QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(5) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked:

What is DIMIA's response to claims that section 501 is effectively violating the double jeopardy principle and people are being punished twice for the one crime?

Answer:

Visa cancellation and consequent removal of a non-citizen is not an additional punishment for the commission of a criminal offence by a non-citizen – it is an administrative decision taken by Australia pursuant to its sovereign right to decide the circumstances in which a non-citizen is permitted to enter and remain within this jurisdiction, with the power to do so clearly enacted by the Parliament.

Although a substantial criminal record is a trigger for considering the exercise of the power, the test for visa cancellation considers the totality of a non-citizen's circumstances. These include the length of the sentence and the seriousness of the crime, in the context of the protection of the Australian community, and also include a range of other factors such as the best interest of any children, and the extent of their ties to the Australian community. These matters are covered in *Ministerial Direction No. 21 – Visa Refusal and Cancellation under Section 501*.

In its 1998 report on the Deportation of Non-Citizen Criminals, the Joint Standing Committee on Migration accepted the view that removal of non-citizens following the commission of a criminal offence is not a second punishment, stating that: "deportation of non-citizen criminals is not an additional punishment. Deportation is a consequence of serious crime committed by a non-citizen, not an additional impost on non-citizens."

Submissions received from the Human Rights Commissioner in the context of this report also supported the Government's view in this regard.

QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(7) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked:

How many people who fit the definition of an absorbed person have been detained and/or deported since the introduction of section 501?

Answer:

Individuals are taken to hold these visas by operation of law. The department identifies such holders if and when it becomes necessary to determine their immigration status. As a result of the *Nystrom* decision, an assessment has been done for persons in immigration detention as a result of visa cancellation under section 501, persons about to be transferred from prison to immigration detention as a result of visa cancellation under section 501, and non-citizens being considered for visa cancellation under section 501.

QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(10) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked:

What is the average and median length of immigration detention for permanent residents who have been detained under section 501 of the Act after serving a penal sentence?

Answer:

Information about the average and median length of time in immigration detention following visa cancellation under section 501 specifically is not separately collected.

QUESTION TAKEN ON NOTICE

SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE: 11 October 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(18) Inquiry into the Administration of the Migration Act 1958

Senator Nettle asked:

The Senate Inquiry *Sanctuary Under Review* completed in the year 2000 made a number of recommendations to reform the RRT. These reforms related to:

- the structure and operation of the Tribunal including the adequacy of the inquisitorial approach of the Tribunal;
- the training and qualifications of Tribunal Members;
- the manner in which proceedings are conducted, including the use of credibility issues by the Tribunal members to challenge applications;
- the adequacy of country information available to Members and how that information is used by Members;
- the alleged or perceived bias of some Members; and
- the use of single-member panels.

Similar concerns have been raised in this inquiry. It has even been put to the committee that the Tribunal should be abolished because, for example, 'it is tainted and a substantial number of its decisions irrational and illogical' (ie, *by the Woomera Lawyers Group*). It has been suggested that the Tribunal's functions can and should be carried out instead by the Federal Magistrates Court or the Administrative Appeals Tribunal.

1. What steps has DIMIA or the RRT taken since the 2000 Inquiry report to implement these reforms and/or ensure public confidence in the Tribunal? How successful do you think these measures have been?

2. Which recommendations of the Inquiry has DIMIA or the RRT implemented?

3. What changes have been made to the RRT since 2000 that address the concerns raised about the RRT in *Sanctuary Under Review* report?

Answer:

1. The Senate Inquiry *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* made a number of recommendations in its Report of June 2000, including recommendations to reform the Refugee Review Tribunal (RRT). The Government Response to this Report, tabled on 8 February 2001, is attached. A large number of the recommendations were noted in the Government response as already current practice and the Government provided details of current practice or provisions that were already in place ahead of the recommendations. No additional action was required in

relation to these recommendations. However, as set out below, the RRT has provided details of their action in relation to these recommendations.

