CHAPTER 10

REMOVALS FROM AUSTRALIA

Introduction

10.1 This chapter provides a brief outline of Australia's obligations and laws relating to the removal of people who have failed to engage Australia's protection obligations. In particular, the chapter considers the role of private contractors in this process in accordance with Terms of Reference (l):

> The role and involvement of private contractors in removal processes

Background

10.2 Under the Migration Act,[1] provisions are made for the removal from Australia of a range of non-citizens, primarily those whose visas have expired or those who have failed to obtain a visa.[2] As noted above, the greatest number of unlawful non-citizens in Australia are those known as overstayers,[3] people who enter Australia lawfully and stay beyond the period permitted under the terms of their visas. Generally, overstayers leave voluntarily and require no special service; however, some apprehended overstayers who refuse to leave are treated much the same way as persons who have failed to obtain a visa.[4] Other persons who had a valid visa, and had

---

1 *Migration Act 1958*, ss 166, 172, 198

2 Such persons are: a detainee who was entitled to apply for a substantive visa within 2 working days, or on application for an extension, within 7 working days, of being detained, but did not apply (s.198(5)); or a detainee whose application for a substantive visa has either been refused and finally determined, cannot be approved or the visa cannot be granted. In these circumstances, unless another valid application for a substantive visa has been made, removal must proceed (s.198(6)). People within this category may leave voluntarily under various arrangements: to their country of citizenship or residence as arranged by the Department of Immigration and Multicultural Affairs; to a country other than the country of citizenship or residence as arranged by the Department of Immigration and Multicultural Affairs; to a country of their choice after purchasing their own ticket (Unlawful non-citizens who choose to purchase their own ticket may avoid the bar on re-entry applying where debts are owed to the Commonwealth (Department of Immigration and Multicultural Affairs, *MSI-54: Implementation of enforced departures*, paragraph 4.1.1); or to a safe third country. The Migration Act provides that persons covered by an agreement between Australia and another country deemed to be a 'safe third country' are not entitled to apply for a protection visa in Australia (*Migration Act 1958*, Subdivision AI). See Department of Immigration and Multicultural Affairs, MS1-54, *Implementation of Enforced Departures*

3 See above, Chapter 1, Paragraph 1.46. People from some countries who are overstayers rarely are 'removed' – see *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 790:'Our largest numbers are still U.K. citizens, and in fact they do not overstay for very long periods. They become unlawful but without any intervention on our part depart several weeks after their visa…'

4 Overstayers, however, may be eligible for a greater range of bridging visas and may be able to avoid detention

that visa cancelled in accordance with the terms of the Migration Act are also subject to removal.[5]

10.3 A fourth group of persons is also removed, those known as 'turnarounds'. These are people who arrive at airports,[6] whose claims are rejected, and who are removed within a short time.[7] These removals are the responsibility of the carrier[8] that brought the individuals to Australia, sometimes without the required papers. No detailed records are kept of the number returned in this manner.[9] Where possible, these persons are removed within 72 hours, often on the same plane on which they arrived.[10] According to DIMA such persons have had the opportunity of identifying a need for protection against the Refugees Convention.[11] They are not assessed under other Conventions.[12]

10.4 Although it is possible to obtain a court injunction to prevent the removal of a person in the above circumstance, in order to allow them to make a formal application

---

5 In some instances, such individuals may have also sought to obtain a protection or other visa. Persons also may be removed from Australia if they have been convicted of a criminal offence or if they threaten national security. The removal of these persons is referred to as 'deportation' (*Migration Act 1958*, s.200). This report does not deal with this category of removal

6 Most 'turnarounds' arrive by air, as persons arriving on boats cannot be returned so quickly, the boats being destroyed

7 See above, Chapter 4, Paragraphs 4.25-4.31

8 The numbers of persons in this category are high (see below, Footnotes 9, 18), as is the cost to the airlines. As well as the cost of removal, the airline is also fined. The Department of Immigration and Multicultural Affairs advised the Legal and Constitutional Estimates Committee that in 1998/99 some $9.288 million was paid in 'settlement of Infringement Notice[s]' at the rate of $2,000 per offence. In 1999/2000 - to 31 January 2000 - the amount was $9.323 million, at the rate of $3,000 per offence, *Department of Immigration and Multicultural Affairs, Answers to Questions on Notice, Additional Estimates*, February 2000. See also *Submission No. 69I*, Department of Immigration and Multicultural Affairs, p. 1, Answer to Question 1. Further information on strategies adopted to minimise unauthorised arrivals by air were outlined in Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice, Supplementary Additional Estimates*, May 2000, Answer to Questions 3 and 4

9 Turnarounds are recorded to a degree when they become the responsibility of the department if it is impossible to identify the carrier which brought them. In other instances, of course, persons who have been able to establish a claim to engage Australia's protection obligations at an airport move from being a 'turnaround' to becoming an applicant for a Protection Visa. Should this claim, and any request to the Minister under S417 fail, their removal will remain the responsibility of the carrier if this can be identified. The Department of Immigration and Multicultural Affairs stated that it did not maintain records, and advised that of the 3199 persons removed in 1998/99, the department was responsible for 259 boat people, and that ' it is a reasonable assumption that the removal of the balance of 2940 was the responsibility of the carriers and the Department.', *Submission 69F*, Department of Immigration and Multicultural Affairs, pp. 1735-1736, Answer to Question 3

10 *Migration Act 1958*, S 217; *Transcript of evidence*, Department of Immigration and Multicultural Affairs, pp. 28-29

11 See copies of some airport interview preliminary assessments – Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice 5 July 1999*, Section E

12 See, for example, the case histories outlined by Amnesty International of people who were deemed not to have engaged Australia's protection obligations at airports but were subsequently granted refugee status. *Submission No. 50*, Amnesty International, pp. 490-491. See also *Submission No. 50A*, Amnesty International, pp.7-9

for a Protection Visa, this does not appear to occur frequently.[13] Turnarounds do not receive an escort,[14] and it is not known by government sources if they return to their own country or to some other place.[15] It has been noted by Amnesty International, for example, that people may be in danger of being refouled through such processes, as no guarantee is given that the person will not be returned to the country from which they say they have fled.[16]

10.5 Although there are options for leaving voluntarily,[17] the majority of persons subject to removal[18] are forcibly removed in the sense of being required to leave. From departmental and other evidence, while these may leave unwillingly, the use of actual force – physical or chemical – is not extensive.[19] The department advised that out of 1718 removals/deportations in 1998/99, only twelve persons were subject to the use of restraint ('reasonable force') during this process. Although captains of aircraft are in control while persons being removed are on carriers, captains may agree that escorts can use reasonable force.[20]

Timing of removals

10.6 The majority of persons who are turnarounds will be removed within 72 hours of arrival, earlier if possible if the carrier is making a return journey.[21] Persons who have been through the primary decision-making and then review process may be removed within 48 hours of being advised that an appeal to the RRT has been

---

13 See *Transcript of evidence*, Department of Immigration and Multicultural Affairs, pp. 35-36. See *Submission No. 50*, Amnesty International, p. 491 and *Submission No. 50A*, Amnesty International, *Transcript of evidence*, Nick Poynder, pp. 244-245; *Transcript of evidence*, McDonells Solicitors, pp. 133-134. *Submission No. 30*, McDonells Solicitors, pp. 209-210, and *Submission No. 30A*, McDonells Solicitors, pp. 1-2

14 See *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p 51:'In other circumstances, people are removed from Australia without escort, where they are placed on an outward flight from Australia. I think the normal air regulations are that there can be no more than two persons on such a flight, or the airline itself may provide security for the person through their own security services'

15 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 615; see *Submission No. 75*, Commonwealth Attorney-General's Department, p. 1144 re ICCPR Communication No.776/1997

