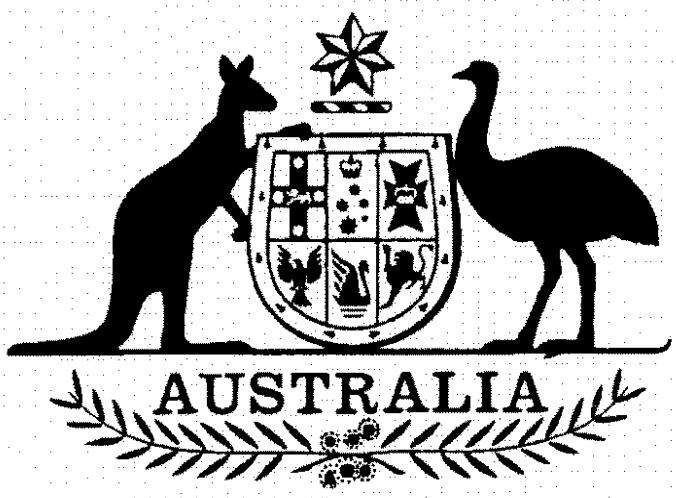
DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS



SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE ON THE ADMINISTRATION AND OPERATION OF THE MIGRATION ACT

AUGUST 2005

Inquiry into the Administration and Operation of the Migration Act 1958

FOREWORD

Structure of Submission

The Department of Immigration and Multicultural and Indigenous Affairs welcomes the opportunity to provide a submission to the Committee's Inquiry into the administration and operation of the Migration Act 1958.

Under the Administrative Arrangements Order, the Department deals with matters arising under the Migration Act 1958. Related matters dealt with by the Department include:

- Entry, stay and departure arrangements for non-citizens;
- Border immigration control; and
- Arrangements for the settlement of migrants and humanitarian entrants, other than migrant child education.

The Migration Act and Regulations made under the Act provide the statutory framework under which the Department manages the delivery of the Government's Migration and Humanitarian programs, facilitates the entry into Australia of persons whose presence is beneficial to Australia, and enforces the requirements of Australia's migration laws, including removing persons with no entitlement under those laws to enter or remain in Australia.

The administration of immigration involves a balance between facilitating the easy entry into Australia of all bona fide visitors, migrants and other entrants who meet the requirements established by Government and Parliament, while at the same time effectively managing such entry and stay in order to ensure that people who do not meet those requirements are not permitted to enter or remain in Australia. The key principles followed in framing and administering the Migration Program aim to ensure that:

- migrant selection is on a strictly non-discriminatory basis, in terms of race, religion, colour or ethnicity;
- the overall immigration intake contributes to the nation's economic and social wellbeing; and
- Australia is able to manage the movement of people across its borders in an orderly and efficient manner. Without this critical capacity, a managed migration policy becomes meaningless, losing the benefits of security, economic prosperity and social enrichment.

As the Committee's terms of reference are broad, this Submission provides an overview of the structure and operation of the Migration legislation in the areas relevant to the Committee's inquiry. It then moves to provide some details of the administration of the matters specifically mentioned in the terms of reference.

The Department is happy to provide further assistance and information on those areas of the administration of the Migration Act that are of particular interest to the Committee.

Overview of Department's Operations

The Department is an organisation of approximately 2,670 people located in Canberra, an additional 2,900 people in locations across Australia, and 840 people in overseas posts. Approximately 690 of the overseas staff are locally engaged employees of overseas missions.

The Department's contribution to Australia in its administration of the Migration Act and related responsibilities is illustrated by the following examples from the last financial year (1 July 2004 to 30 June 2005):

- The Department processed 22,038,923 air and sea arrivals and departures.
    - Each year, DIMIA will process the arrival of more than 22 million people through Australia's air and sea ports.
    - More than 60,000 people will be processed through Australian air and sea ports each day.
- The Department received a total of 4,555,730 visa applications.
    - On any given day, more than 12,000 visa applications are received by DIMIA.
    - That is over 500 visa applications per hour.
- The Department granted a total of 4,214,574 temporary entry visas.
    - On average, DIMIA will grant around 11,500 temporary visas each working day.
    - This equates to 480 visas per hour.
- The Department granted a total of 133,060 permanent migration visas.
    - On average, DIMIA will grant around 500 permanent visas each working day.
    - Of these approximately 35 per working day are humanitarian visas.
- The Department received over 1,383,102 general client service enquiries.
    - Over 700 people an hour per working day ring DIMIA centres.
    - Another 235 an hour make citizenship enquiries.
    - Over 75 people per hour attend appointments under DIMIA's National Appointment System.
- The Department interpreted 441,952 telephone calls
    - Each day, DIMIA will arrange interpreting services for 1,700 telephone callers.
    - Each day, DIMIA will provide nearly 180 clients with interpreting services.
    - On average, DIMIA will assist clients by interpreting 31 documents per working day.

The volume of decision-making in administering the Migration Act is immense and has been growing at a rapid rate. In such a large organisation, spread across over 100 locations within Australian and the globe, the Department strives towards ensuring that clients in similar circumstances receive similar outcomes no matter where they are located. Consistency of outcome, quality of outcome, reasonable speed of outcome, fairness in the processing of applications, all within the parameters of a complex legislative framework, are key goals. The legislative framework is complex because of the multiplicity of goals and objectives that it serves.

1. LEGISLATIVE FRAMEWORK

1.1 AN OVERVIEW OF THE OPERATION OF THE MIGRATION LEGISLATION

1.1.1 Purpose

1. The purpose of the *Migration Act 1958* (the Migration Act) is to 'regulate, in the national interest, the coming into, and presence in, Australia of non-citizens' (s 4(1)).

1.1.2 Visas – Decision-making Requirements and Processes

Generally

2. All non-citizens must have a visa to enter and remain in Australia.

3. The Migration Act creates a universal visa system. All persons who are not Australian citizens, who want to travel to, enter and remain in Australia, must hold a valid visa. To obtain a visa, each person must meet the legal rules set out in the Migration Act and the *Migration Regulations 1994* (Regulations) for the grant of a visa. There are some minor variations:

- New Zealand citizens and Permanent Residents of Norfolk Island travel visa free and are usually granted a visa on arrival in Australia; and
- Traditional inhabitants of the Torres Strait Protected Zone do not require visas to enter the migration zone within the Protected Zone. Visas are necessary for movement beyond the Protected Zone

4. Any non-citizen in Australia's migration zone (or seeking to enter the migration zone (other than an excised offshore places) without a visa that is in effect is an 'unlawful non-citizen' (s14) and must be detained (s189) until either granted a visa or removed from Australia.

Migration Zone

5. The 'Migration Zone' is defined in s 5 of the Migration Act as meaning the area consisting of the States, Territories, and Australian resource installations. To avoid doubt, the definition of 'migration zone includes:

- land that is part of a State or Territory at mean low water;
- sea within the limits of both a State or Territory and a port; and
- piers, or similar structures, any part of which is connected to such land or to the ground under such sea.

6. The definition of 'migration zone' does not include sea within the limits of a State or Territory but not in a port.

Excised Offshore Places

7. 'Excised offshore place' is defined in s 5 of the Migration Act. The definition contains a list of external territories, such as Christmas Island, Ashmore and Cartier Islands, the Cocos (Keeling) Islands, Australian sea installations and resource installations and any island that is part of a State or Territory that has been prescribed by the Regulations for the purpose of the

definition. Unlawful non-citizens who arrive at excised offshore places cannot make a valid application for any visa (46A) while they are in Australia.

Applications for visas

8. The Migration Act and Regulations specify how a non-citizen is to apply for a visa. Generally, visa applicants must apply for a particular visa class and each class may have a number of visa subclasses. In most cases this means the non-citizen must complete a prescribed form (often electronically) and pay a visa application processing charge. The Act specifies that failure to meet these requirements means the application is not valid and must not be considered (s47).

9. Once a valid application has been made, the statutory criteria that need to be satisfied by an applicant for the grant of a visa are set out in the Migration Regulations.

10. The statutory criteria can differ between visa classes, but almost all classes of visa share certain health, public interest and character requirements that need to be met by visa applicants. [Some classes of visa do not contain public interest criteria such as Special Purpose Visas (for certain military personnel, guests of government, air and sea crew), Special Category Visas (a temporary visa for New Zealand citizens), Permanent Resident of Norfolk Island visas and Bridging visas].

11. Persons who have made a valid visa application and meet all the statutory criteria prescribed for that class of visa, must be granted a visa of that class (s65). Conversely, if the statutory criteria are not met, the application must be refused (s65).

Types of visa

12. The Migration Act sets out 2 main types of substantive visa:

- A permanent visa – which allows holders to remain indefinitely in Australia (but which may have a limited travel facility).
  - After being in Australia for 2 years as the holder of a permanent visa, the holder can qualify for the grant of Australian citizenship - section 13 of the *Australian Citizenship Act 1948*.
- A temporary visa - allows the holder to remain in Australia for a specified period, or until a specified event occurs, or while the holder has a specified status.

Migration Regulations

13. Whilst the Migration Act contains the broad structure of the legal rules about which non-citizens can come to and remain in Australia, the Migration Regulations contain the detail of the requirements ('prescribed criteria') that a non-citizen applicant must meet to be granted a visa and how applications for visas must be made.

14. The structure of the Regulations and the requirements that the Regulations set out is as follows:

- Part 1 sets out preliminary matters, such as interpretation and definitions regulations;
- Part 2 sets out the classes and subclasses of visas, lists the criteria for visas, applications for visas and code of procedure regulations;
- Part 3 deals with immigration clearance and collection of information;
- Part 4 sets out regulations relating to review of decisions made by the Merits Review Tribunal (MRT) and Refugee Review Tribunal (RRT);
- Part 5 relates to other miscellaneous matters, including notification provisions;
- Schedule 1 sets out the valid application criteria for all classes and subclasses of visas – including the prescribed form, fee, subclasses and other details, such as where an applicant must be;
- Schedule 2 sets out the criteria for grant of a visa;
- Schedule 3 sets out additional criteria for grant in the case of unlawful non-citizens at the time of application;
- Schedule 4 sets out public interest criteria (PIC) such as character, national security, health, debt to Commonwealth, risk factor, etc;
- Schedule 5 sets out Special Return criteria – additional criteria to be met where applicants left Australia as removees, etc;
- Schedules 5A and 5B sets out evidentiary requirements for student visas and secondary applicants;
- Schedules 6 and 6A set out requirements relating to the general points test;
- Schedule 7 sets out requirements relating to the business points test;
- Schedule 8 sets out visa conditions – the conditions that are imposed on temporary visas;
- Schedule 8A sets out details relating to partial refunds for visa application charge (VAC);
- Schedule 9 set out classes of persons to whom special entry and immigration clearance arrangements apply;
- Schedule 10 sets out details relating to forms – such as search warrant forms and identity forms;
- Schedule 11 sets out the text of the Memorandum of Understanding (MOU) with the PRC; and
- Schedule 12 details the Exchange of Letters relating to the MOU.