Recommendation 5.1 called for a clear statement on the nature and operation of the RRT to be freely available. The RRT continues to produce a regularly updated brochure informing the public of the operations and procedures of the Tribunal. The RRT also provides on its website a number of fact sheets on the operation of the Tribunal and composition of its Membership.

The RRT provides a copy of its Client Service Charter to all review applicants, including those in detention. The RRT's website offers further information relating to the general conduct of reviews by the RRT, including the new Principal Member Direction 2/2005 issued on 5 October 2005.

Recommendation 5.2 related to further training for RRT Members in the use of inquisitorial methods used in hearings. The RRT has an ongoing development and training program for all Members, including training in inquisitorial methods appropriate to the Tribunal. Training is conducted in a variety of ways, ranging from individual mentoring, workshops, formal presentations and where appropriate, the use of external experts. Areas of focus include refugee, migration and administrative law, country information, professional skills, practical and procedural issues, cross-cultural awareness, and information technology. Members attend external conferences and training where it is identified as beneficial to their professional development.

Recommendation 5.3 called for credibility to continue to be a factor in the determination of refugee status. Tribunal Members are required to assess the factual evidence before them in order to determine whether the applicant is a person to whom Australia has protection obligations. This necessitates consideration and weighing of all the all evidence, including that provided by the applicant.

Recommendation 5.4 called for the RRT to be able to sit as a single member or where appropriate as a panel of two or three Members. In its response, the Government indicated that the then proposed Administrative Review Tribunal would replace the RRT and provide a multi-member tribunal. This proposal was not implemented. Under the current provisions of the *Migration Act 1958* (the Act) this recommendation is not possible, as section 421(1) of the Act provides that the Refugee Review Tribunal is to be constituted by a single Member.

Recommendation 5.7 called for the Department of Immigration and the Department of Finance and Administration (DoFA) to consider the changing and diverse workload of the RRT when reviewing funding arrangements. The RRT has its own purchasing agreement with the Department of Finance and Administration and is a prescribed agency under the *Financial Management and Accountability Act 1997*. The funding arrangements for the RRT are regularly reviewed with DoFA.

Recommendation 5.8 called for RRT members to be drawn from a broad cross section of the Australian community, including the legal profession, government agencies, and non government organisations specialising in refugee and humanitarian issues.

Persons appointed as Members have typically worked in a profession or have had extensive experience at senior levels in the private or public sectors. While there are no mandatory

qualifications for appointment of Members, it can be seen from the biographies of Members that are published in the Tribunal's Annual Report that Members bring a considerable depth of knowledge and experience to the task of providing a final and independent merits review of decisions.

Members bring a range of experiences to the RRT including:

- serving on other Tribunals such as the SSAT and the AAT;
- working for the UNHCR, for refugee organisations such as the Refugee Council of Australia and the Refugee Advice and Casework Service, or in legal practice representing refugees;
- working for Government departments and agencies such as the Department of Foreign Affairs and Trade and the Commonwealth Ombudsman. Of the current RRT Members, 6 out of 71 have previously worked for DIMIA.

With respect to **Recommendation 8.2,** the RRT continues the practice of referring cases to the Department for Ministerial consideration where it is considered there may be humanitarian grounds under international conventions.

2. Subsequent action to implement those recommendations agreed to by the Government and which required some action by DIMIA are set out below.

Recommendations 3.2 and **3.5** of the Report called for an efficiency audit and evaluation of the IAAAS program be undertaken. As indicated in the Government response, an audit by Ernst and Young into the IAAAS was already underway. This audit was finalised and all recommendations were implemented.