16 *Submission No. 50*, Amnesty International, pp. 491-492, Cases 10 and 12

17 See above, Footnote 2

18 The department advised that in 1998/99 the number of those who were refused entry and removed within 72 hours of arrival, was 1457. 1669 overstayers and persons with cancelled visas were removed. See *Transcript of evidence*, Department of Immigration and Multicultural Affairs, pp. 604-606. See also *Submission No. 69*, Department of Immigration and Multicultural Affairs, Paragraph 10.12, pp. 339-340. As noted, the number of persons removed in 1998/99 was 1718

19 See *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 51 and also below, Paragraphs 10.67-10.72

20 Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice 5 July 1999*, Section L

21 See, for example, *Transcript of evidence*, McDonells Solicitors, p. 133

unsuccessful. This is a policy decision and not a legal requirement.[22] According to RILC:

> In practice, DIMA does not remove …detainees whilst they have unresolved applications before a Court (except where it is an application for special leave to appeal to the High Court). This is most likely because such behaviour would obviously antagonise the Court and herald a return to earlier times when it was necessary to obtain an injunction from the Court in every case, once proceedings had been issued.[23]

10.7 This informal arrangement may only benefit those who have been able to give notice of an appeal to the Federal court, and as noted elsewhere, may contribute to the large numbers of persons making such applications without much consideration of the merits of the case.[24]

10.8 The reason given for the discrepancy between having a right to appeal within 28 days, but not having a right to stay in Australia during that 28 days, is that the provisions for judicial review form Part 8 of the Act and therefore do not have the effect of suspending a removal.[25] According to the *Migration Act 1958*, an application for a substantive visa is finally determined where:

- an application is not, or is no longer, subject to any form of review under Part 5 or 7 of the Act; or
- the period within which such a review could be instituted has ended without a review having been instituted as prescribed.[26]

10.9 Making a request under s417 also falls within Part 7 of the Act. According to RILC, this does not affect a removal process on the grounds that a request is not a visa

---

22 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p.613: 'There is no statutory right for a person not to be removed for the period following an Refugee Review Tribunal decision during the 28 day period in which they have a statutory right to go to the Federal Court.'

23 *Submission No. 38*, Refugee and Immigration Legal Centre, pp. 340-341

24 While there is a statutory right to appeal to the Federal Court within 28 days of an Refugee Review Tribunal decision, there is no provision that a failed asylum seeker who has been in detention is entitled to remain in Australia during this period. Persons who have been living in the community, on a bridging visa, were allowed to remain until the end of the 28 day period during which an appeal could be lodged - see *Submission No. 35*, Nick Poynder, p. 247

25 This position contrasts with some other countries, for example: in Germany, the U.K. and New Zealand, a person cannot be removed until any outstanding appeals have been finalised; in the US, removal proceedings are suspended if an applicant seeks a review in the Court of Appeals; in Canada, removal of unsuccessful claimants is deferred for seven days to allow an appeal for judicial review; in the Netherlands, appeal to a court has no suspensive effect, however, where a review by the Immigration and Naturalisation Service is sought, expulsion is postponed; in Sweden, a claimant may appeal against an expulsion order, in which case the appeal has the effect of suspending removal (Justice, ILPA/ARC, *Providing Protection: Asylum determination in selected European countries*, 1997, and *Providing Protection in Canada,* 1997; World wide Refugee Information (1999) http:/www.refugees.org/world.

26 *Migration Act 1958* s5(9)

application.[27] This would detract from the effect of the Ministerial discretion as a means of implementing the provisions of various conventions.[28]

Removals by contractors

10.10 Security and related contractors are used both by carriers responsible for removing individuals[29] and by the Department.[30] Both must adhere to the *Air Navigation Act*[31] in respect of security requirements, and this will guide both parties in respect of escorts of persons being removed. While an airline may use its own security staff as escorts, the need for specialist services including guarding of an individual while in transit between countries,[32] transfers to other airlines, and the obtaining of documentation,[33] may lead it to contract such services to a private company. Similarly, the Department uses both contracted security staff, such as APS and later ACM,[34] off-duty police officers,[35] and other services such as P&I and their subsidiaries which provide escort, transit, and documentation services. Escort services are required under International Civil Aviation Organisation principles (reflected in the Air Navigation Act).[36] Escorts must be trained in restraint methods:[37]

---

27 See *Submission No. 38*, Refugee and Immigration Legal Centre, p. 340

28 See Chapter 8

29 *Migration Act 1958 (C'th), s*217

30 *Migration Act 1958 (C'th)*, s198(6)

31 *Air Navigation Act 1920, s*297P. See answer to Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice* 29 *July 1999, Answers to Question 2*. See also *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 599

32 Transit services are essentially the provision of a 24 hour guard on an individual being repatriated while the individual is in transit between countries, and provision of accommodation, meals and so forth if the transit period is extensive: see *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Attachment C, pp. 1762-1769 which refers to the costs incurred in transit services. In some circumstances, duties such as securing visas and clarifying an individual's status may be undertaken during the transit period if such matters have not been resolved prior to departure – see the case referred to in *Submission No. 69 F*, Department of Immigration and Multicultural Affairs, Attachment A, pp. 1751-1754

33 See below, Paragraph 10.19

34 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 51

35 Department of Immigration and Multicultural Affairs appears to confirm the availability of officers for these trips (*Submission No. 69F*, Department of Immigration and Multicultural Affairs, Attachment E, pp. 1778-1779, 1784-5, and Attachment F, p. 1787ff. The department advised that these off-duty police officers would be 'on leave' and would be contracted to the department for the specific escort task, *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Answer to Question 2, p. 1732 and *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 598. See also below, Paragraph 10.76

36 Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice 29 July 1999*, Section A, Answer to Questions 3 and 5

37 Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice 29 July 1999*, Section A, Answer to Questions 3 and 5

> The air navigation regulations require that people being deported or removed from Australia under the Migration Act on a public carrier aircraft must be escorted….
>
> I understand that under relevant instruments under [the Air Navigation Act] the escort has to be an officer trained in appropriate methods of restraint in case there are any security incidents on board, and has to have in possession equipment which would be able to restrain the person if that is required, and that is essentially handcuffs.[38]

10.11 DIMA is responsible for the removal of those persons who have overstayed their visas, those whose visas are cancelled in Australia, those who entered the country unlawfully (such as boat people) and those who arrived by an unidentified air carrier. In these cases, DIMA arranges the necessary escorts. The Committee was advised that, at the time of the inquiry, DIMA contracted the following companies:

- Australasian Correctional Services P/L (ACS) [which has subcontracted its service delivery to its related company: Australasian Correctional Management (ACM)];
- Correction Enterprise (CORE) staff;[39]
- off duty police officers; and,
- Protection and Indemnity (P&I), a private South African firm, which is used primarily for removals to certain African countries.[40]

The role of contract staff

Carriers

10.12 Limited information was available regarding the contracted staff utilised by carriers, but the information that was obtained suggested that these staff played similar roles in respect of both the carrier and DIMA.[41] In the case of Mr SE, for example, the relevant carrier was British Airways who used a domestic carrier on the proposed journey from Melbourne to Perth on 28 October 1998.[42] P & I had been contracted to

---

38 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 598

39 See *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Attachment F, memo dated 15/9/99 (unpublished). 'CORE' is Public Correctional Enterprise, a service agency within the Victorian Department of Justice

40 *Answers to Question on Notice 29 July 1999*, Answers to Questions 1 and 4. See *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 599. In 1998, according to the Department of Immigration and Multicultural Affairs, P&1 was contracted by the department on 6 occasions. It is not known how many individuals were removed through this process. The limits on numbers of escorted passengers meant that four separate trips were required in the removal by Qantas of 15 Somalis - see Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice, 29 July 1999*, Answer to Question 12