Bridging Visas

15. A non-substantive visa established by the Regulations is the Bridging Visa. Bridging visas provide lawful status to non-citizens in Australia who do not hold a substantive visa that is in effect. In this way, Bridging visas provide lawful status to people who would otherwise be unlawful by virtue of not holding a substantive permanent or temporary visa. A person who holds a Bridging visa (BV) will not be detained, as they are provided with lawful status for the life of the BV.

16. Grounds on which a Bridging visa might be granted to a non-citizen include (but are not limited to):

- where a valid application for a substantive visa is being processed by
- the Department;
- whilst a non-citizen awaits the outcome of a merits or judicial review of a decision to refuse or cancel a visa; and
- while arrangements are made by a non-citizen who does not hold a substantive visa to leave Australia.

17. The classes of Bridging visas, established by the Regulations, are:

- **Bridging visa A** – available to non-citizens who apply for a visa within Australia and who hold another visa (other than a Bridging Visa or Criminal Justice Visa) at time of application. It does not come into effect unless the first substantive visa ceases in which case it serves to keep them lawful until the application is decided.
- **Bridging visa B** – available to all Bridging visa A holders who have valid reasons for wanting to travel outside Australia while their substantive visa application is being considered.
- **Bridging visa C** – available to applicants who do not hold a visa when they apply for another visa while in Australia, with the exception of people who have been granted a Bridging visa E since they last held a substantive visa.
- **Bridging visa D** – a short term bridging visa available to persons who are unlawful or will soon become unlawful and want to make an application for a visa but are temporarily unable to do so; or, who do not want to or are unable to apply for a visa but a compliance officer is not available to interview them.
- **Bridging visa E** – available to certain unlawful non-citizens who are located by DIMIA and who may be applying for visas or making arrangements to depart Australia
- **Bridging visa F** – enables the release from immigration detention of certain unlawful non-citizens who may be able to assist with investigations into people trafficking, sexual servitude and/or deceptive recruiting offences.
- **Bridging visa R** – enables the release from immigration detention of certain unlawful non-citizens who are awaiting removal from Australia and are invited by the Minister to apply.

18. The conditions attached to a Bridging visa vary according to the type of visa applied for, the applicant's immigration status and personal circumstances at the time of application.

Character test

19. The Migration Act sets out a character test in section 501. The Minister or delegate may refuse to grant a visa or may cancel a visa if the Minister or delegate reasonably suspects an applicant does not pass the character test outlined in subsection 501(6), and the applicant does not satisfy the Minister that he or she passes the character test.

20. Whether an applicant passes the character test is determined by considering any criminal history, suspicion of criminal associations, significant risk that the person will engage in criminal, dangerous or threatening behaviour on entering Australia, and having regard to the person's past and present general conduct.

21. Under the Act, the Minister is able to personally exercise his or her power to refuse to grant or to cancel a visa on character grounds where the Minister 'reasonably suspects' that the non-citizen does not pass the character test and is satisfied that refusal or cancellation is in the national interest. The Minister's personal decisions are not reviewable by the MRT, RRT or AAT. A person may still apply to the Federal Court for judicial review regarding the lawfulness of a decision made by the Minister under his or her personal powers.

Capping of visas

22. Section 65 of the Migration Act states that if a non-citizen meets the legal criteria for the grant of a visa, the visa *must* be granted.

23. However, the Act states that the grant of a visa is subject to separate provisions which allow for the number of visas in particular classes to be 'capped' for each financial year:

- there are some visa classes which the legislation does not allow to be capped – for example, spouse and (onshore) protection visas;
- there are different capping mechanisms in the Act - one mechanism can terminate existing visa applications, another can queue applications once the cap has been reached; and
- the Migration Act also allows the Minister to put in place priority processing lists for visa applications.

Cancelling a visa and visas otherwise ceasing

24. There is no general power in the Act to cancel visas. Instead, the Act contains separate cancellation powers, which are "situation specific" in nature. These powers may be applied on a discretionary or mandatory basis or may apply automatically by operation of law.

25. A visa can be cancelled if certain grounds are established. Cancellation is generally discretionary. Grounds for cancellation include (but are not limited to):

- breach of conditions attached to a visa;
- circumstances which permitted the grant of the visa no longer exist;
- giving incorrect information on visa application or passenger card;
- prescribed grounds for cancellation under the regulations (for example Regulation 2.43 of the Migration Regulations);
- reasonable suspicion that the visa holder does not meet the character test; and

- cancellation by operation of law – for example in respect of student visas.

26. Sections 109, 116, 128, 134, 137J, 137Q, 140 and 501 of the Act and the Migration Regulations provide for the cancellation of visas as follows:

- **s 109** – cancellation of visas based on incorrect information or bogus documents;
- **s 116** – cancellation of visas on certain grounds;
- **s 128** – cancellation of visas of people outside Australia without notice;
- **s 134** – cancellation of business visas
- **s 137J** – automatic cancellation of student visas based on breach of the student's visa conditions;
- **s 137Q** – cancellation of regional sponsored employment visas;
- **s 140** – cancellation of visas where other visas have been cancelled under section 109, 116 or 128 and 137J (i.e. visas held by members of a family unit are cancelled where the primary visa holder's visa is cancelled); and
- **s 501** – cancellation of visas of people on character grounds.

27. A visa can cease to be in effect in certain circumstances (s82). Examples of the circumstances a visa will cease to be in effect include:

- where the period that the visa remains in effect expires;
- where the visa holder enters Australia otherwise than by an authorised place;
- where the visa holder does not comply with immigration clearance requirements;
- where the visa holder leaves Australia on a visa with no return facility; and
- where the visa holder is deported from Australia.

Bars and other restrictions on making a visa application

28. There are legislative bars and restrictions on which visa classes can be applied for either onshore or offshore and limits on making further visa applications.

29. Generally, once a person has made an unsuccessful onshore visa application, the person has a very limited group of further visas for which an application can be made. This is to prevent persons delaying departure from Australia by lodging endless visa applications with no prospect of success.

30. The most notable bars for persons who are physically in Australia are those on making valid applications for protection and other visas while they remain in Australia:

- s 48 prevents the making of further applications for substantive visas other than those of a prescribed class;
- s 48A prevents repeat protection visa applications from being made unless the Minister personally lifts that bar (s 48B);

- s 91E prevents the making of a valid visa application where the non-citizen has a prescribed connection with a safe third country with which Australia has an agreement, unless the Minister personally lifts that bar (s 91F); and
- s 91P prevents the making of a valid visa application where the non-citizen has a right to reside in another country other than the country of persecution unless the Minister personally lifts that bar (s 91Q).

31. Certain Australian territories have been designated an 'excised offshore place'. A non-citizen who arrives unauthorised at an excised offshore place (see below) is barred from making a valid visa application unless the Minister chooses to lift that bar (section 46A).

Merits review rights

32. A decision of a primary decision-maker to refuse a visa application or to cancel a visa can be reviewed if the application is made in Australia or if the visa applicant has an Australian sponsor.

33. There is no merits review of a decision to refuse or cancel a visa in immigration clearance, however judicial review of decisions made in immigration clearance is available.

34. Merits review is conducted by the Refugee Review Tribunal (RRT) if the visa application was for a protection visa (ie. the person claims to be a refugee) or by the Migration Review Tribunal (MRT) if the visa application was for any other class of visa.

35. The Administrative Appeals Tribunal (AAT) has jurisdiction to review:
- visa refusals based on section 501 character grounds;
- protection visa refusals based on Articles 1F, 32 or 33(2) of the Refugees Convention; and
- business visa cancellations under section 134.

36. Decisions of the MRT, RRT and AAT may be reviewed by the Federal Courts (see below).

1.1.3 Ministerial Discretion

Exercised in public interest

37. The Migration Act contains several non-delegable provisions that enable the Minister to substitute a tribunal decision with a decision that is more favourable to the applicant, where the Minister believes it is in the public interest to do so. Usually this power is exercised to grant a visa to an applicant who did not meet the statutory criteria for the grant of the visa subject to review by the relevant Tribunal.

38. The Minister's non-compellable powers are provided for in the following sections of the Migration Act:
- section 351 - following an MRT decision;

- section 417 - following an RRT decision; and
- section 501J - following an AAT protection visa character decision.

39. The Minister also has other personal non-compellable public interest powers under the Act:

- s197A – the Minister may grant a detainee a visa;
- s197AB – the Minister may make a 'residence determination' to the effect that a person who is or may be detained under s189 of the Act may reside at a place other than an immigration detention centre; and
- s197AD – the Minister may revoke or vary a 'residence determination'.

40. The main features of these non-compellable public interest powers are:

- the Minister may intervene where the Minister believes it is in the public interest to do so;
- the powers cannot be delegated – only the Minister may exercise these powers;
- the Minister cannot be compelled to consider whether or not to exercise these powers;
- in exercising these powers the Minister is not bound by the statutory criteria in the Regulations, nor is he or she bound by the visa processing procedural requirements in the Migration Act; and
- where the Minister exercises any of these powers, he or she must cause to be laid before each House of the Parliament a statement setting out the reasons for the Minister's decision.

41. Ministers have issued guidelines to illustrate the types of circumstances where they considered it may be in the public interest to consider intervention under the powers outlined in paragraph 35. These have included:

- compelling individual circumstances, such as the person having strong family ties in Australia;
- the applicant would meet criteria for a visa, but is barred from making a further application while in Australia;
- the applicant does not meet the statutory criteria due to a deficiency in those criteria;
- the applicant's removal from Australia may affect Australia's international obligations; or
- there is difficulty in removing the person from Australia.

42. DIMIA employees examine all protection visa cases following an RRT decision and draw the Minister's attention to those that raise issues covered by the Minister's intervention guidelines. The actual decision whether to consider the exercise of the powers or whether to grant the visa, must be made by the Minister personally. DIMIA employees also assess requests for intervention against the guidelines and submit reports to the Minister on the requests.

43. There are additional powers in the Act that only the Minister may exercise personally. Some examples of these powers include:

- the power to lift bars on the making of valid visa applications (for example section 48B referred to above); and
- the power to make decisions to refuse or cancel visas on character grounds, where it is in the national interest to do so, in circumstances where the person is not given a *prior opportunity* to comment on a proposed decision (sections 501(3) and (4)).

Section 499 Directions

44. The Minister has the power under section 499 of the Migration Act to issue policy directions which apply to all decision-makers (including the merits review tribunals). This power does not extend to giving directions that would be inconsistent with the Act or the Regulations.

45. The main area in which these directions have been made is in relation to discretionary powers in the Act.

46. While decision-makers must have regard to the section 499 directions, under law the directions cannot extinguish the discretion of the decision-maker. They can, however, direct what weight must be given to certain matters:

- In character cancellations the Minister has directed under section 499 that the following are 'primary' considerations when delegates are considering the exercise of their power to cancel or refuse a visa under section 501:
  - the protection of the Australian community, and members of the community;
  - the expectations of the Australian community; and
  - in all cases involving a parental or other close relationship between a child or children and the person under consideration, the best interests of the child or children (this is in compliance with Article 3 of the Convention on the Rights of the Child).

