[4] To be inserted in the Preamble (amended version) 17.

> a third country national [that is, not a national of an EU State] or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in article15, and to whom Article 17 paragraph 1 and 2 does not apply, and is unable, or owing to such risk, is unwilling to avail himself or herself of the protection of that country.

Article 15 of the revised Proposal defines 'serious harm' as:

> (a) death penalty or execution; or
>
> (b) torture or inhuman or degrading treatment or punishment of an applicant in his or her country of origin, or in the case of a stateless person, his or her country of former habitual residence; or
>
> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

These three categories are more limited than the original version of the Directive, which enabled subsidiary protection to be claimed when an individual had a well-founded fear of being subjected to the following serious and unjustified harm:

> (a) torture or inhuman or degrading treatment or punishment; or
>
> (b) violation of a human right, sufficiently severe to engage the Member State's international obligations or; [sic]
>
> (c) a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalised violations of their human rights.

The test has shifted from one based on a 'well-founded fear of being subjected to [particular instances of] serious and unjustified harm', to one based on 'a real risk of suffering serious harm as defined in article15'. The 'real risk' test is understood in European jurisprudence to be a stricter test that the 'well-founded fear' test (see cases on article 3 of the ECHR).

The test in the original proposal was preferable because it addressed more situations from which persons may be fleeing serious harm than the present version does, simultaneously anticipating the scope for flexible and evolutionary interpretation of the content of the obligations (especially in paragraphs (b) and (c)). Codification of similar provisions in Australian law is particularly necessary since Australia is not party to a regionally enforceable instrument, such as the ECHR, which has safeguarded rights (particularly those in paragraph (a)) for a number of unsuccessful refugee applicants and consequently developed the law as it applies to *non-refoulement* in those States. Such codification would bring into domestic effect Australia's international protection obligations under treaties such as the CAT and ICCPR.

2 Exclusion Clauses

The exclusion clauses of article 17 of the Directive are by and large consistent with those under the Refugee Convention in articles 1F and 33(2). Article 17(1)(b) of the Directive excludes any individual who has committed a 'serious crime', which has a greater reach than the parallel provision under article 1F(b) of the Refugee Convention which excludes a person who has committed 'serious non-political crime outside the country of refuge prior to his admission to that country as a refugee'. Additionally, article 17(3) provides that a person can be excluded from subsidiary protection if prior to admission, he or she

> has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes.

3 Rights

In most cases, beneficiaries of subsidiary protection are entitled to the same rights as refugees. Beneficiaries of subsidiary protection and accompanying family members are entitled only to a one year residence permit, to be automatically renewed for periods of not less than one year, until such time as the authorities establish that protection is no

longer required. Under article 22, beneficiaries of subsidiary protection may obtain long-term residence permits on the same terms as refugees.

Beneficiaries of subsidiary protection are entitled to work under the same conditions as nationals no later than six months after their subsidiary protection status is granted, with access to employment-related education opportunities for adults, vocational training and practical workplace experience under the same conditions as nationals no later than one year after such status is granted. Furthermore, they are entitled to equal treatment with nationals in terms of remuneration, access to social security systems relating to employed or self-employed activities, and other conditions of employment (article 24).

Refugees and beneficiaries of subsidiary protection enjoy rights equivalent to nationals with respect to access to education (article 25), social welfare (article 26), and health and psychological care (article 27). States are to ensure that both groups have access to suitable accommodation (article 29), and that their freedom of movement is not curtailed (article 30). in many cases. Furthermore, special provision is made for the treatment and care of unaccompanied minors (article 28).

C UNITED STATES AND CANADA

In the United States, the article 3 CAT obligation has been implemented through a procedure known as deferral of removal or CAT protection. It cannot constitute the basis of an 'affirmative' asylum claim unless it also falls within article 1A(2) of the Refugee Convention, in which case it will not be relied upon directly. A claim based on article 3 of the CAT will only be assessed once a final order of removal has been issued and all other avenues of review have been exhausted,[5] and in this respect it functions primarily as a defence to deportation. Beneficiaries of such protection receive no legal status in the US but are entitled to a work permit. Effectively this amounts to nothing more than a tolerated status without formal legal recognition or access to many rights, including no right to public benefits or family reunion.

[5] D Anker *Law of Asylum in the United States* (3rd edn Refugee Law Center Boston 1999) 570.

In most cases, a person who fears torture will be able to bring his or her claim within the terms of article 1A(2) of the Refugee Convention. However, if a person is excluded from the Refugee Convention's benefits, then invocation of the CAT may be the only possibility for him or her not to be deported. Accordingly, deferral of removal in practice tends only to be invoked by persons with criminal convictions who are either barred from the Convention through its exclusion clauses, or because they have been convicted of an 'aggravated felony', which is very broadly defined in US law.

In Canada, an individual may apply to remain in Canada on humanitarian or compassionate grounds as a 'person in need of protection'. This is defined in section 97(1) of the Immigration and Refugee Protection Act 2001 as:

> a person in Canada whose removal to their country or countries of nationality ... would subject them personally
>
> (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
>
> (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
>
> (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
>
> (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
>
> (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
>
> (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

In addition, article 97(2) provides that the regulations may prescribe further classes of persons 'in need of protection'. By virtue of section 95(1), such a persons obtain the same rights and benefits as Convention refugees. The practical effect of this provision has been to incorporate torture as another ground on which an asylum claim may be based.

UNHCR 'Protection of persons of concern to UNHCR who fall outside the 1951 Convention: a discussion note' (2 April 1991) UN Doc EC/1992/SCP/CRP.5

Matters provided for by regional conventions that do not feature in the 1951 Convention (para 13):

OAU Convention	**Cartagena Declaration**
External aggression	Foreign aggression
Occupation	***
Foreign domination	***
Events seriously disturbing the public order	Circumstances which have seriously disturbed the public order
***	Generalized violence
***	Internal conflicts
***	Massive violations of human rights

Para 18. The minimum content of temporary protection might be considered to be:

(a) respect for the right to leave one's country, including the corollary of access to a country where safety may be sought;

(b) respect for basic human rights, i.e. humane treatment, in the country of refuge; and

(c) respect for the right not to be returned forcibly to danger.

Para 19. As regards humane treatment of persons enjoying temporary protection in the country of refuge, Executive Committee Conclusion 22 (XXXII) is a useful guide to appropriate standards, even though these were specifically elaborated to deal with a mass influx of asylum-seekers temporarily admitted to a country pending arrangements for a durable solution. These standards, in summary, are:

(a) No penalty for illegal presence.

(b) Respect for fundamental civil rights.

(c) Food, shelter and other basic necessities of life.

(d) No cruel, inhuman or degrading treatment.

(e) No discrimination.

(f) Considered as persons before the law.

(g) Safe and secure location.

(h) Respect for family unity.

(i) Assistance in tracing relatives.

(j) Protection of minors and unaccompanied children.

(k) Provision for sending and receiving mail.

(l) Permission for friends and family to assist.

(m) Arrangements to register births, deaths, and marriages.

(n) Necessary facilities for obtaining durable solution.

(o) Permission to transfer assets.

(p) Facilitation of voluntary repatriation.