41 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 51

42 See *Transcript of evidence*, Mr John Young and Macpherson and Kelley, p. 316

provide escort services, and had proposed to handcuff Mr SE when he refused to board the plane. The Captain of the domestic flight refused to carry Mr SE.[43]

10.13 The second attempt to remove Mr SE was on 19 November 1998, and on this occasion, it is stated, there were two Qantas security officers who were the escorts for the trip to Perth. It is not clear if these escorts were also to accompany Mr SE to South Africa. However, at Perth, the removal of Mr SE was cancelled and he was transferred to Port Hedland instead.[44]

10.14 In Amnesty International's submission, a case study documents how fifteen Somalis, held at Port Hedland Detention Centre, including a woman seven months pregnant, were removed from Australia by a carrier, using the P& I company. Complaints were made that the group were detained for one month in South Africa before being returned to Mogadishu.[45]

10.15 In response to these allegations, DIMA provided information stating the fifteen Somalis entered Australia 'posing as refugees' and travelling on forged Australian Documents of Identity and visas. Upon arrival in Australia, they were refused entry and placed in detention, and responsibility for their removal rested on the carrier who brought them to Australia.[46] The carrier, Qantas, contracted the Chubb company to escort the group to South Africa.[47] P&I were contracted to obtain Somali travel documentation and arranged for the group's onward travel from South Africa, by charter flight, to Somalia.

10.16 According to DIMA, South African immigration rules require that persons in transit through South Africa, while being returned elsewhere, must be held under guard by a licensed security firm while in transit. In this instance, the guard was Fidelity Guards, an affiliate of P&I.[48] Other explanations were offered for the delays that occurred within South Africa, during which time some of the passengers were accommodated in gaol. According to DIMA, some of the 15 Somalis lodged applications for refugee status with the UNHCR office in South Africa. As a consequence, departure was delayed from South Africa. Medical problems (measles) with two of the children further contributed to the delay in the charter flight arrangements. Medical treatment was provided. Air transport requirements are that

---

43 *Transcript of evidence* [In camera], pp. 59-60

44 *Transcript of evidence* [In camera], pp. 67-68. See Chapter 7

45 *Submission No. 50*, Amnesty International, p. 486

46 Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice, 29 July 1999*, Answer to Question 12

47 A carrier may decide that an individual does not need an escort; it may provide an escort itself; or it may hire another firm to escort the person being removed. Strict regulations apply to the removal of unlawful non-citizens on commercial flights with Qantas. Only two persons in lawful custody can be on the same flight (there may be exceptions, see below) and must be accompanied by an escort who must be a Department of Immigration and Multicultural Affairs official, APS officer or airline security officer

48 Department of Immigration and Multicultural Affairs, *Answers to Question on Notice, 29 July 1999*, Answer to Question 12

people should not be carried while they have a contagious condition. DIMA advised that other factors included the need for UNHCR to assess whether consideration of refugee applications were appropriate, and to inquire into claims of the right of some to reside in Kenya, which proved false, and as some in the group physically protested removal from South Africa, the captain of the aircraft decided to cancel a flight. DIMA also advised that it was the South African department of Immigration, which wished to have the majority of the group accommodated in gaol.[49]

10.17 This information, however, differs somewhat from that provided by Amnesty International which stated that the transit through South Africa appeared to have been irregular, that the company involved (P&I) may have been disciplined by the government, and that a transit visa was subsequently introduced by the South African government.[50] The Committee notes that this information was not provided to DIMA for comment as it was contained in a confidential submission.

The Department and contractors

10.18 In respect of removals where the department has primary responsibility,[51] departmental officers are directly involved during all of the preliminary procedures of the removal up until the point of departure. In some instances, the department has the major responsibility for obtaining travel documents for persons to be removed, as many have destroyed their documentation prior to arrival, or it has been taken by a courier. In some cases, this process has taken a considerable period of time, especially when large numbers of people are concerned.[52] Occasionally, especially with respect to removals to Africa, a contractor may be employed to obtain such material. Where this task has not been undertaken, contracted services may not commence until the departure, when an escort service comes into operation.

10.19 When DIMA has the responsibility for removal, for example, it may employ P&I to provide a full range of professional services which include obtaining

49 Department of Immigration and Multicultural Affairs, *Answers to Question on Notice, 29 July 1999*, Answer to Question 12

50 *Submission No. 50A*, Amnesty International, p. 2. This situation would need to be considered in the light of other information provided about possibly irregular practices with other persons being removed from Australia through South Africa, as noted in the '4 Corners' program of 13 March 2000

51 In cases where the carrier has primary responsibility, but the person has been in detention, the department retains responsibility until the individual is taken to the airport or aircraft; this process would involve the use of contract staff such as Australasian Correctional Management

52 This was the case in respect of the removal of a number of passengers from the 'Cockatoo', where delays in obtaining required documentation contributed to the extended period of detention. This is noted in the Department of Immigration and Multicultural Affairs, Folder 1, Item 5.1 of 1 September 1999 (unpublished)

identification and travel documents,[53] hotel transit accommodation and medical assistance as required:

> Many people from central and northern African countries arrive in Australia without any form of documentation, having destroyed their papers prior to arrival in Australia, and refuse to cooperate in providing accurate personal details. Significant difficulties are therefore frequently encountered when attempting to obtain the cooperation of African countries to identify their nationals and to issue appropriate travel documents. Arranging issue of travel documents through missions offshore is also very difficult. [54]

10.20 One organisation has suggested that handing over to private contractors persons to be removed (but whose identity and nationality have not been established), risks generating what are known as 'refugees in orbit'. These are people unable to secure entry to any country.[55] However, although it is possible that this situation could occur in respect of turnarounds,[56] it is not clear if carriers would fail to obtain appropriate documentation for those detainees and others they have a duty to remove. It is in the interests of carriers to ensure that the passenger will be allowed to enter or transit the port of destination. In the copy of a repatriation report provided to the Committee, P&I, working on behalf of DIMA, noted that they had obtained relevant clearance from the Johannesburg International Airport Immigration and Police and also South African Airways. Similar clearances were obtained for each part of the journey.[57]

10.21 In other evidence it is also stated that there are requirements under IATA not to leave passengers at the first possible point, or at the passenger's preferred destination, unless the individual has some claim to be accepted there.[58]

> My understanding is that, ordinarily, the carrier would take them back certainly to the port of embarkation…the immigration authorities of that particular country may have some interest in the matter as well, depending on whether the person was merely transiting …or whether there was some further place for the person to be sent back to.[59]

---

53 The Refugee and Immigration Legal Centre stated in their submission that Department of Immigration and Multicultural Affairs used P&I to obtain a travel document for Mr SE, even though British Airways was the responsible carrier. See *Submission No. 38*, Refugee and Immigration Legal Centre, p. 349

54 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 839

55 *Submission No. 24*, Refugee Council of Australia, p. 146

56 See above, Paragraphs 10.3-10.4. It is not clear what processes are followed if people who have destroyed their identity documents are refused entry, and are returned to the last port of call before Australia. In some instances they may be detained there. See *Submission No. 50*, Amnesty International, p. 491

57 *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Attachment A, pp.1750-1753

58 *Minister for Immigration and Multicultural Affairs and Anor ex parte SE*, High Court M99/1998, p. 7

59 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 615. Additional information was provided in Department of Immigration and Multicultural Affairs, *Supplementary*

10.22 DIMA guidelines also suggest this type of situation is unlikely to occur, at least in respect of removals for which it is responsible, because of established processes: 'Before making any arrangements for enforced departure, it is important to establish the following:'

- whether the person being removed has a valid travel document and/or entry visa if one is required by the proposed receiving country;
- whether the proposed receiving country will accept the person;
- whether transiting certain countries will present any difficulties; and
- whether the person being removed has any claims to (re-) entry to a third country which may require consideration. [60]

10.23 DIMA also advised that:

> Unlawful non-citizens, returned to their country of origin…and who depart on standard commercial flights, must travel on recognised travel documents as must any other traveller….
>
> …if the removee refuses to complete standard travel document application forms they may travel on temporary 'emergency' travel documents. [These] usually have restricted validity and are sometimes valid only for a specified itinerary.[61]

10.24 The department attempts to establish the identity, destination and any potential complications that may occur during the return. On those occasions when the person being removed does not have valid travel documents and particularly in the cases of African countries that do not have diplomatic representation in Australia and when the administrative process make it difficult for the department to obtain these, P&I have been contracted to undertake this service.[62]

10.25 The department's Migration Series Instruction MSI–22 sets out the procedure that should be followed in the event of a removal. This procedure addresses issues of advice and information that should enable the detainee to make appropriate

---

Additional Estimates, May 2000,Answers to Questions on Notice, Answer to Question 6: 'People are not removed from Australia when that removal would place Australia in breach of its domestic or international obligations.'