1.1.4 Entry

Immigration clearance

47. The Migration Act requires all persons, including citizens, to pass through immigration clearance:
- In practice this mostly occurs when a person passes the customs line at airports and follows customs clearance at seaports, although a person can remain in clearance until they pass beyond the perimeter of the port.
- Australian citizens are required to show evidence of their identity and Australian citizenship.
- Non-citizens must show evidence of a visa that is in effect visa and evidence of their identity.

48. Non-citizens who do not hold a visa that is in effect will generally be refused immigration clearance and taken into immigration detention, unless they are granted a visa.

1.1.5 Unlawful Non-citizens

Detention

49. If an officer knows or reasonably suspects that a person in the migration zone, or seeking to enter the migration zone (other than an excised offshore place), is an unlawful non-citizen, the officer *must* detain the person (section 189(1) and (2)). Section 189 also provides discretionary detention powers in relation to unlawful non-citizens in excised offshore places.

50. The courts have noted that to have a reason to 'suspect' involves something more than mere speculation but less than belief. The placement of the word 'reasonably' before the word 'suspects' in s 189(1) makes it clear that in order to justify detention, the suspicion that a person is an unlawful non-citizen must be justifiable upon objective examination of relevant material.

51. Whilst the Act does not specify how or in what time frame a reasonable suspicion that a person is an unlawful non-citizen is to be resolved, it is clear that there must be some time allowed to resolve a reasonable suspicion. If a suspicion is sufficient to justify a person's detention under s 189 (that is, it is 'reasonable), it is likely, if it persists, to be sufficient to justify the person's continued detention until the reasonable suspicion is displaced, through further inquiry.

52. In many cases, non-citizens are granted a bridging visa (a temporary non-substantive visa) to avoid the need to detain them or to release them from detention while, for example, they await the outcome of an application for a substantive visa, or while they are making arrangements for voluntary departure from Australia. A bridging visa may also be granted while a non-citizen awaits judicial review of a visa refusal decision.

Discretionary detention and removal from excised offshore places

53. As noted above, Christmas Island, Thursday Island, Horn Island and Ashmore and Cartier Islands and the Cocos (Keeling) Islands, Australian sea installations and Australian resource installations are excised offshore places. The Regulations may also prescribe certain islands or external territories as excised offshore places (section 5 definition).

54. There is a discretion to available to officers to detain unlawful non-citizens in an excised offshore place, or persons seeking to enter an excised offshore place, who would be unlawful on entry (sections 189(3) and (4)). If an unlawful non-citizen enters an excised offshore place, they may be taken to a 'declared country' (section 198A) for processing and determination of their refugee claims.

Removal

55. If an unlawful non-citizen is in immigration detention and has no outstanding visa application on foot, including merits and judicial review of any visa refusal/cancellation decision, the Migration Act requires that the person *must* be 'removed' from Australia (section 198).

Deportation

56. There is a *discretionary* power in the Act for the Minister to order the deportation of a non-citizen (section 200). Section 200 applies to allow the deportation of non-citizens:

- who have committed serious crimes in Australia within 10 years after becoming a permanent resident (section 201);
- upon security grounds (section 202); and
- who are convicted of certain serious offences (section 203).

1.1.6 Offshore Border Control – People Smuggling

57. There is no criminal penalty imposed on a person who comes to Australia without a visa. However, the Migration Act imposes penalties on persons who bring unlawful non-citizens to Australia:

Non-criminal penalties:

- Non-citizens face restrictions on making applications for visas and are liable to be placed in immigration detention.
- The Migration Act imposes penalties on air and sea carriers if they bring a non-citizen to Australia without a visa.

Criminal penalties:

- People found to be deliberately or recklessly bringing unauthorised non-citizens into Australia face substantial fines and terms of imprisonment (sections 229-233A).

1.1.7 Judicial Review

58. The federal courts can, upon application, review decisions of the RRT, MRT and AAT.

59. Part 8 of the Migration Act provides a scheme for judicial review of migration decisions. The key provision in this scheme is the "privative clause" contained in subsection 474(1) of the Act. In essence, the privative clause operates to expand the legal validity of the acts and decisions of decision-makers, and thereby limits the grounds of judicial review.

60. In 4 February 2003 the High Court handed down its decision in *Plaintiff S157 of 2002 v Commonwealth* (2003) 195 ALR 24 (*S157*). The court upheld the validity of the privative clause. However, it found that decisions tainted by

jurisdictional error are not "privative clause decisions" and therefore are not subject to the judicial review scheme provided for in Part 8 of the Act.

61. 'Jurisdictional errors' occur where a decision maker acts in excess of their jurisdiction or, alternatively, fails to properly exercise their jurisdiction. This concept has been applied very broadly by the courts. It has been found to include, for example, breaches of procedural fairness, failure to consider an integer of a claim, or misapplication of a law.

62. In practice, 'jurisdictional error' has been expanded to cover the same level of review of decisions as other jurisdictions. Therefore, the intention behind Part 8 of the Migration Act, to restrict the ambit of judicial review of visa-related decisions, has not been effectively realised.

2. ADMINISTRATION OF IMMIGRATION PROCESSES

2.1. AN OVERVIEW OF THE ADMINISTRATION OF VISA PROCESSING

2.1.1 Migration and Temporary Entry Visa Processing

The Migration and Temporary Entry programs

How people apply for visas

63. Application requirements for various visa classes are set out in Schedule 1 to the Migration Regulations. Schedule 1 generally prescribes:

- the visa application charge (VAC) (most visa classes under the migration and temporary entry programs require a VAC);
- the form used to gather the requisite information; and
- the place and mode of application.

64. Applications for some visa classes may be made while the applicant is in Australia (onshore) while other visa classes must be applied for outside Australia (offshore).

65. The way in which visas are processed or assessed depends on a range of factors. Some visas have very fast processing times whereas others are more protracted. At one end of the spectrum, Electronic Travel Authority (ETA) visas (which provide for tourism or business visits to Australia for nationals considered a low security and compliance risk to Australia) are lodged via the internet and are processed electronically mostly in a matter of seconds.

66. Processing times for migration visas are significantly longer reflecting the more complex nature of the assessments involved – including medical and character checking procedures, verification of relationships and, in some cases, assessment of skills and other attributes.

67. DIMIA undertakes detailed monitoring and reporting of processing times as this is a central issue for our service delivery. Generally, average processing times for migration visas have been declining in recent years as a result of new processing strategies. Processing times for individual cases are dependent on the characteristics of the case – for example, a case with complex health, character or fraud issues will inevitably take longer to resolve than a simple well-documented application.

68. In recent years, Australia's approach to managing visa applications has been driven and informed by the concept of "global working". Put simply this involves:

- maximising the processing and information delivery benefits of modern IT and communications technology including the internet;
- centralising those aspects of processing (usually in Australia) where it is efficient and practicable to do so in order to create specialised processing centres that maximise consistency of processing methodology and decision making; and

- appropriate risk management – for example referral of integrity checking to relevant overseas posts.

69. A good example of the practical application of global working principles is the way in which Australia manages applications in the General Skilled Migration (GSM) category – this covers a number of visa classes within the Skill Stream of the migration program, most of which are subject to the points test. These applications are all lodged and processed in Adelaide. The repatriation of GSM visa processing in conjunction with reforms to the points test introduced in the late 90's have yielded very significant benefits for both clients and DIMIA including:

- consistency and quality of decision-making, including through more coordinated and concentrated training delivery;
- increased integrity – resulting from the use of electronic tools such as a profiling system, referral of cases to overseas posts for integrity checking and the establishment of a specialist integrity unit;
- gradually declining processing times
- improved ability to manage delivery of a much larger migration program; and
- reduced offshore resources devoted to processing these applications, which have been redirected to integrity checking and other essential areas.

70. Applications made over the internet offer more secure and reliable processing as many checks that are undertaken manually for paper applications are made automatically by the system in the electronic environment. This enables human resources to be focused on areas that require judgement.

71. A further enhancement to DIMIA's services, just recently introduced, is the capacity for some GSM applicants to lodge their applications via the internet using a specially designed interactive "form" which is sensitive to the applicant's particular characteristics and which gives relevant information to the applicant while he she is completing the application. At present this is confined to the onshore (former student) visa classes and to the State sponsored GSM visa class offshore (ie the Skilled Independent Regional visa). As DIMIA continues to build systems capacity and capability, this process will incrementally be made available to all GSM applicants.

The Migration Program

72. The migration program consists of people who are applying to come to Australia on a permanent basis. It is formulated annually and is announced after consideration by Government (usually around April). The lead up process includes consultation with:

- other Commonwealth agencies;
- State and Territory governments; and
- a range of interest groups, including business and industry.

73. Formulation of the program includes consideration of:

- the budgetary impact of the program;
- economic and labour market conditions;
- prevailing levels of demand for skilled migration;
- the medium to long term demographic challenges facing Australia;
- the distribution of the migration program – where people settle; and
- the social dimension – particularly relevant to the Family Stream of the program.

74. The migration program is primarily divided into:
- the **skill stream** which selects people on the basis of their capacity to contribute to the Australian workforce or business environment; and
- the **family stream** where the criteria are relationship based (rather than skill based). The largest component of the Family stream consists of the spouses and fiancés of Australian citizens and permanent residents. Spouse visas are demand driven.

Management of the migration program

75. Migration program outcomes are closely monitored over the course of the program year. Monthly progress reports go to the Minister's Office and DIMIA. There are a number of tools used in managing migration program outcomes including:
- the capacity to cap some visa classes where demand exceeds the number of places available – for example the non-contributory Parent visa classes; and
- the capacity to make policy adjustments to influence demand positively or negatively in particular visa categories.

76. An important tool for managing demand in the skills stream is the points test pass mark, which can be varied in line with needs. There are, however, time lags in terms of when pass mark changes flow through and take practical effect.

77. Another important tool for managing the large points tested categories is the Migration Occupations in Demand List (MODL) formulated on the basis of advice from DEWR about labour market dynamics. Applicants with occupations listed on the MODL are given a significant relative advantage (in the form of extra points) over applicants with non-MODL occupations. This influences the profile of the skill stream outcome in favour of those with skills most in demand.

78. A feature of the 2005-06 Migration Program is the Government's intention to maximise the volume of employer sponsored migration and thereby further increase the level of targeting within the migration program. A number of measures are in place to assist this including:
- closer engagement with peak business and industry bodies by means of out-posting 13 DIMIA officers to industry bodies;
- pro-active promotion by DIMIA of employer sponsorship options; and

- streamlining arrangements for persons on long-stay temporary skilled visas to convert this to permanent employer sponsored visas, and abolition of labour market testing for employer sponsored entry.

Temporary Entry Visas

79. Temporary entry visas are designed to serve Australia's broad national interests in a number of ways, through:

- facilitating growth in tourism (including working holidays);
- facilitating family visits;
- building the overseas student industry and supporting development;
- meeting labour market needs through temporary skilled employment (which often feeds through to permanent visas); and
- meeting demand for entry to Australia in a number of specialised areas – eg. religious workers, academics, sportspeople, media etc.

