DIAC REPLIES TO QUESTIONS ON NOTICE TAKEN AT THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE HEARING INTO THE MIGRATION AMENDMENT (IMMIGRATION DETENTION REFORM) BILL ON 7 AUGUST 2009

Note: this document addresses Questions 1, 2, 3, 9, 11 and 12.

1. Senator Crossin (L & CA 3) asked:

Could you then summarise, please, for the committee the differences between the process for dealing with unauthorised boat arrivals compared with that for unlawful non-citizens.

Answer:

To confirm Mr Metcalfe's advice during the hearing:

- A lawful non-citizen is defined by section 13 of the *Migration Act 1958* (the 'Act') as a non-citizen who is in the migration zone who holds a visa that is in effect[1].;
- An unlawful non-citizen is defined by section 14 of the Act to be a non-citizen within the migration zone who is **not** a lawful non-citizen.

UNAUTHORISED BOAT ARRIVAL REFUGEE PROCESSING

Statutory Refugee Assessment Process

Non-citizens who do not arrive in Australia at excised offshore places can seek refugee protection by applying for a Protection visa. If such people are in detention, for example if they are irregular maritime arrivals, they are offered publicly funded migration agent assistance with their visa application and any merits review, should they be unsuccessful in the first instance

Non-statutory Refugee Status Assessment (RSA) Process

Under the Refugee Status Assessment processing arrangements, Offshore Entry Persons (OEPs), for example, persons who arrive without a valid visa at an excised offshore place, are prevented from making a valid application for a visa in Australia under Section 46A(1) of the Migration Act 1958 (the Act) unless the Minister considers such an application to be in the public interest under section 46A(2) of the Act. Section 46A(2) gives the Minister the non-compellable power to allow an OEP to make a valid Protection visa (PV) application.

Although OEPs are prevented from making a valid application for a visa, the RSA assessment process mirrors the mainland PV process in that clients are assessed to determine whether they are owed protection obligations under the Refugees

[1] Section 13 provides that the only other way to be a lawful non-citizen in the migration zone is if you are an allowed inhabitant of the Protected Zone who is a protected area in connection with the performance of traditional activities.

Convention, they are provided with access to publicly funded migration agents, and are entitled to seek independent merits review of unfavourable outcomes. An outline of the similarities and differences of the two processes is attached.

Under the RSA process, those who are found to be refugees are referred to the Minister for Immigration and Citizenship (the Minister) for consideration of whether he thinks it is in the public interest to allow them to apply for a PV ("lifting the bar"). If the Minister lifts the bar, they are then eligible to make a valid application for a PV which is granted as soon as possible thereafter.

On 29 July 2008, the Minister announced enhancements to the non-statutory RSA processing arrangements for OEPs, including the following.

Publicly Funded Migration Agent

Under the Immigration Advice and Application Assistance Scheme (IAAAS) publicly funded independent advice and assistance is provided to all OEPs who are raising claims which *prima facie* may engage Australia's protection obligations. This assistance is provided to OEPs at the primary stage (assistance with lodging and pursuing their claims) and independent merits review stage (review of unfavourable refugee status assessment). The provision of an IAAAS migration agent does not preclude an OEP from engaging their own migration agent, but they would be responsible for all associated costs. Those who are not *prima facie* engaging Australia's protection obligations are not provided with a publicly funded migration agent and are removed as soon as reasonably practicable.

A person in immigration detention may request legal assistance at any time and the department is obliged under section 256 of the *Migration Act 1958* to provide reasonable facilities to the detainee for obtaining legal advice, such as providing contact details for legal practitioners (including those companies which have advised that they are available to provide such service on a *pro bono* basis).

Robust Procedural Guidance

Procedural guidance for the enhanced non-statutory RSA process has been drafted and consultation with stakeholders has commenced. A final draft is being prepared incorporating comments from the UNHCR and the Commonwealth and Immigration Ombudsman and will be circulated to external stakeholders before being finalised. The draft RSA procedures continue to be used in the interim.

These procedures have benefited from feedback from the Ombudsman, UNHCR and IAAAS providers. Further consultation is ongoing.

Independent Merits Review

The Department is currently developing detailed policy guidelines and procedures for non-statutory independent merits review for asylum seekers on Christmas Island for the longer term. The independent merits review replaces the internal review mechanism where a senior departmental officer reviewed the RSA.

Interim arrangements are in place for independent merits review of unfavourable RSA outcomes. Long term arrangements are being progressed and are expected to be in

place by July 2009. Policy guidelines and procedures are currently being developed and consulation with stakeholders is planned.

External Scrutiny

The Commonwealth and Immigration Ombudsman has been actively oversighting the new RSA process. Officers from the Ombudsman's office have visited Christmas Island on a number of occasions and have provided the Department with positive feedback on the enhancements to the RSA process.

The UNHCR has provided the Department with a report on their visit to Christmas Island which reported that the Department had made significant efforts to implement the evolving RSA procedures in a way which ensures international protection needs are met, and provided support for the Department's improvements to the transparency and efficiency of the RSA process. UNHCR also welcomed the introduction of the independent merits review.