60 Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice 29 July 1999*, Section A2, p.8, Paragraph 3.4.3 (MS1-54 *Implementation of Forced Departures*)

61 *Submission No. 69E*, Department of Immigration and Multicultural Affairs, Answer to Question 2, pp. 1673-1674

62 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 601

arrangements, and allow the detainee's legal representatives time to undertake any additional processes they may consider necessary.[63]

Contractual basis

10.26 Each escort is performed under an 'agreement for escort service', which is signed by both the departmental representative and the escort.[64] The agreement for escort service specifies the responsibilities, including transferring the passenger to the authorities and writing a report.[65] In the 'Protocol concerning the handling of removals from Australia by P&I Associates on behalf of DIMA'[66] the guidelines for the written report are –

> (4) During the course of and at completion of a removal, P&I shall provide DIMA with interim reports of progress as well as written final reports on the removal exercise. This report should include information on the agencies or organisations with whom they have liaised/negotiated, documents and travel routing used, countries transited, difficulties experienced, what occurred on arrival at the final destination, including reception by airport officials, and any other incidents which occurred that had a bearing on the removal exercise.[67]

---

63 See also *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Answers to Questions 10 and 11, pp. 1739-1741. However, in some instances, such as the second effort at removing Mr SE (where it has been claimed that five minutes notice was given) these principles do not seem to be applied. See *Transcript of evidence*, [In camera], p. 64. It has also been claimed that the normal process was ignored in respect of Mr SE, when he was removed before business hours, limiting the opportunity for him to contact legal advisers. The Refugee and Immigration Legal Centre stated that the Detention Centre where Mr SE was held had been instructed to fax an advice letter from the Department of Immigration and Multicultural Affairs to the Refugee and Immigration Legal Centre *after* Mr SE had been put on a flight prior to business hours. As well, an attempt by another detainee to phone the Referee and Immigration Legal Centre was intercepted by Australasian Correctional Management staff, and misleading information was provided to the Refugee and Immigration Legal Centre regarding Mr SE's whereabouts. *Submission No. 38*, Refugee and Immigration Legal Centre, pp. 339-340

64 Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice 29 July 1999*, Answers 3 and 5. See also *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Attachments B and D, pp. 1756-1758, 1771-1773

65 *Agreement for Escort Service* in Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice29 July 1999 A2*, and also at *Submission No. 69F*, Attachment E, p. 1778: 'On arrival at the destination, pass responsibility for the removee/deportee to the authorities of that country (if applicable), as instructed in the Escort Instructions. Provide a written report and fax such report as soon as I arrive at the final destination to: Department of Immigration and Multicultural Affairs contact officer as detailed in the attached Escort Instructions; the Qantas Airport Manager at the arrival destination (if applicable); and the Qantas Duty Security Controller in Sydney (if applicable).'

66 See *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Attachment B, pp. 1756-1758

67 In the event of an unusual incident that may require variation to the agreed itinerary and repatriation arrangement, 'Department of Immigration and Multicultural Affairs is to be contacted': see *Protocol Concerning the Handling of Removals from Australia by P&I Associates on Behalf of Department of Immigration and Multicultural Affairs*, *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Attachment B, pp. 1756-1758

10.27 The escort agreement sets out the conditions to be met by the private contractor during the flight. These include providing a suitable environment with respect to personal safety and respect, medical, religious, dietary, and hygiene needs.[68]

10.28 In theory, such standards should meet the basic requirements of conventions such as the ICCPR, which emphasise the dignity of the individual and respect for customs. Other departmental roles

10.29 DIMA officers have two further roles in the removal process:

- managing the provision of necessary information relating to the removal, and
- monitoring the results of the removal.

Information relating to the unlawful non-citizen

10.30 In removals for which DIMA has major responsibility, departmental officers have additional roles including the provision of information or advice on procedures to be undertaken with respect to the receiving country. Guidelines set out under a further document[69] include appropriate countries to transit, appropriate times of arrival for a person being removed, the protocol on advance notification, and policies on re-admitting criminal deportees.[70]

10.31 DIMA has emphasised that, for security reasons, it limits the information provided. For the process of removal, it has been stated by the department that contractors are only provided with the information about individuals in their charge, which DIMA considers 'essential.' They are advised of any behavioural problems, security assessment of the individual's potential for violence, details of travel (including destination) and whether the person might require any form of medical attention. Escorts are requested to keep in their possession the individual's travel document to ensure it is not destroyed *en-route* in an effort to stop the removal.

10.32 Similarly, DIMA states that it only provides escorts with the information required for them to undertake their removal function. They are not provided with any details concerning the reason for removal, length of stay, or avenues for stay that may have been accessed by the person being removed.[71]

---

68 *Protocol Concerning the Handling of Removals from Australia by P&I Associates on behalf of Department of Immigration and Multicultural Affairs*, *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Attachment B, pp. 1756-1758

69 Department of Immigration and Multicultural Affairs, *Requirements of specific countries where removees/Deportees are to enter or transit*

70 Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice*, 29 July 1999, Attachment 7, *MSI-54 Implementation of Enforced Departures*

71 Although the company itself, as opposed to the individual escorts, may assume the person has been an applicant for refugee status in some instances, see *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Attachment A, pp. 1751-1752

10.33 Once travel arrangements have been made, departmental officers escort the person being removed to the point of departure,[72] and monitor the results of the actual removal and arrival. Unauthorised arrivals are removed by air on either a commercial or charter flight. Charter flights are generally contracted to remove boat people only. Escorts on charter flights are provided by ACM,[73] and departmental officers also travel on these flights. Any incidents that occur on these flights are reported by the DIMA officer in charge.

Monitoring of contracted services

10.34 ACS Pty Ltd Detention Agreements have a provision for a performance review by the DIMA Secretary of the services they have provided.[74] In addition to the *Protocol Concerning the Handling of Removals from Australia by P&I Associates on Behalf of DIMA,* [75] the DIMA Migration Series Instructions set out guidelines to be followed by DIMA officers during the removal process.[76] For each of the removals, the private contractor is required to complete a repatriation report documenting the processes that were carried out, as well as an assessment of any difficulties that may have been encountered, and whether the person being removed arrived safely in the country to which they were returned.[77]

10.35 These reports are examined by the DIMA officer responsible for the removal and placed on the individual's file, with the department making payment once the return has been assessed as meeting requirements satisfactorily.[78] In the absence of an independent assessment, the repatriation report provides the only account of how the private contractor performed the removal service.[79] The department's method of

---

72 'During the removal, the Supervising officer accompanies the person being removed to the point of departure, remains at the aircraft bay while the aircraft is at the blocks and stays in the vicinity until it is airborne. The supervising officer leaves the airport after waiting for a suitable time to elapse to ensure the aircraft is not forced to return.' See also *Transcript of evidence*, [In camera], p. 59

73 See *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 51

74 Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice, 29 July 1999*, Section A, *Detention Agreements Between The Commonwealth of Australia and Australasian Correctional Services Pty*, 27 February 1998, see Paragraph 7.8

75 See *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Attachment B, pp. 1756-1758

76 Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice 29 July 1999*, Section A, *Migration Series Instructions Numbers 54 & 232* and see also Answer to Question 6

77 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 606. See also Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice 29 July 1999*, Section A, Answer to Question. 7

78 Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice 29 July 1999*, Section A, Answer to Question 7

79 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 606

working only on individual files,[80] and not collating information across a range of issues, necessarily limits its capacity to be aware of systemic problems and trends.