80. Temporary entry programs are (by their nature) demand driven – they are not managed in terms of a set program size and composition in the same way as permanent migration. There is ongoing consultation with stakeholders to ensure that DIMIA delivers appropriate services, and policy and legislation in this area is under constant review to achieve the right balance. Many temporary entry visa classes have been incorporated in the global working approach – including:

- the Electronic Travel Authority for visitors from selected countries;
- e.lodgement and centralised processing of visitor visas for non-ETA applicants from selected countries (this is progressively being expanded);
- e.lodgement and centralised processing of some student applications (this is also progressively being expanded);
- e.lodgement and centralised processing of Working Holiday Maker visa applications; and
- e.lodgement and processing at Business Centres in DIMIA's Australian office for temporary business visa applications.

81. An online health processing system has been developed for use with applications lodged over the internet and this is currently available in Singapore, Japan, Hong Kong, Taiwan, South Korea, UK and Germany. Further expansion is planned for the coming months. The system is fast and convenient for clients and offers greater security, as it dispenses with the need for hard copies, which can be vulnerable to alteration.

Assessment and Decision making processes for visa applications

82. A generic processing workflow for visa applications is as follows:

- valid application received – complies with s 46 of the Migration Act and meets Schedule 1 criteria such as the prescribed form, fee and place of lodgement;
- application is registered on the relevant IT system and acknowledged;
- application is assessed against the various criteria applying to the particular visa subclass (or subclasses), including health and character criteria as and where relevant. Where elements of an application

require verification or further information is required, it may be requested or obtained in a number of ways including by mail, email, telephone or personal interview (some applications also require referral to a third party); and

- on the basis of the assessment, a delegated officer will decide whether the criteria for the visa are met.
  - if any criterion for the relevant subclass (or subclasses) is not met, the application would be refused, the applicant would be given (or sent) a decision record and, where relevant, the applicant would be advised of any review rights; or
  - if all criteria are met, a visa would be granted to the applicant and any secondary applicants, the applicants would be notified of the approval and (depending on the visa class) the grant would be subsequently evidenced.

83. In making a decision on a visa application, a delegate of the Minister has regard to:

- the Migration Act;
- the Migration Regulations;
- s 499 directions;
- gazette notices (where applicable) which are used to define elements within specific regulations; and
- policy documents including the Procedures Advice Manual (PAM) and Migration Series Instructions (MSIs).

84. The Act and Regulations have the force of law and are binding. Policy is not binding but provides guidance for decision makers as to how the regulations should be interpreted and their underlying intent.

85. As discussed below, where a person has an Australian connection and has had their application refused, they may seek merits review by the Migration Review Tribunal (MRT). Generally, an Australian connection will be either that the person was physically present in Australia at the time of making their application, or that they have an Australian permanent resident of citizen sponsor.

86. MRT proceedings are conducted in public and the non-adversarial procedures are similar to those of the Refugee Review Tribunal (RRT) (see paragraphs 107-115 below).

87. Unsuccessful MRT applicants can seek Ministerial Intervention under section 351. The processes and procedures for seeking intervention are the same as those under s 417 (see paragraphs 116-118 below).

2.1.2 Processing Protection Visa Applications

Overview

88. Australia's protection visa regime has been structured to be non-adversarial, thorough and objective. Australia's procedures for the determination of refugee status either meet or exceed the minimum standards

in examining the claims of asylum seekers as set out in the UNHCR Executive Committee Conclusions.

89. Applications for protection visas may only be made by people physically present in Australia. People seeking asylum in Australia may be granted one of two types of refugee visas:

- If they arrive lawfully in Australia, and are found to require protection, they may be granted a permanent protection visa (PPV) which enables them to live permanently in Australia.
- If they arrive in Australia unlawfully and are found to require protection, they may only be granted a temporary protection visa (TPV), which provides temporary residence for three years in the first instance.

  This restriction to a temporary protection visa applies to protection visa applications lodged by unauthorised arrivals on or after 20 October 1999. From 1 November 2000, the Migration Regulations were amended to provide that people who have been immigration cleared on fraudulent documents, also only have access to the TPV in the first instance.

90. As a result of legislative changes in September 2001, TPV holders who fled directly to Australia continue to have access to a PPV if found to be owed protection. However, those TPV holders who have resided for 7 days or more in a country where effective protection was available to the applicant may only be granted a further TPV if they lodged their further protection visa application after 27 September 2001, depending on their individual circumstances. There is a power for the Minister to waive this requirement in the public interest. The assessment is made by the decision maker as to whether effective protection had been available to the individual, and if so, whether to waive the provision preventing access to a permanent protection visa.

91. On 13 July 2004, the Government announced new measures for TPV holders. The three main elements of the measures include:

- changes to enable TPV or temporary humanitarian visa (THV) holders to apply for a range of permanent and temporary non-humanitarian onshore visas;
- access to a reintegration package for all current and former TPV and THV holders who are prepared to voluntarily return to their country; and
- introduction of a new 'return pending visa' to provide 18 months stay for former TPV and THV holders whose further protection visa applications are unsuccessful, to enable them to make orderly arrangements for departure.

92. The determination process comprises, in the first instance, the examination and determination of protection visa applications by delegates of the Minister who are officers of the Department of Immigration and Multicultural and Indigenous Affairs.

93. An independent merits review of a decision to refuse or to cancel a PV application is available on application to the Refugee Review Tribunal. An application for a review of a decision to refuse, or to cancel, a PV relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention, must be made to the Administrative Appeals Tribunal (AAT).

94. Asylum seekers in the community have access to Australia's public health system, and to work rights if they need them, while their application is being considered, provided that they have been in Australia for less than 45 days in the 12 months before the date of their protection visa application. If it takes more than 6 months to decide their case, or earlier if a range of exemption criteria are met, they may apply for publicly funded assistance to meet their health, accommodation and food needs.

95. Current protection visa processing times are short by world standards. In 2004-05, some 80 per cent of initial applications for protection from applicants in the community were finalised by DIMIA within 90 days of application. For 2004-05, some 81 per cent of initial protection visa applicants from persons in detention were finalised by DIMIA within 42 days of lodgement.

96. The determination process and the broader regime have been the subject of extensive external scrutiny, including by Parliament, which has reviewed the process on a number of occasions. The Australian National Audit Office (ANAO) completed a performance audit, titled "Management of the Processing of Asylum Seekers" on 23 June 2004. The ANAO concluded that the onshore processing of asylum seekers is managed well and uses experienced officers supported by appropriate training and guidelines.

Procedures for Processing Community-Based Protection Visa Applications

Generally

97. Applications are lodged on the form 866 (Application for a Protection Class XA Visa). A $30 fee is payable for a single applicant or a whole family application.

98. All applications for a protection visa are assessed on a case by case basis under determination procedures designed to ensure that decision making is consistent and undertaken in a fair manner.

99. A trained case officer is assigned to each case and is responsible for assessing and determining the applicant's claims against the UN Convention and Protocol Relating to the Status of Refugees (the "Refugee Convention") and Australia's domestic legislation.

100. The case officer may seek further information from the applicant at interview where interpreters, chosen with regard to cultural and gender sensitivities, are provided wherever required.

101. Procedural fairness is incorporated in the decision-making process. Under the codes of procedure contained in the Migration Act 1958, case officers are required to provide applicants with an opportunity to comment on adverse information which is specific to them and may result in the refusal of the application. Processing arrangements are set out in a comprehensive protection visa processing manual which is available to the public.

102. If an applicant is found not to engage Australia's protection obligations, they are provided with the case officer's detailed written decision record, outlining findings of fact and the reasons for the decision, and advised of their right to have the decision reviewed by the Refugee Review Tribunal (RRT). The advice also informs the client of the existence of the $1400 post RRT decision fee. This is a fee that is imposed on unsuccessful applicants that appear before the RRT.

103. When an applicant is found to meet the tests for refugee protection at Article 1A of the Refugees Convention, health and character checks are undertaken. The Refugees Convention contains provisions excluding some people from refugee protection on character grounds. The character check informs judgements on whether the applicant satisfies other provisions in the Refugees Convention that determine whether Australia owes protection obligations to the applicant. Provided that the character checks are clear and the applicant is not considered a danger to the security of Australia, a protection visa is granted.

104. A permanent protection visa gives a refugee:

- permanent residence;
- access to Australia's public health services including Medicare benefits, Pharmaceutical Benefits Scheme (PBS), and public hospital benefits;
- permission to work;
- access to a range of employment benefits (including disability support pension, Newstart allowance, Fully Job Network Eligible, and other similar benefits);
- access to a wide range of welfare benefits (including Austudy, Carer Allowance/Payment, Child Care Benefit, Family Tax Benefit, Health Care Card, Maternity Payment, Mobility Allowance, Sickness Allowance, Youth Allowance, Special Benefit, and other similar benefits);
- access to a range of settlement services (such as Adult Migrant English Programme, Community Settlement Services Scheme, Integrated Humanitarian Settlement Strategy, Programme of Assistance for Survivors of Torture and Trauma, and other similar services);
- access to a range of education services (including ESL New Arrivals Programme, Language, Literacy and Numeracy Programme, New Apprenticeships, Vocational Education & Training (VET) Priority Places Programme, and other similar schemes);
- permission to travel to and enter Australia for five years after grant; and
- eligibility to apply for citizenship after two years permanent residence.

105. A temporary protection visa gives a refugee:

- three year temporary residence in the first instance;
- access to Australia's public health services including Medicare benefits, Pharmaceutical Benefits Scheme (PBS), and public hospital benefits;
- permission to work (including Job Matching assistance through Centrelink)
- access to a limited range of welfare benefits (including Child Care Benefit, Special Benefit, Maternity and Family Allowances and Family Tax Payment); and
- access to a limited range of settlement services (such as Integrated Humanitarian Settlement Strategy and Programme of Assistance for Survivors of Torture and Trauma).

106. TPV holders are able to apply for a further protection visa at any time. However, a permanent further protection visa may be granted only after 30 months if they still need protection at that time. Whether that visa is a temporary or permanent visa will also depend on a number of factors, including the person's actions as they travelled to Australia.

107. The TPV provides no rights for people to bring their families into Australia and does not provide an automatic right of return to Australia if the TPV holder departs Australia.

The Refugee Review Tribunal

108. Applicants rejected at the primary stage may seek review of the primary decision by an independent statutory review body, the Refugee Review Tribunal (RRT). The RRT is an independent, specialist, non-adversarial merits review tribunal that removes the need for applicants to access a costly, time-consuming, adversarial judicial review process in order to have their primary decision reviewed.

109. The RRT has developed substantial expertise in the determination of claims for protection under Australia's international obligations. The RRT undertakes a full merits review and is able to affirm (or uphold) the primary decision, remit a decision with directions, set aside the primary decision and substitute in its place a decision that Australia owes the applicant protection obligations, or vary the decision.