Recommendation 4.7 called for the ANAO to undertake an efficiency audit into protection visa decision making. The ANAO completed a performance audit "Management of the Processing of Asylum Seekers" in June 2004 (Audit report No. 56, 2003-04). The ANAO's overall conclusion (at paragraph 18) was that:

> *"…the Onshore processing of asylum seekers is managed well. The overall standard of record keeping, including the documentation of the reasons for decisions was high. This reflects DIMIA's decision to use higher level and more experienced officers to make decisions in processing PV applications. These officers are also supported with appropriate training and guidelines"*

In response to **Recommendation 6.3**, the Government indicated that a costing and analysis of the existing two-tier determination and judicial review system relating to migration and refugee processes was under preparation. The cost of DIMIA processes on migration and refugee processing was reported in the 2001-02 Portfolio Budget Statements.

Recommendation 6.5 requested that the Department continue to monitor the attitudes of other signatory nations in relation to the terms and protocols of the Refugee Convention. As flagged in the Government response, a review of the interpretation and implementation of the Refugees Convention in Australia and other states was underway. This review culminated in the amendments to the *Migration Act 1958* in 2001 to codify in domestic legislation key elements of the definitions used to identify persons owed protection obligations, and in the publication of "Interpreting the Refugees Convention - an Australian contribution" in 2002

which gave a rigorous analysis of current international law and Australia's considered position on interpretation of some of the important provisions of the Refugee Convention.

3. Please see answer to question one, above.

GOVERNMENT RESPONSE TO THE SENATE LEGAL & CONSTITUTIONAL REFERENCES COMMITTEE REPORT: 'A SANCTUARY UNDER REVIEW: AN EXAMINATION OF AUSTRALIA'S REFUGEE AND HUMANITARIAN DETERMINATION PROCESSES'

CHAPTER ONE: THE REFUGEE ISSUE

Thursday, 8 February 2001 SENATE 21747

Recommendation 1.1

That the Government arrange for a detailed costbenefit analysis of the concept of the provision of temporary safe haven, including estimates of all services likely to be provided by both Government and non-government agencies. (p.38)

Government response

Decisions on the merits of engaging safe haven provisions are necessarily taken on a situationby-situation basis and cannot be pre-empted. The cost so far of the safe haven program is on the public record. The benefits are difficult to quantify as they relate in large part to foreign and aid policy.

CHAPTER TWO: AUSTRALIA'S INTERNATIONAL OBLIGATIONS AND THE PRINCIPLE OF NONREFOULEMENT

Recommendation 2.1

That the Government ensures decision-makers are well enough resourced to facilitate proper assessment of claims for refugee status in accordance with the Convention definition of "refugee". (p.52)

Government response

The Government will continue to implement its commitment to adequately resource onshore protection decision-makers to enable them to properly assess claims according to the criteria of the UN Convention.

Recommendation 2.2

That the Attorney-General's Department, in conjunction with DIMA, examine the most appropriate means by which Australia's laws could be amended so as to explicitly incorporate the non-refoulement obligations of the CAT and ICCPR in domestic law. (p.60)

Government response

The current provisions of Section 417 of the Migration Act, allowing for Ministerial discretion on humanitarian grounds, are adequate to ensure compliance with CAT and ICCPR.

CHAPTER THREE: LEGAL AND OTHER ASSISTANCE TO ASYLUM SEEKERS

Recommendation 3.1

That DIMA investigate the provision of videos or other appropriate media in relevant community languages, explaining the requirements of the Australian onshore refugee determination process. This material should be available to those in detention, and to IAAAS providers. (p.89)

Government response

DIMA already ensures that a range of information on the protection visa process is available. The protection visa application form provides comprehensive information on the protection process. In addition, DIMA Fact Sheets 41, 'Seeking Asylum within Australia', and 42, 'Assistance for asylum seekers in Australia', are publicly available. A large body of information on onshore protection processes is also made available by IAAAS service providers to both detainees and applicants in the community.

Recommendation 3.2

That an appropriate body such as the ANAO undertake an efficiency audit to determine if community-based protection visa applicants, eligible for IAAAS assistance, are not receiving it. The audit should assess if funds could be managed more efficiently to provide additional services. (p.89)

Government response

The effectiveness with which IAAAS providers target available resources to those individuals in greatest need is being considered in an audit conducted by Ernst and Young. The audit report will indicate whether further exploration of this issue is warranted. These matters are also assessed as part of the IAAAS tender evaluation and contractor performance monitoring processes in DIMA. The audit report will be provided to the Committee.