10.36 The Committee has received a copy of a repatriation report, a copy of a draft protocol arrangement with P&I and a copy of the type of letter, which forms the contractual arrangement between the department and P&1.[81] It is not possible to assess the accuracy of the repatriation report, although the example given was useful in noting some of the difficulties involved in obtaining appropriate documents. The department has stated that legal advice from the Commonwealth Attorney-General's department is that the exchange of letters with P&I constitutes a contractual arrangement.[82]

Accountability Issues

10.37 In examining the role of contractors in the removal process, a number of concerns have been raised relating to the accountability of such contractors to both Parliament and to the public. These concerns centre on the appropriateness of, and legal basis for, outsourcing, of the returns themselves, and of the removal practices.

Responsibility for outsourced services

10.38 A number of organisations expressed uncertainty about outsourced services, on two grounds. The first was whether the department could delegate matters such as the custody of people to be removed to persons who were not departmental officers. An integral part of this argument, at least as presented in the case concerning the removal of Mr SE, was whether any person was responsible for the return of 'removees' *to* a particular place (as opposed to removal *from* Australia). The second was the wisdom of using private services, including one registered outside the country,[83] when this might limit accountability.

Delegation

10.39 The issue of delegation was not discussed in detail. However, the contractual arrangements between DIMA and ACS in respect of holding people in detention

---

80 See *Transcript of evidence*, Department of Immigration and Multicultural Affairs, pp. 602, 614, and see also below, Paragraph 10.61. *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Answers to Questions 13 and 14, pp. 1741-1742

81 *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Attachments A and B, pp. 1750-1758

82 *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Answer to Question 8, pp. 1737-1739

83 This is P&I which is registered in South Africa. The Refugee Council of Australia questioned if it was possible for the Australian government to remain accountable 'given that the company used to undertake such tasks is registered outside Australia'. The Refugee Council of Australia also suggests that handing over a person to P&I effectively placed a person 'in the custody of an agent for an undetermined period and in conditions under which the Government had no control.' *Submission No. 24*, Refugee Council of Australia, p. 146, *Submission No. 38*, Refugee and Immigration Legal Centre, Paragraph 10.3.2 and Paragraph 10.7.3, pp. 347, 350

centres in Australia are unlikely to be problematic.[84] The provision of escort services, including use of reasonable force, and administration of medication, within Australia, is also straightforward. DIMA maintains that removals are supervised and controlled by departmental compliance officers. Responsibility for the removal rests with the Officer-in-Charge, Compliance Section, 'who ensures that removals are carried out in accordance with legislative requirements and operational guidelines.'[85] The capacity of the contractor to detain a person derives from the DIMA officer 'provid[ing] the P&I escorts with a notice to detain, consistent with the definition of Immigration Detention under s5 of the Act.'[86] DIMA has also stated that, although the employees of contractors or subcontractors are not sworn in as DIMA officers, they are given written authority by a delegate under section 5 of the *Migration Act 1958* to remove a person from Australia. DIMA further noted that police officers and APS staff are officers under the Act.[87]

10.40 DIMA also advised that the authority under the Act 'ceases once the person leaves Australia's migration zone,'[88] a point which was crucial to the argument in the case of SE.[89] While travelling in an aircraft, passengers are subject to the authority of the captain. However, the issue of the authority to control an individual once they have reached another country, including during the transit period, is far from clear. If specific provisions are made by the relevant country for those passengers in transit who are being escorted, it is assumed that the responsibility for the well-being of the person being removed would shift to the government of that country and the escort service. The authority for retaining the individual in a custodial situation is less clear, as is the authority for actually returning an individual to specific persons at an

---

84 The Refugee and Immigration Legal Centre emphasised that the responsibility for actions such as restraint and sedation was unclear even within Australia: 'We are a complete loss to know how the private operators are purporting to be holding people in custody, either in Australia or extraterritorially, if they are not officers', *Transcript of evidence*, Refugee and Immigration Legal Centre, p. 378, and see also p. 379. See also *Submission No. 38*, Refugee and Immigration Legal Centre, Paragraphs 10.4.5, 10.6.2, and 10.6.3, pp. 348, 349, 349-350: 'the use of private contractors to remove unlawful non-citizens is not permissible in that it involves an abdication by the government of a primary duty. It involves the total loss of control over what happens to the removee once he or she leaves Australia. If there is a breach of the human rights of the removee due to actions of a private contractor purporting to exercise Australia's removal power, the Australia government may be liable in international law for the actions of the private contractor.' See also *Submission No.7*, Tribal Refugee Welfare of Western Australia Inc., pp. 36-37

85 Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice 29 July 1999*, Answer to Question No. 6

86 *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Answer to Questions 10 and 11, pp. 1739-1741

87 Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice 29 July 1999*, Answer to Question 12

88 Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice 29 July 1999*, Answer to Question 12. See also *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Answer to Questions on Notice 10 and 11, pp. 1739-1741

89 *Minister for Immigration and Multicultural Affairs and Anor ex parte SE*, High Court M99/1998

airport.[90] The authority to detain, mentioned above, would not be effective in another country.

10.41 The department has emphasised on a number of occasions that the primary responsibility in respect of removals is to ensure the individual leaves Australia.[91] RILC noted that the issue of responsibility outside Australia does raise problems in respect of liability.[92] However, it would appear that this liability is not so much connected with the question of delegation as it is with the absence of a legal authority. A power to delegate may authorise removals, but the authority of the departmental officer or the contracted party has no extraterritorial application.[93] The Committee believes these issues should be considered further by the department and a publicly available protocol developed for carriers using escort services. This is considered further below. [94]

10.42 RILC also emphasised that in some areas – such as meeting international obligations during a removal process – the obligation may not be able to be met by any other party: 'Australia cannot directly, or indirectly, - including through the use of private contractors – be involved in any actions which would have the end result of a breach of our international obligations.'[95] Although RILC does acknowledge the limits placed on jurisdiction overseas, [96] it considers the use of departmental officers preferable to the use of private contractors.

Liability for injury or harm

10.43 Given the difficulty of monitoring persons once they have been returned,[97] and given also the assessment that the individual did not engage Australia's protection

---

90 This issue was raised in the case of Mr SE, and mentioned also in other instances of individuals being returned to authorities in their own country. While extradition may require a handover to authorities, it is not apparent that a removal does. *Minister for Immigration and Multicultural Affairs and Anor ex parte SE*, High Court M99/1998. See also *Transcript of evidence*, Amnesty International, pp. 190-191, although the reference is to Australian 'officials'. The department noted that in some cases it may be that a person is kept in temporary detention 'because the country has had no means to verify that they are in fact a citizen of that country', *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 610 -. See also Department of Immigration and Multicultural Affairs, *Submission No. 69F*, Attachment E, pp. 1778-1779, which refers to the duties of escorts, and notes that on arrival in the relevant country responsibility for the person being removed should be passed 'if applicable' to the authorities of that country

91 See in particular *Minister for Immigration and Multicultural Affairs and Anor ex parte SE*, High Court M99/1998, p. 7. *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 615

92 See above, Footnote 84

93 The issues of responsibility and legal authority are outlined in *Minister for Immigration and Multicultural Affairs and Anor ex parte SE*, High Court M99/1998, pp. 11, 18, 20 and 32 in particular

94 See below, Recommendation 10.3 The Committee notes the department suggested in September 1999 that a more formalised arrangement may be put in place: *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 606

95 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 347

96 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 349

97 See Chapter 11

obligations, the question of liability is unclear. Even though in some instances it appears that the basis of an RRT decision is that a person may live safely in some other area in their country,[98] there is no evidence to show that any responsibility is assumed for returning them to that place rather than to the main city. Indeed, given that there is limited acceptance of a responsibility to return an individual *to* any place, this issue is one that requires some further consideration.