110. In making assessments on issues of protection obligations, the Tribunal is restricted to consideration of whether the 'inclusion' criteria for refugee protection as set out at Article 1A are met. The Tribunal has no jurisdiction to consider whether the individual is excluded from Convention coverage and hence is not owed protection on character related grounds set out in the Refugees Convention.

111. Where the Tribunal is not able to make a decision in favour of the applicant "on the papers", it must offer the applicant an oral hearing, along with the opportunity for the applicant to notify the Tribunal of any person(s)

from whom they wish the Tribunal to obtain oral evidence. Oral hearings are non-adversarial. Rather they are informal and are not bound by technicalities or rules of evidence to enable the applicant to present their claims and provide responses to Tribunal questions without formality. Hearings are held in private to protect the applicant's privacy and safety. Appropriate interpreters are provided to assist applicants where required. Applicants may be accompanied at the Tribunal; however only the applicant has the right to address the Tribunal.

112. In making its decision, the Tribunal is not bound by the information or evidence available to the primary decision-maker, but is able to take account of new claims, information, evidence and arguments, whether presented at an oral hearing, in written submissions or obtained independently by the Tribunal.

113. The Tribunal is also bound by the requirements of procedural fairness and must provide the applicant with an opportunity to comment on any adverse third party information that is of material importance and specific to their case.

114. Applicants are provided with a written notice of the Tribunal's decision within 14 days of the decision being made. The notice sets out the decision, reasons for the decision, findings on any material questions of fact, and evidence or any other material on which the findings of fact were based. The applicant is also offered the opportunity to obtain a copy of the tape of any oral hearing.

115. Since mid-1999, applicants are required to be invited to a formal handing down of Tribunal decisions on all cases except where an *ex tempore* decision is made at the time the applicant is heard by the Tribunal.

Minister's power to intervene to grant a visa

116. Under s 417 of the Act, the Minister has a non-compellable and non-delegable power to substitute for an RRT decision another decision more favourable to the applicant where she believes it is in the public interest to do so.

117. Each case where the RRT affirms a refusal decision is assessed by DIMIA officers against the Minister's guidelines to identify unique or exceptional cases that she may wish to consider.

118. This intervention power provides the Minister with the ability to intervene and grant a visa in cases that *inter alia* raise Australia's international obligations under the Convention Against Torture, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

Judicial review

119. An applicant may appeal an RRT decision to the Federal Magistrates Court or the Federal Court if there has been an error of law. Applicants may also pursue avenues of judicial review to the High Court either having

exhausted Federal Court avenues, or direct to the High Court in its original jurisdiction.

Bridging visas

120. An applicant for a protection visa, unless they have arrived in Australia unlawfully, is usually granted a bridging visa that will provide them with lawful status and permission to remain in Australia during the processing of their application for a protection visa.

121. The bridging visa ceases 28 days after notification of a decision that a person is not a refugee. If a review application is made to the RRT during that 28-day period, the bridging visa remains active and provides lawful status for the duration of the processing of the RRT application. It ceases 28 days after notification of a decision by the RRT that a person is not a refugee.

Offshore processing arrangements in declared countries

Generally

122. Australia's processes for refugee status determination for persons who arrive without authority in excised offshore places or for persons taken to the Offshore Processing Centres are modelled on those of the UNHCR. These processes enable Australia to conduct refugee assessments, and reviews of such assessments, offshore and to advise the Minister accordingly.

123. In September 2001, legislative changes allowed for certain parts of Australian territory to be excised from the migration zone. This means that a person landing in an excised territory is not entitled to make an application for a visa, unless the Minister considers this to be in the public interest. The legislation also allows for people who arrive at an excised offshore place to be taken to a declared country.

124. A declaration of a country for this purpose can be made only by the Minister, where fundamental safeguards to adhere to Refugee Convention obligations are in place. The Minister must be satisfied that a declared country provides people seeking asylum with access to effective procedures for assessing their claims. Asylum seekers must be provided with appropriate care and protection pending the determination of their refugee claims and while they await either resettlement or return.

125. Offshore processing facilities were established in two declared countries - Nauru and Papua New Guinea. These facilities were set up with the cooperation of the Governments of Nauru and Papua New Guinea. Asylum seekers are not detained under Australian law, or the laws of Nauru or Papua New Guinea, but are instead granted special purpose visas by those countries to facilitate their stay while they await processing and resettlement or return.

126. The assessment of any protection claims by asylum seekers in the Offshore processing facilities has been undertaken by both representatives of the United Nations High Commission for Refugees (UNHCR) and officers

from the Department of Immigration and Multicultural and Indigenous Affairs, and is in accordance Australia's obligations under the 1951 United Nations Convention Relating to the Status of Refugees (UN Refugee Convention) and its 1967 Protocol.

127. The refugee status assessments conducted in the Offshore Processing Centres by Australia have also been used to gather other information of potential relevance for possible future Government decision making. For example, information on geographical location of family members of asylum seekers is gathered to inform any future judgements about the countries to which persons found to be refugees may be resettled. Preliminary information is also gathered to identify any cases where there may be issues of concern under the Convention Against Torture or the International Covenant on Civil and Political Rights should the person ultimately be unsuccessful in their refugee claims and the question of their voluntary return home from the safety of the Offshore Processing Centre becomes an immediate prospect.

2.1.3 Processing Offshore Humanitarian Visa Applications

Overview

128. Australia's offshore humanitarian visas offer resettlement to refugees and others overseas who are in need of humanitarian resettlement and for whom other durable solutions cannot be found. Australia works closely with UNHCR to identify refugees most in need of resettlement.

Procedures for processing offshore humanitarian visa applications (applications for Class XB Schedule 2 Migration Regulations)

Generally

129. For an application to be valid it must be made in accordance with Schedule 1 *Migration Regulations* requirements. There are no application fees for a Class XB visa.

130. There are five permanent subclasses of visas. Of these, four categories fall within the Refugee category and one within the Special Humanitarian Program category.

131. The visa subclasses within the Refugee category are:

- Refugee (subclass 200), for applicants who have fled persecution in their home country and are living outside their home country;
- In-country Special Humanitarian Program (subclass 201), for applicants living in their home country and subject to persecution;
- Emergency Rescue (subclass 203), for applicants who are living in or outside their home country and who are in urgent need of protection because there is an immediate threat to their life and security; and
- Woman at Risk (subclass 204), for female applicants who are subject to persecution or are of concern to UNHCR, are living outside their home country without the protection of a male relative and are in danger of victimisation, harassment or serious abuse because of their gender.

132. The Special Humanitarian Program is for people who are subject to substantial discrimination amounting to gross violation of their human rights in their home country, are living outside their home country, and have links with Australia.

133. There are two temporary offshore humanitarian visas known as Secondary Movement Visas (subclass 447 and 451). They are for people who are subject to persecution or substantial discrimination in their home country and who have moved beyond a country where they had access to effective protection to a third country. This category was introduced in September 2001.

134. There are two visa subclasses in the Secondary Movement category:
- Offshore entry (subclass 447), for people who entered Australia unlawfully at certain offshore places (see s.5 *Migration Act* for definitions of *excised offshore places* and *offshore entry person*). Holders may remain in Australia for up to three years in the first instance and apply for a further protection visa.
- Relocation (subclass 451), for secondary movers who are outside Australia. Holders of this visa may remain in Australia for up to five years in the first instance and apply for a permanent protection visa. (See Offshore Processing Arrangements for Declared Countries for further details).

135. Applications may be made on Form 842 (Applications for an offshore humanitarian visa) at overseas diplomatic missions with the exception of Special Humanitarian Program applications accompanied by a proposal form 681 (Refugee and special humanitarian proposal) for persons in Africa or the Middle East. These applications must be lodged at the relevant processing centre in Australia. Assessment of applications is undertaken by delegated officers of the Minister for Immigration and Multicultural and Indigenous Affairs.

136. A permanent offshore humanitarian visa gives:
- Permanent residence
- Access to Australia's public health services through Medicare
- Permission to work
- Access to welfare benefits
- Access to the Integrated Humanitarian Settlement Strategy
- Permission to travel and enter Australia for five years after grant; and
- Eligibility to apply for citizenship after two years permanent residence.

137. A temporary offshore humanitarian visa gives:
- Three or five years temporary residence in the first instance
- Access to Australia's public health services through Medicare
- Permission to work (including Job Matching assistance through Centrelink)

- Access to a limited range of welfare benefits (including Special Benefit, Rent Assistance; Maternity and Family Allowances and Family Tax Payment); and
- Eligibility for referral to the early health assessment and intervention program and torture and trauma counselling.

Public interest criteria (Schedule 4, Migration Regulations)

138. All visa applicants must satisfy public interest criteria (PIC) intended to protect the interests of the Australian community. These criteria relate to health (PIC 4007); character (PIC 4001) and national security requirements (PIC 4003).

Merits and Judicial review

139. Applications for an offshore humanitarian visa (class XB) do not attract merits review rights. New applications may be made and no application fee is applicable.

140. An applicant may appeal a decision to refuse an application for an offshore humanitarian visa (class XB) to the Federal Magistrates Court or the Federal Court or directly to the High Court in its original jurisdiction.

2.2 AN OVERVIEW OF THE ADMINISTRATION OF COMPLIANCE ACTION

2.2.1 Immigration Clearance: Visa Cancellation and Detention

Overview

141. As mentioned at paragraph 45, all persons entering Australia, including citizens, must pass through immigration clearance. The Act sets out the primary requirements relating to immigration clearance:

- s 166 – which outlines the evidence that must be given to a clearance officer upon entry to Australia;
- s172 – which outlines a person's immigration clearance status (that is whether he or she has been immigration cleared, is in immigration clearance, has been refused immigration clearance, or has bypassed immigration clearance); and
- s 175 – which outlines the evidence that must be given to a clearance officer upon departure from Australia.

142. Generally, a person who cannot comply with s166 (and who is not granted another visa) will have their visa cancelled and be refused immigration clearance. They then become subject to summary removal as an unlawful non-citizen.

143. Cancellation grounds at s 116(1)(g) and reg. 2.43(1)(i), (j) and (k) will most often be used in immigration clearance – for example, where the person presents fraudulent documents, gives incorrect information on a passenger card, or where an officer is satisfied that a person is not a genuine visitor.

Detention of Persons in Immigration Clearance

144. The power for 'Questioning detention' is provided by s 192. In the context of immigration clearance, questioning detention may occur when an officer reasonably suspects that a non-citizen would, if not detained, attempt to by-pass clearance or otherwise would not co-operate with the officer in relation to visa inquiries. The purpose of questioning detention is to enable an officer to question a non-citizen about their visa or about matters relevant to the visa. Questioning detention may only be used in cases where a visa is liable to be cancelled and that suspicion must be formed by an officer before s192 can be invoked. The detention must not be for longer than an aggregate of 4 hours.

145. Where practical, the person may be detained in the airport, until removal by the relevant airline. It should be noted that in such a case, the definition of 'immigration detention' in s.5(1)(a) of the Act applies, that is 'immigration detention' means:

> 'being in the company of, and restrained by:
> (i) an officer; or
> (ii) in relation to a particular detainee - another person directed by the Secretary to accompany and restrain the detainee..'