Recommendation 3.3

That the IAAAS provide a separate fund for translation and interpretation services. These should be capped at an appropriate level, with IAAAS managers having the discretion to extend the funding in cases where more extensive services are required. (p.92)

Government response

The cost of translation and interpreting services is included in IAAAS funding. DIMA monitors the quality of these services to ensure that adequate standards are met.

Recommendation 3.4

That the IAAAS provide a separate fund for medical and psychiatric assessments. These should be capped at an appropriate level, with IAAAS managers having the discretion to extend the funding in cases where more extensive services are required. (p.92)

Government response

Assessments and treatment are available when needed from professional torture and trauma

counselling services funded through DIMA's Early Health Assessment and Intervention Services program. To the extent that assessments are sought solely to support protection claims as distinct from providing treatment, IAAAS pro21748

viders are expected to factor such costs into their tendered service prices.

Recommendation 3.5

That an independent evaluation of the administration of IAAAS, including the quality of work performed by contractors and the effectiveness of the complaints mechanism, be undertaken and completed by a qualified body within two years. (p.99)

Government response

The current Ernst and Young audit of the IAAAS program (Recommendation 3.2 refers) is assessing DIMA's administration of the IAAAS, including effectiveness of the complaints mechanism. The outcome of this assessment will determine whether further evaluation is necessary.

As stated in the response to 3.2, contractor performance issues are already closely assessed through monitoring mechanisms which are being examined by the current audit and are addressed also in re-tendering processes.

Recommendation 3.6

That a body such as the Australian Law Reform Commission be asked to undertake a comprehensive study of:

- the causes of appeals to the courts in refugee matters, and whether increases in legal assistance would serve to reduce the numbers of unmeritorious claims; and
- the costs associated with unrepresented litigants in refugee matters, and whether increases in legal assistance would be effective means of reducing the costs to the wider system. (p.106)

Government response

See response to Recommendation 3.7 below.

Recommendation 3.7

That the Government amend the legal aid guidelines to enable the Legal Aid Commissions to provide limited legal advice to help applicants consider the value of an appeal. (p.107)

Government response (Recommendations 3.6 and 3.7)

The Government has previously examined the level of unmeritorious applicants before the Federal Court and has introduced legislation in the form of the Migration Legislation Amendment (Judicial Review) Bill 1998 to address these concerns.

The Government has also introduced legislation to address the abuse of class action procedures in migration matters. The Government has presented evidence on these issues to the Parliamentary Committees examining those Bills.

In July 2000 the Department of Immigration and Multicultural Affairs, in conjunction with the Federal Court, instituted and funded a pilot scheme which allows every legally unrepresented applicant to the Federal Court in Sydney in migration matters to receive advice from a lawyer in respect of that application. It is expected that further information, similar to that set out in Recommendation 3.6, will flow from that pilot scheme.

One objective of the pilot scheme is to allow such applicants access to independent legal advice on the merits of their Federal Court application. In this context it is not proposed to revise the legal aid guidelines.

CHAPTER FOUR: DECISION MAKING – PART 1

Recommendation 4.1

That all information provided by non-citizens on arrival during an interview with a DIMA officer be retained, even if the individual is removed. In cases where individuals make an application, this information should be made available to them. (p.120)

Government response

This is current practice. All reports of entry interviews with illegal arrivals are retained by DIMA. Where an arrival applies for protection the entry interview report is included on the case file. Any information particular to the individual that is adverse to a case is presented to the applicant for comment under natural justice provisions. Information on the applicant's file is accessible under Freedom of Information provisions.