10.44 It has also been noted that the issue of liability for injury during removal is undetermined. Should the person being returned be injured in some way, it may be extremely difficult for him or her to obtain any proof sufficient to make a claim.[99] Also, as noted by RILC:

> It is important to bear in mind too that it should not be expected that there be a great deal of these sorts of claims because by their nature they are people who are leaving the jurisdiction and, generally speaking, are going to situations where telecommunications is not the most available commodity. If people have complained about the way in which they have been treated or the conduct of the security services, these stories are unlikely to make their way back to Australia.[100]

Conclusion

10.45 The Committee considers that the contractual relationships between the Commonwealth and private contractors covering the removal process require further investigation. Such investigation should be carried out by the Department and HREOC.

Monitoring of service provision

10.46 Advocates of outsourcing of government services do not consider that the act of engaging a private contractor necessarily reduces the Government's accountability.[101] The critical issue in relation to accountability is whether DIMA is maintaining supervision and control over any private contractor performing the removal service. If it is, this would reduce concern over the issue of whether the state must effect the removal, as opposed to the state contracting the service to a third party under supervision. With appropriate systems in place (escorts completing written reports, escorts contacting DIMA in the event of a difficulty, and some effective

---

98 See, for example, *Submission No. 50A*, Amnesty International, pp. 13-14 which refers to an expectation by the Refugee Review Tribunal that people could be re-located in other areas, although other evidence shows that 'people from other areas and other clans would be at very grave risk of human rights violations.'

99 See also below, Paragraphs 10. 73-10.79

100 *Transcript of evidence*, Refugee and Immigration Legal Centre, p. 379

101 'Whatever method of service provision is used, a government agency remains accountable for the efficient performance of the functions delegated to it by government': Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies*, Report No. 48 January 1996, p. 326

follow-up by DIMA on a random basis) 'a loss of control' can be minimised, although not completely eradicated.

10.47 The Refugee Council of Australia comments that very little is known about the activities of private firms since they are beyond the scope of FOI claims. Not only does this organisation raise questions over the Government's responsibility to remain accountable should any undesirable actions take place outside Australia, it also questions whether:

> … the practice of engaging the services of a private company to facilitate the removal of failed asylum seekers from Australia constitutes sufficient risk management of this activity.[102]

10.48 DIMA maintains that the department supervises and monitors the performance of escorts. In evidence to the Committee it referred to the repatriation report that was provided in respect of P&I services, and conceded that additional evaluation might be useful:

> Now that we have been working with the company for a year or two in this small number of cases, whether it is now appropriate for us to more formally evaluate the removal process is something that I have not yet turned my mind to…It is probably becoming appropriate that, in the near future, we more formally evaluate this process.[103]

10.49 The Committee notes that opportunity for assessment by other parties is reduced without access to the contracts.[104]

10.50 The opportunity for redress in the process of removal could also be enhanced if organisations were subject to informal and external assessments, which is also impossible without access to the full contracts. Further, it is questionable exactly how much of the information contained in a removal contract needs to be in-confidence. It could be argued that the information directly related to protecting the commercial interests of the private company could easily be removed. Given the fact that complaint mechanisms may not be the most effective method of identifying problems[105] there is a correspondingly greater need to provide another check on the processes utilised.

---

102 *Submission No.24*, Refugee Council of Australia, p. 27

103 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 606

104 The Industry Commission notes there is an opportunity for competitive tendering and contracting to enhance the accountability of Government (Industry Commission, Competitive Tendering and Contracting by Public Sector Agencies, Australian Government Printing Service, Melbourne 1996, pp 5-6). They identify three desirable precursors. In addition to having a clearly specified contract with precise allocations or responsibilities between the agency and the contractor for delivery of the service, and specific criteria on which the contractor's performance is to be measured and monitored, there needs to be the opportunity for redress where there is dissatisfaction

105 See below, Paragraphs 10. 73-10.79

10.51 DIMA originally advised the Committee that a formal contract between DIMA and P&I did not exist.[106] There was a draft protocol relating to the standard of service and arrangements on a fee-for-service basis. When questioned over the legal validity of this arrangement, DIMA stated that:

> In a legal sense there is a contract. There is a contract in that P&I provides a tariff of fees and costs. In purchasing their services, there is obviously a contract. There is also associated with that contract, a very advanced draft protocol as to our overall expectations. Those expectations are commonsense expectations. They are essentially to ensure that the removee is treated with dignity and that everything happens according to law. It is not final in that is has not been finally signed, but it is certainly a working document.[107]

10.52 In additional information provided on this point, DIMA later advised the Committee that the arrangements between DIMA and P&I had been cleared by the Attorney-General's department,[108] so that each separate letter of agreement was in fact a contractual arrangement.

Conclusion

10.53 The Committee believes that the responsibility of the various parties involved in removals is insufficiently clear. It has made a recommendation concerning escort services provided to carriers below.[109]

Cost-effectiveness

10.54 Limited information is available on the cost-effectiveness of the removal procedure. Given the need to remove persons whose applications for asylum or other status have failed, certain costs are inevitable in achieving this objective.

10.55 Payment for removal services provided by a private company are in accordance with agreed *per-diem* amount with DIMA, for escort fees and costs, plus any additional services rendered, such as acquisition of travel documents, guarding, meals, accommodation, transportation, and telecommunication. In the case of off-duty police officers, DIMA meets accommodation and travel costs and any expense incurred during the removal including taxis to and from airports, passport and visa

106 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 606

107 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 607

108 See *Submission No.69F*, Department of Immigration and Multicultural Affairs, Answer to Question 8, pp. 1737-1739

109 See Recommendation 10.3

costs, and vaccinations if required.[110] However, there is no additional fee paid for the escort service.[111]

10.56 Although no information has been provided by official sources on such costs, one organisation has claimed that P&I charges as much as $12,000 per person, not including expenditure on items such as accommodation etc.[112] Costs for large group removals appear to be less, although this would depend on the distance travelled, cost of a charter flight and other factors.[113] DIMA stated the average cost for the six removals where it employed P&I to perform the removals and professional services was $22,000 per person. This cost includes airfares, the services of the company, obtaining travel documents, etc.[114]

10.57 DIMA indicated that this was a 'reasonable' cost when considering the alternative detention costs,[115] and later provided information which supported this argument. This information noted that without P&I services, detainees from African countries would generally require longer detention periods (while documents were being obtained), and, at the rate of $10,000 per three months' detention, the P&I service was cheap.[116]

Conclusion

10.58 The Committee acknowledges that in the interests of accountability it is desirable that information relating to the terms and conditions of the engagement of private companies involved in removal be more readily available. The Committee has made a recommendation to this effect, Recommendation 10. 3

Appropriateness of removal practices

10.59 Some evidence provided to the Committee suggested that certain practices of private contractors could infringe the rights of the individual and subject them to processes that were demeaning and possibly in contravention of other obligations:

---

110 Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice 29 July 1999*, Answer to Questions 3 and 5. See also *Submission No. 38*, Refugee and Immigration Legal Centre, p. 348

111 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 599

112 See *Submission No.24*, Refugee Council of Australia, p. 146. See also *Submission No. 38*, Refugee and Immigration Legal Centre, Paragraph 10.5, pp. 348-350

113 For example, it has been estimated that the cost of Ms Z's removal was $5,500 and this was presumably the same for all other persons on the flight to PRC

114 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 601

115 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p.601. See also Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice 22 July 1999*, p.11, *MSI-54 Implementation of Enforced Departures*

116 *Submission No 69F*, Department of Immigration and Multicultural Affairs, Answer to Question 4, p. 1736

> It is acknowledged that the Australian Government has the right to remove failed asylum seekers. This being said, it is argued that the Australian Government has an obligation to ensure that such repatriation is undertaken in conditions of safety and dignity. [117]

10.60 This statement embraces all aspects of the removal process and is particularly relevant to those cases where allegations have been made that the removal process has not been in accordance with guidelines (such as failure to give sufficient notice of removal), that some form of restraint has been applied, or that individuals have been subjected to some forms of inappropriate treatment.