146. Where it is not practical to keep the non-citizen at the airport, for example in cases where the next available flight for the removal of the person is not for some days, the person is taken to the nearest immigration detention centre or other suitable place of detention.

147. In respect of the provisions of s 193, in certain limited circumstances, (for example, compelling compassionate reasons), or circumstances beyond the person's control, it may be open to DIMIA clearance officers to grant a border visa and immigration clear the person.

Seaports

148. Where an unlawful non-citizen is detected at a seaport (for example, a stowaway), Customs officers inform DIMIA officers as soon as possible. In many cases, it is not practical for clearance officers to authorise the removal of the unlawful non-citizen to an immigration detention centre pending removal from Australia. In this circumstance, officers may prevent the unlawful non-citizen from leaving the vessel on which he or she arrived, pursuant to s 249 and may take any action and use force as necessary for that purpose. The vessel, in these circumstances, is a place of immigration detention (see the definition of 'immigration detention' s.5(1)(b)(iv) of the Act).

2.2.2 Compliance Processes

Generally

149. The National Onshore Compliance Program, as part of the Border Control and Compliance Division of DIMIA, is responsible for contributing to the maintenance of the integrity of the immigration and citizenship programs and contributing to achieving Portfolio Outcome 1:

> *"Contribute to Australia's society and its economic advancement through the lawful and orderly entry and stay of people."*

Role of the Compliance Officer

150. Compliance officers are required to carry out a range of functions relating to the identification and location of unlawful non-citizens and people in breach of their visa conditions.

151. An important additional role is to encourage non-citizens to comply with the conditions of their visas and to regularise their status.

152. Under the Migration Act, Compliance officers have responsibility for:

- cancelling a person's visa;
- searching for unlawful non-citizens and visa holders breaching their work conditions;
- detaining unlawful non-citizens, non-citizens liable for visa cancellation, and non-citizens liable for deportation;
- removing unlawful non-citizens, their dependants and the dependants of deportees; and
- deporting non-citizens on criminal and security grounds.

Location of Unlawful Non-citizens

Information sources

153. Compliance officers receive information concerning unlawful non-citizens or lawful non-citizens in breach of visa conditions from a variety of sources, including:

- DIMIA case files referred following the refusal of applications, for example, for a further visa;
- DIMIA reports detailing people who have not departed Australia or been granted a further visa;
- anonymous sources of information by correspondence, telephone or personal representation about people believed to be unlawful non-citizens;
- State or Federal Police; or
- other government agencies eg Centrelink, Australian Taxation Office.

154. The information provided to DIMIA is carefully checked and substantiated to establish a high degree of probability of whether or not a person is an unlawful non-citizen, or a visa holder whose visa is liable for cancellation.

155. Verification may be undertaken by:

- checking DIMIA databases including Integrated Client Service Environment (ICSE), Movements and Total Records Information Management (TRIM) to determine if the person has travelled or lodged a visa application;
- locating client files or previous applications;
- contacting the overseas post for information that may have been lodged as part of the initial application;
- any other internal information systems to ascertain whether there is an outstanding application; and
- advice from other agencies.

156. In some cases, officers may not be able to establish the status of a person without contacting the person directly to make further inquiries. This may include a request by letter or telephone for the person to contact the department, or a field visit to locate and possibly detain the person concerned.

Field Visit

157. Subsection 251(6) gives warrant holders and those assisting them the power to enter and search, *with a warrant*, any building, premises, vessel, vehicle or place in which the officer has reasonable cause to believe there may be:

- an unlawful non-citizen, removee or deportee;

- a person whose temporary visa is subject to a work restriction or prohibition (this power should only be used where it is likely that the person has breached the visa condition);
- any document relating to the entry or proposed entry of a person in circumstances where the person would have become or would become an unlawful non-citizen (or, for a non-citizen who may have been in Australia for some time, a prohibited immigrant, a prohibited non-citizen or an illegal entrant); or
- passports, etc or tickets for travel from Australia to a place overseas of an unlawful non-citizen, removee or deportee.

158. Officers requesting warrants are required to put a submission to the Secretary's delegate setting out the details of the searches to be conducted. Warrant holders also report to the delegate on the use of the search warrant.

159. An application for a search warrant must detail, where relevant:
- names of unlawful non-citizens, removees, deportees, or holders of temporary visas subject to work rights to be searched for (if known);
- documents or valuables to be searched for;
- addresses to be searched to locate such people, documents or valuables;
- dates and times proposed for the execution of the warrant;
- names of the team leader, other DIMIA employees and non-DIMIA employees to be involved in the execution of the warrant;
- the name of the officer applying for the warrant (who has reasonable cause to believe certain persons, documents or valuables may be found); and
- if applicable, why the warrant is to be executed between 2100hrs and 0600hrs.

160. Before issuing a search warrant to an officer, the delegate is to be satisfied that the officer has gathered sufficient evidence to establish a reasonable cause to believe that a search of the premises may result in the location of the person or interest or relevant document.

161. Under s 251(6) and 223(16), warrant holders can seek any assistance they believe is necessary to enter and search premises. This assistance may be sought not only from other DIMIA employees, but also the Australian Federal Police, State and Territory police services.

162. To execute a search warrant, the warrant holder should:
- identify themselves and other officers to a person living or working on the property (depending on whether it is a residential or business property);
- explain the purpose of the visit, and
- show the person the warrant and provide them with a copy.

Establishing a person's status

163. Section 188 of the Act provides that an officer may request evidence of a person's lawful status where the officer knows or reasonably suspects that the person is a non-citizen. In order to question a person of interest about their status in Australia under section 188, officers must have a reasonable suspicion or evidence that the person is not an Australian citizen.

164. The Act does not provide authority to require evidence of Australian citizenship. In most situations, persons will not have documentary evidence of citizenship immediately available. However, data base checks may be used to quickly verify a person's Australian citizenship.

165. Where a person is unable to produce appropriate evidence immediately, officers are to take account of any verbal information provided by the person, and check the details against the departmental database.

166. A departmental employee may be satisfied about a person's claimed identity in circumstances where, for example:

- a person provides a departmental employee with his or her personal particulars (name, date of birth, place of birth, citizenship and address) and documentary evidence;
- the person displays an appropriately detailed level of knowledge regarding the claimed identity, such as is recorded on departmental records (ICSE, Movements Database, TRIM);
- at least one form of documentary evidence contains a recent photograph;
- the documentary evidence confirms his or her personal particulars and matches the person's physical appearance; and
- there is no reason to suspect that the documentary evidence is fraudulent, forged or tampered with.

Unlawful non-citizens

167. As mentioned at paragraph 47, the Act provides for mandatory detention of a person who an officer knows, or reasonably suspects, is an unlawful non-citizen (s189). Officers must ensure that knowledge or reasonable suspicion about a person's status as an unlawful non-citizen is based on objective evidence such as information held in Departmental records and credible information from third parties.

168. While officers are obliged to detain an unlawful non-citizen, they are, in the first instance, to consider whether or not a bridging visa should be granted to make the person a lawful non-citizen.

Questioning Detention

169. As already noted above, s192 of the Act allows officers to detain lawful non-citizens (ie. visa holders) who they have reasonable grounds to suspect would be liable to visa cancellation under sections 109 and 116 of the Act, and where the officer believes:

- the visa holder would attempt to evade compliance action; or

- the visa holder would not otherwise cooperate with their inquiries.

170. A non-citizen can only be detained for a maximum of four hours and must be released immediately if it becomes clear that there are no grounds for cancellation. The purpose of this detention power is to provide officers with the opportunity to question visa holders about possible visa cancellation.

171. Where a person's visa is cancelled, they must be detained under s189 until such time as they depart Australia or are granted a further visa.

Removal

172. The following sections of the Act provide for the removal of non-citizens:

- s 198 – which provides for the removal from Australia of unlawful non-citizens;
- s 199 – which provides for the removal of dependants of a removee (ie. spouse and/or dependant children); and
- s 205 – which provides for the removal of dependants of a deportee.

173. Removal is to occur 'as soon as reasonably practicable', and officers are required to complete a 'Removal Checklist' in each case indicating that requirements for removal have been satisfied.

Assistance from Other Agencies

174. DIMIA exchanges information with the Australian Taxation Office, Centrelink and other organisations in Australia for a variety of purposes, including:

- to verify lawful entitlement to work or study in Australia – includes checks with employers, labour suppliers and licensing authorities; and
- to locate people living unlawfully in Australia – for example, visa overstayer records are regularly matched against taxation records to obtain details of residential addresses and places of employment.

Overstayer Matching with the ATO

175. The full overstayer file, extracted from records going back to 1981, is matched against a number of ATO databases in accordance with a Memorandum of Understanding between the two agencies. The matched records are referred to the State & Territory compliance offices for reference and as a source of information as to the whereabouts of overstayers.

176. The Unlawful Non-Citizen Location Enquiry (UNCLE) system allows authorised compliance officers to search address information held at the Australian Tax Office to locate work and home addresses of non-citizens believed to be unlawfully in Australia.

177. DIMIA also produces a weekly extract of people who have become overstayers in the preceding seven days. This extract is checked by analysts,

and additional information added (for example address information from the ATO) and is then referred for action by compliance officers in DIMIA's State & Territory offices. This is so that people unlawfully in Australia are contacted as soon as possible after they become an overstayer.

Officers under the Act

178. Officers of a number of agencies are authorised to exercise the powers of "officers" under the Act. Section 5(1) of the Act identifies some of these agencies and provides for officers from additional agencies to be authorised in writing by the Minister as "officers" under the Act.

179. Assistance provided by other agencies may include:

- locating and detaining unlawful non-citizens;
- holding non-citizens in immigration detention;
- escorting non-citizens in detention; and
- assisting officers to search premises (using a DIMIA search warrant).

180. Under sections 251(6) and 223(16), warrant holders can seek any assistance they believe is necessary to enter and search premises.

181. Persons who assist a warrant holder must act under the warrant holder's direction. They can enter and search premises and identify relevant documents or valuables, but only the warrant holder can seize documents or valuables.

182. If employees from another agency want to enter and search premises with DIMIA employees, but for their own purposes, they will need to enter and search under separate lawful authority.

Police Assistance

183. The decision to seek police assistance from either the AFP or the State/Territory police may be sought in the following circumstances:

- where there is the possibility of violence;
- where there are indications of other criminal activity; or
- where a police agency has advised of an interest in the case.

2.2.3 Cancellation

Generally

184. As explained at paragraphs 25 and 26, there is no general power in the Act to cancel visas. Instead, the Act contains separate cancellation powers, which are "situation specific" in nature.