Recommendation 4.2

That DIMA continue to use the current Australian Public Service level case officers to make decisions at the primary determination stage on the basis that the following proposals are implemented. (p.127)

Government response

The current practice whereby DIMA officers at APS6 level decide protection applications is appropriate.

However, the proposal contained in Recommendation 4.4 below is not accepted.

Recommendation 4.3

That decision-makers have the necessary skills, knowledge and ability and the necessary personal

attributes to perform the decision-making function, the Committee recommends that primary decision-makers have additional specialist training, both before and during their tenure. Such training can be obtained from a crosssection of sources, including the legal profession,

European judicial specialists and other government and non-government organisations. (p.127)

Government response

Case officers receive all necessary training to properly carry out their decision-making function. This includes training by DIMA legal specialists, torture and trauma treatment service providers and community groups. Refresher courses on specific issues are conducted when necessary.

Recommendation 4.4

That, where decision-makers are of the view that an applicant should not proceed to interview stage, the decision-maker must provide reasons for that decision to the applicant. (p.127)

Government response

An interview is only one of a number of assessment tools available to case officers and is not always necessary. Whether an interview takes place or not, applicants are always informed of adverse information, and decision records, including
reasons for the decision, are always provided.

Recommendation 4.5

That the responsibility for refugee determination under the Protection Visa system remain in the DIMA portfolio. (p.130)

Government response

There is no expectation that the current arrangements
whereby the DIMA portfolio has responsibility for refugee determination will be altered.

Recommendation 4.6

That accurate and up-to-date information from a broad cross-section of Government and nongovernment
sources should be entered into CIS.
Staff using CIS for visa determination decisions should be trained in rapid information retrieval, information analysis and methods of critical evaluation. (p.133)

Government response

This is current practice. CIS already collects upto-date country information from a wide range of sources. Case officers are trained to retrieve and appropriately use that information in decisionmaking.

Recommendation 4.7

That the ANAO conduct an efficiency audit to determine if improved primary decision-making will reduce program costs. (p.138)

Government response

ANAO conducted an efficiency audit of primary decision-making as part of its audit, 'The Management
of Boat People', in 1998. As part of the on-going DIMA-wide evaluation program, a number of reviews affecting the onshore protection program are planned, including an evaluation of the IAAAS due for completion by December 2000 (Recommendation 3.2 refers), and pricing and bench-marking reviews. These will seek to establish appropriate prices and resources for the program. The need for a further ANAO efficiency audit and its possible scope and timing is a matter for the Auditor-General.

Recommendation 4.8

To facilitate the preparation of more complete and accurate applications, the Committee recommends
that sufficient resources be made
available to ensure that applicants are better able to understand the requirements of Australia's refugee and humanitarian program and to provide the necessary detailed information required. (p.139) (See also Recommendation 3.1)

Government response

(Recommendation 3.1 refers). Appropriate resources
are made available to properly inform applicants of the requirements of the program. Protection visa application forms contain extensive information on requirements and processing arrangements for this visa. All applicants in detention are offered publicly funded assistance under the IAAAS. Applicants in the community who are in greatest need also receive assistance under the scheme.

CHAPTER FIVE: DECISION MAKING – PART 2

Recommendation 5.1

That a clear statement should be available on the nature and operation of the RRT and this should be freely available, including to detainees. (p.151)

Government response

This is current practice. The letter from DIMA informing an unsuccessful protection applicant of the decision, contains information about review provisions and encloses a separate brochure on the RRT. The RRT produces a handbook on its purpose and procedures which is regularly updated. The RRT also provides a copy of its Client Service Charter to all review applicants, including those in detention. It also has a website providing information about its procedures.

Recommendation 5.2

That further training be provided for RRT members in the use of those inquisitorial methods accepted as integral to the Tribunal. (p.151)

Government response

This is current practice. The RRT has an ongoing development and training program, including training in inquisitorial methods appropriate to the RRT.