Insufficient notice of removal

10.61 As noted above, the extent of notice of removal that is given depends to some extent on the department.[118] According to DIMA, the 48 hours period was more likely to be a minimum than a maximum: 'The 48 hours notice is given in the knowledge that removal will then not take place for 48 hours and it could be longer.'[119] As DIMA does not maintain 'universal' statistics,[120] it could not provide more specific data. The Committee was therefore unable to obtain information on the number of people who have been removed with less than 48 hours notice.[121] With respect to persons who are to be removed at the carrier's expense, the notice to carriers specifies removal within 72 hours.[122]

10.62 If it is necessary for individuals to be met by someone on their arrival, it may be dangerous for the individuals not to be able to arrange this. While the individual may not have been considered at risk for a Refugee Convention reason, he or she may need to have arrangements made within the country in order to ensure a safe passage, including travel to another area. Failure to provide adequate notice of return could jeopardise a person's safety, and this is as true of any country to which a person may be returned, not just his or her own country of origin.[123] In theory, therefore, both 'turnarounds' and those who have been through the refugee determination process can be at risk if there is no interest in where they are returned.

10.63 In some instances, it was claimed, a person was removed at a weekend or outside business hours during which time it would be difficult for the unsuccessful

---

117 *Submission No.24*, Refugee Council of Australia, p. 146

118 See above, Paragraphs 10.6 -10.9

119 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 613. However, see also *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 612: 'There may be some grounds, which go to security or other issues, where that process may be less than 48 hours.'

120 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 614

121 *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Answer to Question 13, and see also Answer to Question 14, pp. 1741-1742

122 *Migration Act 1958 (C'th)*, s217

123 See above, Paragraph 10.4

asylum seeker to contact legal representation. One of the cases in which this is said to have occurred is that of Mr SE. The Refugee and Immigration Legal Centre stated that the Detention Centre where Mr SE was held had been instructed to fax an advice letter from DIMA to RILC *after* Mr SE had been put on a flight prior to business hours. As well, an attempt by another detainee to phone RILC was intercepted by ACM staff, and misleading information was provided to RILC regarding Mr SE's whereabouts.[124]

Power to exercise force or restraint

10.64 The issue of whether the obligation to remove an unlawful non-citizen carries with it a power to exercise any force or restraint has arisen in some cases.

10.65 As a general principle, everyone on the aircraft is under the authority of the captain, regardless of whether the removal is being contracted by the airline carrier or DIMA. Subject to this principle, DIMA has stated that escorts, including P&I, are permitted to use reasonable force to restrain persons being removed and ensure the safety of the aircraft, passengers and crew in accordance with international conventions relating to aircraft and passenger security.[125]

10.66 Given the authority to exercise restraint or force while travelling is derived from the captain, it is questionable whether DIMA has any role in overseeing or interfering with this authority in the event of abuse. As noted, the *Migration Act 1958* confers no jurisdiction or authority on immigration officers outside of Australia in respect of persons removed from Australia, and DIMA's powers in respect of persons being removed cease once they leave the migration zone.[126]

10.67 Although the Committee has received little evidence of incidents of unsatisfactory or inappropriate removal processes, it was at one time alleged that some form of sedation had been given to Ms Z at the time she was removed in July 1997 on a chartered flight.[127] The evidence available, in the preliminary report produced by Mr Tony Ayers for the Minister for Immigration and Ethnic Affairs, suggests that this did not occur. This report by Mr Ayers was tabled in the Parliament. The Committee was not required to inquire specifically into this matter and therefore was not in a position to ascertain the facts of the allegations. The Committee notes that Ms Z did not raise the issue of sedation or restraint in the video which was made in March 1999.[128] Evidence provided by a number of individuals who spoke with Mr Ayers in June 1999

---

124 See *Submission No. 38*, Refugee and Immigration Legal Centre, pp. 339-340.

125 Department of Immigration and Multicultural Affairs, *Answer to Question on Notice, 5 July 1999*, Folder 1, Section L

126 *Submission No. 69*, Department of Immigration and Multicultural Affairs, paragraph 10.14, p. 840 and Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice 29 July 1999*, Answer to Question 12

127 See Chapter 9, Paragraph 9

128 Department of Immigration and Multicultural Affairs, Folder 2, 1 September 1999, Section 1

suggested that no sedation be used.[129] Further, although the Committee notes that there have been other allegations that some form of chemical restraint or sedation has been used on others, it has not inquired into these. [130]

10.68 Reference has also been made to the proposed treatment of Mr SE by the contractor after his refusal to board a plane during the first removal attempt. Some suggestion of physical restraint was made and an internal British Airways memorandum produced for evidence in the High Court stated 'P&I Associates in JNB' had been 'advised of the situation' and their response was to suggest sedation of the applicant. The memorandum records that the Department rejected this proposal.[131]

10.69 While this suggests that DIMA did maintain contact and control of the man's removal by P&I, and avoided an unnecessary course of action, one witness to the committee has suggested that 'there is evidence that the private contractor's behaviour was less than satisfactory.'[132] The Committee also notes that the events in question occurred in Australia where the ability of the department to respond was more obvious.

10.70 DIMA has advised that 'chemical restraint is not used' and that 'any sedatives are administered for medical purposes only:'

> Escorts are not permitted to sedate removees. Removees who are of medical or psychiatric concern are referred to medical officers for examination and decision as to their fitness to travel prior to departure. If the medical practitioner prescribed medication, a suitably trained medical or para-medical attendant accompanies the removee, on the advice of the medical practitioner or the airline company, to administer the medication as prescribed. [133]

10.71 The Committee has not been in a position to thoroughly evaluate the allegations that have been made about sedation, or the evidence provided to refute such allegations. It notes also that the department now appears to be fully dependent on information provided by ACM on issues such as medication and sedation, on the grounds that ACM is now responsible for the provision of health services:

> the provision of health services is the responsibility of the detention service provider.

---

129 Ayers File, pp. 28, 31-32

130 See ABC TV '4 Corners' program, 13 March 2000

131 *The Minister for Immigration and Multicultural Affairs and Anor ex parte SE* HCA 72, 25 November 1998. See *Submission No. 39*, Mr John Young, p. 362. See Chapter 7

132 *Submission No.39*, Mr John Young, p. 362

133 Department of Immigration and Multicultural Affairs, *Answer to Question on Notice, 5 July 1999*, Folder 1, Section L. See also *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Answers to Questions 18-20

> ACM's Executive General Manager of Health Care advises that in the small number of cases where…medication [such as major and minor tranquillisers and drugs of addiction] is prescribed, it is for appropriate clinical purposes not for the purpose of behaviour control to secure compliance of an individual for removal. [134]

10.72 Health services, including during the period that Ms Z was in detention, were previously the responsibility of the department.[135] The Committee has some concern at the fact that the department appears to have limited information on such issues to hand, and that when the files of individuals are returned to the department, it does not retain information on the use of certain drugs. There may be no legal requirement to do so,[136] but the issue is not so much one of 'legal requirements' as it is of needing to be sure that an appropriate service is provided by a contracted party.