Handling arrangements for offshore entry persons vs. mainland arrivals

	Boat of asylum seekers arrives at excised offshore place and is processed under the non-statutory Refugee Status Assessment process	**Boat of asylum seekers arrives on Australian mainland**
Immigration status	- **Offshore entry person**	- **Unlawful non-citizen**
Processing location	- **Christmas Island**	- **Christmas Island**
Eligible to make a valid visa application?	- **No**, unless the Minister for Immigration and Citizenship takes a decision to allow them to make an application.	- **Yes.**
Statutory process	- **No**	- **Yes**
How are protection claims assessed?	- A person is assessed as to whether they are a person to whom Australia has **protection obligations under the *Refugees Convention***. - Standard immigration checks (security checking, health checking, public interest considerations) are undertaken.	- A person is assessed as to whether they are a person to whom Australia has **protection obligations under the *Refugees Convention*.** - Standard immigration checks (security checking, health checking, public interest considerations) are undertaken.
Access to publicly funded migration agent regarding the protection claims?	- **Yes**, access to publicly funded assistance from a migration agent under the Immigration Advice and Application Assistance Scheme.	- **Yes**, access to publicly funded assistance from a migration agent or the Immigration Advice and Application Assistance Scheme.
Access to independent merits review?	- **Yes.** Merits review is undertaken by an independent professional contracted by DIAC for this purpose.	- **Yes**, by the Refugee Review Tribunal or the Administrative Appeals Tribunal (depending on the basis of the refusal).
Access to judicial	- **Yes**, but limited to the original	- **Yes,** judicial review provisions in

review?	jurisdiction of the High Court.	the *Migration Act 1958.*
Likely outcome if found to be refugee?	- **Resettlement in Australia**. - Permanent Protection visa	**Resettlement in Australia** Permanent Protection visa
Streamlined return arrangements for those who do not engage Australia's protection obligations?	- **Yes**, as can not make visa application unless the Minister allows.	- **Possible**, because they have access to a greater number of appeal processes.
Offers more flexibility in dealing with sensitive case loads?	• **Yes**, the Minister can choose not to give them access to the Protection visa process, and instead allow access to a visa which does not require a refugee status assessment.	- **Limited flexibility**, for alternative handling strategy after a Protection Visa application has been made.

2. Senator Barnett (L & CA 7) asked:

What are the reasons for their detention? Can you provide the reasons on notice? - and the category of person. What measures have been taken and what plans do you have to move them on – bearing in mind they have been there for more than two years?

Answer:

As at 17 July 2009, there were 21 clients in immigration detention who have been detained for two years or more. All of these clients are actively case managed by the Department and are subject to regular close scrutiny to ensure that detention remains lawful and reasonable – this case oversight also includes active case management to promote speedy resolution of any outstanding issues which may be impeding timely resolution of the person's immigration status.

Of the 21, 13 were in secured immigration detention (immigration detention centres).

Of the 13 in secured immigration detention:

- Two have unresolved identity issues, with possible security concerns;
- One has since been removed from Australia;
- One has since been granted a visa; and
- The remaining nine have had their visas cancelled or refused on character grounds (associated with prior criminal conduct) and the department has maintained the placement because they present a risk to the Australian community.

3. Senator Barnett (L & CA 7) asked:

Of the 13 in detention centres, who has been detained the longest?

Answer:

The person who has been detained in an Immigration Detention Centre (IDC) for the longest period was detained as a result of their visa being cancelled under s501 and is awaiting departure. As at 24 July 2009 they have spent some 6 years and 2 months in an IDC. This detainee has unsuccessfully applied for a Protection visa and has made a request that the Minister intervene in their case.

9. Senator Crossin (L 7 CA 48) asked:

What would be the problem then with putting the principles into the objects of the Act? Should they go at the start of those parts? Or should they be 4AAA(1) if we renumber other parts?

Answer:

We have considered the option of moving the key principles currently articulated in the Immigration Detention Reform Bill into the provision that specifies the object of the Migration Act itself. This would not be appropriate as the principles relate to the use of the immigration detention power, rather than the overall purpose of the Act – which is to regulate the entry and stay in Australia of non-citizens.

However, there is an option, which we favour, to place the key principles in provisions at the opening of Division 7 of Part Two of the Migration Act to make clear their importance in relation to the use of the immigration detention power.

This would also ensure that the principles do not inadvertently apply to other forms of immigration detention under the Act, such as under section 192 (questioning detention), section 250/189 (detention of suspected offenders, which is used for Illegal Foreign Fishers in particular) and section 249 (preventing persons from leaving a vessel). These provisions have their own purposes and are intended to operate in accordance with their terms.

11. Senator Crossin (L & CA 55) asked:

I just want to raise two other sections with you. The witnesses from Uniting Justice raised with us the removal of section 4AAA(1)(b). They said it just states the blindingly obvious – that an outcome of this is to resolve a person's migration status. Why is it there? Could we actually remove it? Does it add anything to the intent?

Answer:

Concerns over the citing of a 'purpose' of immigration detention as being to "resolve the non-citizen's immigration status" could be addressed by making it clearer that detention is solely for the purpose of managing risk while immigration status is being resolved.

A change could be to delete existing subsection 4AAA (1)(b) and amend existing subsection 4AAA (1)(a) along the following lines

(a) Manage the risks to the Australian community of the non-citizen entering or remaining in Australia, pending the resolution of the non-citizen's immigration status

This would be consistent with section 196 of the Act which requires that an unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is removed, deported or granted a visa.

12. Senator Crossin (L & CA56) asked:

What would be your view if the committee were to recommend the application of the proposed subsection 189(1)(b) to the excised offshore territories?. Note: reference should be to 189 (1B)

Answer:

An amendment could usefully be made to address concerns that the existing provisions of section 189(1B) should be applied also to relevant detainees (referred to in subparagraphs 189(1)(b)(ii)-(v), inclusive) who are in excised offshore places (noting that the existing subsection 189(1B) applies only to detainees who are not in an excised offshore place).