Recommendation 5.3

In carrying out its task to determine whether a person is a refugee, the Committee recognises that the RRT's assessment of a claim for refugee status will and should be influenced by matters that go to an applicant's credibility. The Committee recommends that credibility continue to be a factor in the determination of refugee status. (p.158)

Government response

This recommendation is currently complied with by the RRT and members are provided with ongoing training on matters of credibility assessment.

Recommendation 5.4

That the RRT be able to sit as a single member body and as a panel of two and up to three members as appropriately determined by a Senior, or the Principal Member. Members would be drawn from people with appropriate backgrounds for considering refugee and humanitarian applications. (p.169)

Government response

Multi-member panels of the RRT are not possible under the current provisions of the Migration Act. However, the proposed Administrative Review Tribunal (ART), which will replace the RRT, will provide a facility for multi-member tribunals. RRT members are currently drawn from people with appropriate backgrounds for considering refugee and humanitarian applications.

Recommendation 5.5

That the Principal Member of the RRT should be a person with judicial experience. (p.172)

Government response

The Principal Member of the RRT is a person with an appropriate background. Judicial experience is valuable, but not the sole factor to be considered.

Recommendation 5.6

That officers from DIMA, Attorney-General's or DFAT should not be RRT members. Officers seeking such placements should move to the unattached list. (p.173)

Government response

RRT members are drawn from people with a broad range of experience and there is no reason why officers from these Departments should be ineligible for consideration. However, Australian Public Service regulations prevent any officer in the pay of the Commonwealth being paid concurrently by the RRT.

Recommendation 5.7

That DIMA and the Department of Finance and Administration acknowledge the changing workload of the RRT and differing complexity of its cases. This information should be used to assess appropriate funding levels and/or systems. (p.174)

Government response

The Government has long recognised that resourcing of Commonwealth funded bodies should be adapted to meet their changing roles and workload and this is implemented through purchasing agreements. In the case of the RRT such an assessment was completed as part of the 2000-01 Budget process in a Pricing Review.

Recommendation 5.8

That members of the RRT be drawn from a broad cross-section of the Australian community, including the legal profession, with experience in refugee and humanitarian issues. (p.179)

Government response

This is current practice.

CHAPTER SIX: JUDICIAL OVERSIGHT OF ADMINISTRATIVE DECISIONS

Recommendation 6.1

That DIMA maintain an up-to-date comparative database of international refugee determination systems in a number of countries which are State parties to the relevant international conventions. This material should be made available in a format that is easily accessible. (p.201)

Government response

The International Section of DIMA has information on refugee determination systems of a number of other countries. A principal source of information is the Inter-Governmental Consultations on Asylum Refugee and Migration Policies in Europe, North America and Australia (IGC) of which Australia is an active member and which produces regular comparative reports and data on refugee matters. Most of this IGC information is publicly available. Since countries adopt different legislative and policy approaches to their refugee determination systems, data collected by countries are not always strictly compatible.

Recommendation 6.2

That DIMA commission an independent analytical report on State parties' incorporation into domestic law of international legal obligations

requiring access to courts and tribunals, and judicial oversight of the refugee determination process. The Committee further recommends that DIMA provides that report to the Parliament.

(p.201)

Government response

There are no international legal obligations under the Refugees Convention requiring access to courts and tribunals or judicial oversight of the refugee determination process. However, the UNHCR provides non-binding procedural guidance to the effect that persons found not to be refugees should have an opportunity to seek a review of that decision which is either administrative or judicial. Australia currently provides both administrative and judicial review options sequentially.

Recommendation 6.3

That an analysis of the cost of fulfilling Australia's international legal obligations be provided by DIMA to the Committee within three months of the completion of the inquiry referred to at Recommendation 6.2. The analysis should include a comparison of the cost of the administration of both migration and refugee applications under the current two-tiered administrative determination and judicial review system. (p.202)

Government response

The costs of the current protection procedures (primary and RRT) and migration procedures (primary and MRT) are provided in the DIMA Portfolio Budget Statement. Costing and analysis of the existing two-tier determination and judicial review system relating to migration and refugee processes is under preparation and will be forwarded to the Committee. However a range of work relating to costing and benchmarking of DIMA operations and the purchasing agreement needs to be completed first.