Recommendation

Recommendation 10.1

The Committee **recommends** that an inquiry be undertaken into the use of sedation and other means of restraint in detention centres and in the removal of unauthorised non-citizens from Australia.

Complaint mechanisms

10.73 There is some opportunity for a removed person to make a complaint on the level of service received during his/her removal. According to DIMA, an unlawful non-citizen can contact the Department either directly or through family or friends. Alternatively, complaints can be made to the Commonwealth Ombudsman or the Human Rights and Equal Opportunity Commission, who have their own powers of investigation.[137]

10.74 DIMA has advised that once a complaint containing allegations of assault is made against DIMA, ACM officers, or officers undertaking escort work, and if there is physical evidence of assault, the complaints are referred to the relevant police authority. The complaint is otherwise investigated internally by the department. DIMA also advised that the escort company undertakes investigations and 'report the outcome to the department.'[138]

---

134 *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Answers to Questions 18,19, 20

135 *Transcript of evidence* [in camera], p. 167

136 *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Answers to Question 20

137 Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice, 29 July 1999*, Answer to Question 11

138 Department of Immigration and Multicultural Affairs, *Answers to Questions on Notice, 29 July 1999*, Answer to Question 11. Evidence was given in a submission from the Refugee Council of Western Australia of an alleged assault committed in the Perth Immigration Detention Centre, apparently by a

10.75 The allegation noted by the Refugee Council of WA did involve assault which apparently left some marks. However, the matter does not appear to have been investigated by the police.[139] The Committee also notes that off-duty police officers are employed as contractors for some escort work[140] and queried whether DIMA's powers of employment may limit the involvement of police in taking action against complaints.[141] The Committee raised these matters in a public hearing:

> If you were reporting an instance of criminal activity to the police and the police were involved in the removal service, how do you reconcile that conflict?[142]

10.76 The department advised that if such a situation should occur they '… would be wanting to work with the appropriate police authorities in determining the most appropriate way to handle it to ensure there was no conflict of interest.'[143] This answer reflected the department's interpretation of the question as being: 'how would an investigation be carried out if a policeman had been involved in the incident complained of?' It is possible, though, that a broader issue of potential conflict could occur:, would police be willing to investigate a matter, at a detention centre, for example, if they thought future escort work might be affected? The department appears not to have considered the above question in this light, and therefore provided no additional information on this issue.

10.77 The Department has stated that complaints have been investigated by the Ombudsman and the Human Rights and Equal Opportunity Commission and have been found to be unsubstantiated or the force used was not seen as being

---

P&1 employee (*Submission No.18*, Refugee Council of Western Australia, p. 105) but also involving other persons. The powers of the Ombudsman were limited in this matter in respect of the P&I officer, and the police apparently considered that it should be dealt with by the Department of Immigration and Multicultural Affairs. According to the source, the individual did not wish to make a complaint to the Department of Immigration and Multicultural Affairs because 'he was frightened of what would happen to him.' (*Submission No. 18*, Refugee Council of Western Australia, p. 105. See also *Submission No. 38*, Refugee and Immigration Legal Centre, Paragraphs 10.7.7-10.7.8, pp. 350-351) If the allegations are true, it is essential that the Department of Immigration and Multicultural Affairs consider the appropriateness of continuing to use a company which acts in such a violent manner. If the Department of Immigration and Multicultural Affairs and other contracted employees were also involved, it is essential for the Department of Immigration and Multicultural Affairs to report on the disciplinary procedures that occurred

139 See above, Footnote 138. The assault seems to have taken place while the individual may have been considered a detainee, and therefore Australasian Correctional Management would investigate

140 See above, Paragraph 10.10-10.11. See also *Submission No. 67F*, Department of Immigration and Multicultural Affairs, Answers to Questions 2 and 12, pp. 1735, 1741 and see also Attachment F

141 The Committee's own experience in similar matter is limited but sufficient to suggest that there are problems in respect of the action taken about complaints and in respect of uncertainty about the responsibility – that is, whether it is a state or Australian Federal Police matter. See above, Introduction

142 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 602

143 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 602

unreasonable.[144] In later information, referring to 'officers', and their behaviour during removal, the department advised that:

> To the best of our knowledge, none of the investigations conducted by the Ombudsman or HREOC have resulted in referral to the police for further investigation.[145]

10.78 DIMA does not keep statistical information relating to the frequency of complaints made by persons being removed:[146] 'There is no central index recording each removal where a complaint has been made'.[147]

10.79 There are difficulties in these complaint mechanisms. They may be less accessible once a person has been removed from Australia. In some circumstances the potential complainant may consider it undesirable to have further contact. For example, they may believe they are already known to the authorities in their own country, and may feel subject to discrimination because of having left or because of publicity relating to their case. They may also have limited means of making a complaint, including limited access to appropriate information, few or no witnesses, and possibly difficulty in writing English. Also, an individual still in Australia awaiting removal, may fear making a complaint because of the possible consequences.[148]

International obligations

10.80 Australia's international obligations relating to removal arise in part from conventions such as the Refugee Convention, CAT and the ICCPR.[149] As noted above[150] the *non-refoulement* obligations in these conventions require that a person not be returned to a place where their life is in danger or where they may be subject to harm.

10.81 In addition to the above conventions, there may be other provisions that should be considered in respect of the removal process, including the Universal

---

144 Department of Immigration and Multicultural Affairs, *Answers to Questions On Notice, 5 July 1999*, Answer to Question 11 and see also Section C, Part 4

145 *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Answer to Question 5, p. 1737

146 Department of Immigration and Multicultural Affairs, *Answers to Questions On Notice, 5 July 1999*, Answer to Question 11

147 *Submission No. 69F*, Department of Immigration and Multicultural Affairs, Answer to Question 5, p. 1737

148 See Footnote 138

149 Although the Refugees Convention does not protect persons who may be wanted for crimes in their own country (Refugees Convention, Article 33 (2)), the CAT and the Extradition Act would prevent the return of such persons in certain circumstances. Whether the CAT and the ICCPR are sufficiently utilised for asylum seekers, however, is a matter on which there is some disagreement., see Chapter 8

150 See above, Chapter 2

Declaration of Human Rights in respect of general treatment of persons, and the Convention on the Elimination of all Forms of Racial Discrimination.[151] These latter conventions were little mentioned in evidence to the Committee, with most emphasis being placed on the requirement not to *refoule* a person.

10.82 Although the department has established guidelines concerning the treatment of people being removed, and such guidelines appear to adhere to principles in the ICCPR, the lack of accountability and monitoring processes in the management of contracted services may render such guidelines very limited in effect. The Committee notes that it is important for all departments to be aware of the requirements of relevant conventions. Adherence to these may require an assessment of the effectiveness of current performance monitoring plans, including those of outsourced and contracted services.

Conclusions

10.83 The current system of removal does not provide sufficient information about the private contractor's performance during the removal process and the safety of the person being removed. Nor is it clear what recourse a person suffering physical or psychological injury may have against a contractor or indeed DIMA.

10.84 The Committee considers that there is an established need for contract removal services by the department and by carriers. The Committee believes it would be useful for carriers to ensure that their protocols on contract removals are similar to those of the department so as to provide a similar level of service.

Recommendation

Recommendation 10.2

10.85 The Committee **recommends** that DIMA officers, especially senior officers, have a thorough understanding of the relevant international conventions and ensure that appropriate training is given to employees about the requirements of such conventions.

Recommendation 10.3

The Committee **recommends** that appropriate protocols be developed between carriers and contract removal service providers. These protocols, and the implementation of them, should be subject to audit by an external and independent body.

151 The Convention notes at Article 1(2): 'This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State party to this Convention between citizens and non-citizens.' Article 1(3) states that: 'Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalisation, provided that such provisions do not discriminate against any particular nationality.' The Commonwealth *Racial Discrimination Act 1975* incorporates the Convention into domestic law