185. Attachment A outlines the steps involved in cancelling a visa under sections 109, 116, 128, 134, 137J, 137Q, 140 and 501 of the Act. The steps involve differ according to the particular cancellation power. However, the general procedure for the majority of cancellation powers can be loosely summarised as follows:

(1) Identify the grounds for cancellation;
(2) Notify the visa holder of intention to consider cancellation or establish that it is appropriate to cancel without notice;
(3) Await visa holder's response;
(4) Assess response of visa holder and weigh any evidence provided against existing evidence;
(5) Make a decision to cancel the visa – this will include recording the cancellation on DIMIA's electronic systems and raising a Migration Alert entry where required.
(6) Issue notice of cancellation including all required information

186. As is set out at Attachment A, the procedure for cancelling a visa under section 501 of the Act differs from the general procedure outlined above. With section 501 cancellations, emphasis is placed on investigating (both internal and external sources) whether any evidence suggests that the visa holder does not pass the character test.

Consequences of Visa Cancellation

187. Where a visa is cancelled under sections 109, 116, 128, 137J or 140 the non-citizen whose visa was cancelled is subject to a three year exclusion period which prevents the non-citizen from making a valid application.

188. However, migration legislation provides for the exclusion period to be waived in certain circumstances. These include compelling circumstances that affect the interests of Australia; or compelling and compassionate circumstances affecting an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, that justifies the grant of a visa to return to Australia within the three year period.

189. Where a visa is cancelled or refused under section 501 or related provisions, there are 3 major consequences:

- a prohibition on applying for other visas (section 501E);
- refusal of other visa applications and cancellation of other visas (section 501F); and
- periods of exclusion and special entry criteria may apply (section 503, clause 5001 and 5002).

2.3 AN OVERVIEW OF THE ADMINISTRATION OF REMOVAL AND DEPORTATION

2.3.1 Removal

Background

190. Section 198 of the *Migration Act 1958* (the Act) requires that unlawful non-citizens be removed from Australia "as soon as reasonably practicable".

191. Section 5 of the Act states that "removee" means an unlawful non-citizen removed or to be removed under Division 8 of Part 2 (ss198-199) of the Act.

192. An unlawful non-citizen may be a non-citizen who is unlawfully in Australia having:

- entered Australia without being immigration cleared (eg. without a visa);
- entered lawfully on a visa which has subsequently ceased by passage of time; or
- had their visa cancelled since entering Australia.

When can a removal occur?

193. The most frequently occurring situations which lead to removal are when an unlawful non-citizen:

- asks the Minister in writing to be removed (s198(1)); or
- is a detainee who was entitled to apply for a visa within two working days, or requested in writing an extension of time to apply (five additional working days), and did not apply (s198(5)); or
- is a detainee whose application for a visa has been refused and "finally determined" (s198(6)). "Finally determined" is defined in s 5(9) of the Act as being an application that:
  - is not, or is no longer subject to any form of review under Part 5 or 7 of the Act (ie. by the MRT or RRT); or
  - where the period within which such a review could be instituted has ended without a review having been instituted as prescribed.

194. As a matter of general practice, DIMIA does not remove a person whose application has been "finally determined" if they have ongoing court action in relation to the department's or MRT/RRT's decision.

195. Some flexibility exists as to what time period satisfies the direction to remove "as soon as reasonably practicable". While "practicable" denotes what can be done, it is qualified by what is reasonable for the department in all the circumstances.

2.3.2 Deportation

Background

196. Section 200 of the Act empowers the Minister to order the deportation of a non-citizen from Australia.

197. Section 5 of the Act defines "deportee" as a person in respect of whom a deportation order is in force.

198. Deportation applies only to situations where character or security issues have been determined to warrant expulsion from Australia, despite the person holding a permanent visa.

199. Section 206 of the Act states that:

- (1) Where the Minister has made an order for the deportation of a person, that person shall, unless the Minister revokes the order, be deported accordingly.
- (2) The validity of an order for the deportation of a person shall not be affected by any delay in the execution of that order.

200. Under s82(4) of the Act, when a lawful non-citizen is deported from Australia, any visas that person holds will cease upon their departure from Australia.

2.3.3 General Procedures

Determining Availability for Removal

201. Under s198 of the Act, if an unlawful non-citizen is considered available for removal, officers must actively seek to effect his/her removal as soon as reasonably practicable.

202. Availability for removal is checked:

- **At outset:** when the unlawful non-citizen comes to the department's attention/is detained.
- **Routinely:** for cases where the detainee has been initially assessed as 'unavailable' for removal.
- **Before departure:** to ensure that the person is still available for removal.

203. In some circumstances, progress may be made towards removal (such as acquiring a travel document) when the detainee is considered unavailable for removal from Australia. This ensures that removal can take place promptly when the detainee becomes available for removal. This should not occur where the person has an application before the RRT or the Courts in regards to protection claims.

Travel Documents

204. The need to obtain travel documents can arise from:

- persons arriving with no travel document at all;
- persons arriving on travel documents that are found to be bogus;
- travel documents expiring after arrival;
- loss of citizenship of the country of origin by renunciation or by changes in citizenship laws;

- stateless persons never having had formal citizenship of any country, or those with outdated return rights;
- claimed statelessness; or
- loss of permanent residence in the usual country of residence.

205. If a travel document is required the detainee will be asked to assist in applying for one. If the detainee does not cooperate, departmental officers may liaise with the relevant diplomatic mission. In doing so:

- care must be taken to provide foreign authorities with information that is directly relevant to obtaining a travel document. If a person has unsuccessfully sought a protection visa, this must not be disclosed to the foreign authority; and
- identifying information about a person must not be provided to a foreign government if that person has an active Protection Visa application under consideration, including in the courts, and the person's protection claims relate to that foreign government/country.

Resident or citizen spouses/dependants

206. The department has discretion, under sections 199 and 205 of the Act, to assist resident or citizen spouses and/or children to accompany a person who is being removed or deported from Australia. This involves the department paying for the air travel of the accompanying family members.

Involvement of other agencies/organisations

207. Department of Foreign Affairs and Trade (DFAT):

- DFAT Canberra assistance is sought in approaching certain governments for a travel document, in line with DFAT guidelines. On occasion DIMIA will task overseas posts to progress issuance of a travel document with the home government. DFAT may also raise returns issues at bilateral and multilateral fora.

208. Detention Services Provider (DSP):

- assist with security assessment for air travel
- provide removal escorts/security
- organise packing and weighing of detainees' baggage/property

209. Security Escort Agencies:

- provide domestic and/or international escort services

210. Department of Transport and Regional Services (DOTARS):

- on occasion will be required to approve proposed air travel/escort arrangements (under the *Aviation Transport Security Regulations*)

211. Airlines:

- consider proposed travel/escort arrangements
- provide uplift approval (under the *Aviation Transport Security Regulations*)

212. International Organization for Migration:

- The department has contracted the International Organization for Migration (IOM) to assist with the administration of certain reintegration packages. Reintegration packages support the voluntary return of some persons who are found not to be owed protection.

Returns Destination

213. The removal provisions of the Migration Act and Regulations do not specify the destination for removals. However, a detainee can only be removed to a place where they have legal right of entry.

214. Detainees are usually returned to their country of nationality. A person may be returned to a country that is not their country of nationality (ie. a third country) if they have the right of entry to and long term stay in the third country

Notice of Removal

215. There is no legislative requirement that detainees be notified of their removal arrangements. However, once arrangements are in place, the detainee is generally advised in advance of their removal by way of a removals notice. This notice also outlines the exclusion periods which may apply (ie. time restrictions on their re-entry to Australia).

216. A notice outlining debts to the Commonwealth may also be provided at this time.

217. The timing of delivery of these notices will depend upon the particular circumstances of the removal. Generally, for low risk compliant removals, the detainee can be advised 48 hours prior, or whenever the arrangements are in place.

218. If a removals officer believes that the early notification of a removal to a detainee may pose a significant risk to the effective removal of the person, and/or to the detainee's or other person's safety, notification can be deferred until just prior to the commencement of the actual removal process.

Fitness to Travel

219. Before a person is removed from Australia their fitness to travel is assessed by the Detention Services Provider (usually a GP).

Escorted/Unescorted Removal

220. Most unlawful non-citizens are removed from Australia without an escort. However, a person may require an escort if he/she:

- presents a security risk to the flight; or
- requires assistance for transit arrangements enroute; or
- requires a medical escort; or
- the destination country requires that the person be escorted.

3. IMMIGRATION DETENTION FACILITIES AND SERVICES

3.1 AN OVERVIEW OF THE ADMINISTRATION OF IMMIGRATION DETENTION CENTRES

3.1.1 Duty of Care

221. The Australian Government, represented by DIMIA, retains overall responsibility for duty of care of detainees.

3.1.2 Scope of Contract

222. The Commonwealth's contract with a detention services provider provides for the management of immigration detention facilities around Australia and a range of services for detainees, including for care, welfare and security. The detention services provider has engaged specialist subcontractors to provide both general health and psychological services in the detention environment.

223. The contract requires that these services are delivered to specifications and standards. In particular, the contract requires that detainees have access, either in a facility or externally, to a level and standard and timeliness of health services broadly consistent with those available in the Australian community, but taking into account the special needs of detainees. Mental health services delivered under the contract are informed by the National Standards for Mental Health Services.

3.1.3 Special Needs of Immigration Detainees

224. The detainee population comprises a diversity of male and female individuals from different family, social, cultural, religious and political backgrounds. Any number of factors may influence the manifestation and nature of a detainee's particular health condition, including the situation they leave behind and the journey they embarked upon to reach Australia.

225. While DIMIA has a duty of care to all detainees, it has identified the following groups as having special health care needs while in immigration detention:

- accompanied and unaccompanied minors;
- accompanied and unaccompanied women;
- pregnant women;
- elderly detainees;
- detainees with serious health problems;
- detainees at risk of self harm;
- survivors of torture and trauma;
- long-term detainees;
- detainees with a mental illness; and
- detainees with a physical or intellectual disability.

226. DIMIA has progressively evolved its case management processes for detainees over time. Establishment of a Detention Case Coordination Section in DIMIA Central Office and a case management program at Baxter Immigration Detention Facility (both introduced in the second half of 2003) focussed on improving the capacity of DIMIA to respond to the individual needs of detainees.

227. The Minister for Immigration and Multicultural and Indigenous Affairs announced on 25 May 2005 the establishment of new detention review managers in each State/Territory Office to provide additional quality assurance processes that decisions to detain people are soundly based and regularly reviewed.

228. In addition to existing detention case management processes of the Detention Service Provider and the Department, these new positions will also keep detention arrangements for individuals under constant review at a State Office level.

229. Alternative detention arrangements in the community are also pursued by DIMIA with Non-Government Organisations (NGOs) for detainees with special needs. There is also ongoing dialogue with NGOs on release from detention of special needs detainees who are in protection visa processing, or appeals processes, and cannot be cared for in detention, with specific care plans a required feature of this visa class.

3.1.4 Health Care for Immigration Detainees

Generally

230. The provision of health care to immigration detainees is undertaken at each facility through a combination of on-site health care professionals and access or referral to external health facilities and specialists. Approved operational procedures underpin the delivery of health services. Nevertheless, there is an ongoing and regular dialogue between DIMIA and the Detention Services Provider to seek ways to improve services, including mental health care services within facilities as well as access to outside care.