Recommendation 6.4

That the Government commission an independent study on the benefits of modifying the current on-shore refugee determination process. The study should assess, among other matters, the feasibility of moving to a wholly judicial determination process, including the costs of any such process. (p.202)

Government response

The Government has in place mechanisms to closely monitor the performance and effectiveness of the current onshore refugee determination process. Efforts are continually made to maintain its integrity and improve its efficiency. In the circumstances there is no need for an independent study of these matters. In any event, any move to a wholly judicial process could be expected to incur significantly greater costs.

Recommendation 6.5

This inquiry and report is evidence of the fact that Australia has not escaped the pressures placed on refugee-receiving countries. In light of these developments, the Committee recommends that the Government continue to monitor the attitudes of other signatory nations in relation to the terms and protocols of the Refugee Convention. (p.202)

Government response

The Government continually monitors the attitudes and practices of other signatory nations, through the IGC and other means. The Government announced in August 2000 measures to work with other countries and the UN to reform the UNHCR. Suitable reform would enable UNHCR and its Executive Committee to provide better assistance and support to countries in meeting challenges to provide refugee protection to those most in need, while combating people smuggling. As part of this the Government will review the interpretation and implementation of the Refugees Convention in Australia and other states.

CHAPTER EIGHT: MINISTERIAL DISCRETION

Recommendation 8.1

That the Minister should note the concerns expressed about the s417 Guidelines and consult widely with stakeholders on a regular basis to ensure that the content of the Guidelines remains contemporary and addresses the specific purposes of Australia's obligations under the CAT, CROC and the ICCPR. (p.241)

Government response

The Minister for Immigration and Multicultural Affairs regularly consults stakeholders on issues relating to his portfolio. The Ministerial guidelines on s417 are regularly reviewed to ensure that they remain appropriate and reflect Australia's obligations under CAT, CROC and ICCPR.

Recommendation 8.2

That the RRT continue the current practice whereby members informally advise the Minister of cases where it is considered there may be humanitarian grounds for protection under international conventions, as opposed to grounds under the Refugee Convention. (p.251)

Government response

Current arrangements whereby RRT members are asked to flag cases of possible humanitarian concern will continue.

Recommendation 8.3

That an information sheet be produced to explain the provisions of s417 and the accompanying Ministerial Guidelines. The literature should also include information on the procedure for any subsequent application under s48B. This

should be widely available in appropriate languages.
(p.257)

Government response

Ministerial Guidelines on s417 and s48B are publicly available. DIMA Fact Sheet 41 explains the Minister's discretionary powers and further publication of such information is not considered necessary. The powers are non-compellable and, in any event, every case where the RRT finds that a person does not require refugee protection, is considered by DIMA against the intervention guidelines as a matter of course. Cases meeting the guidelines are referred to the Minister without any action being required by the applicant.

Recommendation 8.4

That the s417 process should be completed quickly and the result of the request advised to the relevant person. (p.257)

Government response

DIMA strives to expedite processing of s417 requests. Cases decided by the RRT are normally assessed against s417 guidelines within four weeks of finalisation. DIMA procedures are that written requests for intervention receive written responses.

Recommendation 8.5

That the subject of the request should not be removed from Australia before the initial or first s417 process is finalised. (p.257)

Government response

This is current practice.

Recommendation 8.6

That appropriately trained DIMA staff consider all s417 requests and referrals against CROC, ICCPR and CAT. (p.262)

Government response

This is current practice.

CHAPTER NINE: THE CASE OF THE CHINESE WOMAN

Recommendation 9.1

That policies and practices be developed by DIMA to ensure the Minister is made aware of all relevant facts about detainees prior to their removal from Australia. (p.297)

Government response

In the case of group removals it is established practice that, before the removal, DIMA convenes a meeting of all involved parties to discuss issues relating to individuals in the group. These issues include medical fitness, whether there are any applications before DIMA, the RRT or courts and whether there is any unanswered correspondence from any person being removed.

There is close liaison with the Minister's office in the lead up to group removals.

Individual removals occur on a daily basis and the majority are organised by State based compliance officers. A delegate of the Minister must be satisfied that the pre-conditions set out in Section 198 of the Migration Act are met before the removal takes place. Where there are issues of particular concern or sensitivity in respect of an individual removal, those issues are drawn to the attention of the Minister's office. A national removals reporting system designed to improve advance notice of removal issues has recently been put in place.

Recommendation 9.2

That, in respect of removals from Australia, a protocol on the 'fitness to travel' of pregnant women (especially those in later stages) be developed as a matter of urgency. (p.297).

Government response

Recommendation 9.1 refers. The fitness to travel of all persons being removed, including pregnant women, is addressed prior to removal.

Recommendation 9.3

That pregnant women subject to removal should be given special consideration by the Minister, or a senior delegate, to remain in Australia until after the birth to ensure that no woman is returned pregnant to a country in circumstances where there is a risk the woman will be coerced to undergo an abortion. (p.297)

Government response

Recommendation 9.1 refers. Existing measures to assess fitness to travel cover any physical problems likely to arise with pregnant women during removal. Any risk associated with returning a woman to her country of origin will have been assessed as part of the protection determination.

Recommendation 9.4

That until such time as better procedures are developed, persons with possible humanitarian claims in Australia should be advised of the procedures available to them under s417 for Ministerial consideration on humanitarian grounds. Claimants with English language difficulties should be provided with appropriate assistance. (p.299)

Government response

Ministerial Guidelines on s417 are publicly available. DIMA Fact Sheet 41 explains the Minister's discretionary powers (response to Recommendation 8.3 refers).

Recommendation 9.5

That all steps be taken and put in place to ensure that the situation of Ms Z never occurs again in Australia. (p.299)

Government response

The visa assessment process, combined with Ministerial intervention powers where public interest grounds exist, enable all cases of possible concern to be sensitively handled.

CHAPTER TEN: REMOVALS FROM AUSTRALIA

Recommendation 10.1

That an inquiry be undertaken into the use of sedation and other means of restraint in detention centres and in the removal of unauthorised noncitizens
from Australia. (p.324)

Government response

The use of restraints is under examination as part of a general security review being undertaken within DIMA.

Recommendation 10.2

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. (p.327)

Government response

This is current practice. DIMA officers in positions requiring knowledge of international conventions are appropriately informed about and
trained in those issues.

Recommendation 10.3

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. (p.327)

Government resp onse

Protocols are in place between DIMA and the removal service providers it engages. For DIMA processes, external audit mechanisms exist. Where a particular carrier is responsible for removing
an illegal arrival (because that carrier brought the person to Australia) the procedures adopted are a contractual matter between the carrier and the removal service provider it engages.

CHAPTER ELEVEN: MONITORING OF RETURNED PERSONS

Recommendation 11.1

That the Government place the issue of monitoring on the agenda for discussion at the Inter-Government/Non-Government Organisations Forum with a view to examining the implementation
of a system of informal monitoring.
(p.343)

Government response

The risk to a protection visa applicant inherent in his or her return to the country of origin is assessed as part of the protection determination process. DIMA is in continuous contact, directly or through DFAT or other agencies, with the UNHCR and NGOs in order to gain up-to-date information on the human rights situation and the treatment of returnees in relevant countries. This information is included in CIS country information holdings and is readily available to primary and RRT decision-makers. A system which monitors individual returnees is considered to be impractical and possibly counter-productive. Where it is assessed as part of the protection determination process that that there is no real chance of persecution of the applicant on return, Australia is not responsible for the future wellbeing of that person in their home land merely because at some stage they spent time in Australia.

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