Initial Procedures

231. On entering an immigration detention facility, detainees are screened by a trained nurse for evidence of physical and mental conditions. Where a mental health issue is identified by the nurse during the induction assessment, the individual is referred to a psychologist for further investigation and, as required, ongoing intervention. Detainee care plans which reflect the special needs of detainees are developed.

Programs

232. When in immigration detention, detainees have access to age-, gender- and culturally appropriate sporting, leisure and recreational activities, and are encouraged to make use of these. These activities change over time to reflect the changing needs, number and profile of the detainee population within immigration detention facilities.

3.1.5 Mental Health Issues

Generally

233. While in immigration detention, some detainees experience mental health concerns. Many detainees have been unsuccessful in their claims to remain in Australia despite several court appeals and in this context, some may experience episodes of anxiety or depression.

Training

234. Mental health issues are not always immediately apparent at induction and the detention services provider trains staff working with detainees to be alert to the signs that a detainee may require further intervention. Those working with detainees receive training in a number of relevant areas, including: communication issues, cultural awareness, health services and care, suicide and self-harm prevention, torture and trauma sufferers, and management of special needs.

Management

235. In the detention environment, mental health issues are managed in a multidisciplinary way. Detainees in each of the facilities have access to the on-site or on-call services of qualified medical practitioners, psychologists and counsellors who provide a range of treatment options. Psychiatrists either visit facilities or detainees are referred for external specialist treatment as needed. Other specialist health services are also accessed for broader health needs.

Medication

236. As part of an immigration detainee's treatment, the general practitioner or psychiatrist may sometimes prescribe medications. In these circumstances, the vast majority of prescriptions at any point in time are for medication, such as antidepressants to relieve anxiety or reactive depression, while a very small number are for psychotropic medication.

237. Detainees with mental health issues are also encouraged to participate in education and recreation programs, which can be helpful in supporting people with anxiety and depression.

Referral

238. In some instances, health care professionals indicate that treatment may not be able to be provided within immigration detention facilities and detainees will require referral to specialists or to use hospital outpatient services. Medical practices are followed to arrange admission to hospitals or residence in facilities other than detention facilities, with the legal provisions of the Migration Act covered through arrangements made with the relevant facility and the detention service provider.

239. Federal and State government agencies have and continue to work cooperatively on access to health services outside the detention facilities. Formally agreed mental health care pathways are in place in South Australia for access to State Government mental health care services.

Oversight and Enhancement of Health Care Services

Internal oversight

240. DIMIA officers, drawing on the advice of accredited medical specialists, monitors service delivery against contract requirements and operational procedures on an ongoing basis. DIMIA uses this and other information to make formal quarterly assessments of the detention services provider's compliance with the immigration detention standards and sanctions can be applied where agreed service standards are not met.

241. As required by its contract with DIMIA, the Detention Services Provider has health plans for each facility, its own internal audit processes, and has been progressing the establishment of a health advisory panel. In addition, DIMIA undertakes monitoring of detainee care arrangements through internal staff, including medical professionals in specialist areas. These processes inform ongoing dialogue between DIMIA and the Detention Services Provider to make ongoing improvements to the provision of mental health care in immigration detention facilities.

Recent Changes

242. Several recent events have triggered DIMIA to take further stock of current mental health service arrangements, including issues associated with the Cornelia Rau case and a recent Federal Court judgement critical of mental health care of two detainees in the Baxter Immigration Detention Facility. The Minister for Immigration and Multicultural and Indigenous Affairs announced on 25 May 2005 enhancements to health care services at Baxter IDF with the more frequent visiting of a psychiatrist and the establishment of two new psychiatric nursing positions to achieve seven day coverage, and on-call arrangements at night.

243. DIMIA is also implementing procedural changes and service delivery enhancements flowing from the decision, improved access to care outside detention facilities and reviewing monitoring and oversight arrangements for health care services. DIMIA is accessing further specialist medical expertise to assist it in these processes.

244. Since 5 May 2005, the following actions have been taken:

- The mental health staffing levels at Baxter have been increased to include a visiting psychiatrist on a fortnightly basis and two additional full time mental health nurses; and
- The Department will now routinely seek additional third party medical advice **whenever** it receives conflicting third party medical opinions from sources other than the medical professionals subcontracted by the detention services provider, rather than on a case-by-case basis as was previously the case.

245. Development of a detailed protocol is underway in relation to third party medical opinions. However, in the meantime the following steps are now required to be taken where external medical opinions from medical services

providers other than those subcontracted through the detention service provide, GSL, are received :

1. An external opinion forwarded to GSL or DIMIA must be brought to the attention of the International Health and Medical Services (IHMS) Health Services Manager (and also Professional Support Services (PSS) where the opinion relates to mental health) for immediate forwarding to the detainee's treating physician (ie the General Practitioner, and Medical Specialist and/or the treating Psychiatrist). Where the external opinion received is at odds with the detainee's care plan and the detainee's treating practitioner/s do not have the same clinical and professional qualification as the person who has provided the external opinion (for example, where a psychiatrist has provided an opinion and the detainee has not been assessed by a psychiatrist but is being treated by a psychologist) arrangements must be made immediately to have the detainee assessed at the same level of clinical and professional qualification as the person who has provided the external opinion.

2. Where IHMS is provided directly with an opinion from an external medical service provider that is at odds with the health care plan developed for the detainee, DIMIA must be notified immediately.

3. Written confirmation of receipt of the opinion and advice that this will be referred to the detainee's treating doctor must be provided to the person who provided the external opinion.

4. The detainee's treating doctor must be requested to review the individual detainee's health care plan in light of the opinion provided. The treating doctor is under no obligation to follow the alternative advice. However, the treating Doctor's opinion and advice (drawing on specialist advice as necessary) as to the impact on the current treatment plan and an explanation for any divergence from the recommended course of action suggested by the external party must be noted on the detainee's medical file.

5. Where the detainee's treating Doctor has an alternative view to that expressed by an external medical services provider, the Department must be advised in writing within seven working days so that a review of the detainee and all relevant material can be sought from a suitably qualified independent party (for example a Health Services Australia medical practitioner).

External Oversight

246. Immigration detention is subject to regular scrutiny from external agencies, such as Parliamentary Committees, the Human Rights and Equal Opportunity Commission, the Commonwealth Ombudsman, the Australian National Audit Office, the United Nations High Commissioner for Refugees and the Immigration Detention Advisory Group, to ensure that immigration detainees are treated humanely, decently and fairly.

3.1.6 Operational Costs

247. The detention services contract covers the provision of all detention services within detention facilities. This contract includes all the services required for the daily care of detainees, including mental health. The payment for these contracted services is made on an outcomes and outputs approach as a fixed fee and therefore does not identify the cost of individual components of the services provided.

248. The total operational cost for detention (for both the contract and direct departmental operational expenses) for the 2003–04 financial year was $88 million. This amount includes, but is not limited to, all mental health related expenses incurred by the services provider.

249. In addition, DIMIA incurs some health-related costs for out-of-scope mental health assessments and admissions to mental health facilities. The direct mental health cost in 2003–04 was $449,720 and so far in the 2004–05 financial year, the amount billed is $141,850. This is anticipated to increase by the end of the financial year as further costs are incurred.

ATTACHMENT A: CANCELLATION PROCEDURES AND CONSEQUENCES

Cancellation procedures to cancel a visa under sections 109, 116, 128, 134, 137J, 137Q and 140

The general procedures applicable to cancelling visas under sections 109, 116, 128, 134, 137J, 137Q, 140 of the Act and the Migration Regulations are as follows:

(7) Identify the grounds for cancellation

- **s 109** – the grounds for cancellation are at sections 101-105 and 107 of the Act;
- **s 116** – the grounds for cancellation are at section 116(1)(a)-(g) and section 116(3), including regulation 2.43(1)(a)-(o);
- **s 128** – the grounds for cancellation are at section 116(1)(a)-(g) including regulation 2.43(1)(a)-(o) and regulation 2.43(2)(b) and sections 101-105 and 107(2) of the Act;
- **s 134** – the grounds for cancellation are at section 134(1);
- **s 137J** – Education provider suspects student breach of course requirement conditions and issues a notice to student and advises DIMIA electronically – student responds to notice by attending DIMIA office within 28 days – where student attends DIMIA office to explain alleged breach, automatic visa cancellation process is ceased and consideration is given to establishing grounds for cancellation under sections where applicable (116(3)(b), 116(3) and regulation 2.43(2)(b)). Note: where student does not respond to a notice by not attending a DIMIA office within 28 days the student visa is automatically cancelled under section 137J on the 29th day. A student who has their visa automatically cancelled may apply to DIMIA for revocation of the cancellation);
- **s 137Q** –grounds for cancellation are at subsections 137Q(1) and (2)
- **s 140** – the grounds for cancellation are as per sections 109, 116, 128 or 137J.

(8) Sections 109. 116 and 140 – Notify the holder of the visa of intention to consider cancellation of their visa - Issue of a Notice of Intention to Consider Cancellation (NOIC) under section 107 of the Act.

- **s 109** – NOICC includes the power/ground(s) for cancellation, the reasons/evidence for cancellation, invitation to respond and timeframe for responding, consequences of not responding and of cancellation, effect of sections 108, 109, 111 and 112 of the Act, that obligations under section 104 and 105 are not effected by NOICC, requirement for holder to advice of his/her current address and any change of address and the factors that will be taken into account;
- **s 116** – NOICC includes authority for cancellation (power and ground(s) being considered, reason(s) and evidence for cancellation, invitation to respond as to why the visa should not be cancelled, the consequences of not responding and of cancellation and the time frame to respond;

- **s 137J** – where a student has responded to a notice and attended a DIMIA office within 28 days – procedure is as per 116;
- **s 140** – as per above.

(9) Section 128 – Establish that it is appropriate to cancel without notice.

A delegate has a discretion to cancel a visa under section 128 of the Act only if:

- the non-citizen is outside Australia;
- the delegate is satisfied grounds exist under section 116 of the Act; and
- the delegate is satisfied that it is appropriate to cancel the visa in accordance with Subdivision F (i.e. without notice).

(10) Sections 109, 116 and 140 – Await visa holder's response to NOICC.

A decision cannot be made until the visa holder:

- has responded to the NOICC;
- has advised within the response period that they do not wish to respond; or
- the prescribed time for responding to the notice of intention to consider cancellation has passed.

(11) Section 128 – Make a decision to cancel the visa.

Once it is established that it is appropriate to cancel the visa, the following steps are taken:

- cancellation is recorded on DIMIA electronic system/s that includes a reference to the power and grounds, reasons and evidence and method of notifying the non-citizen;
- a Migration Alert entry is raised, where required, including details such as power and ground, reason/evidence, notification and exclusion periods (if any).

(6) Section 109, 116 and 140 – Assess response of visa holder to NOICC (if any) and weigh evidence.

Consideration is given to the following factors under Regulation 2.41 before making a cancellation decision under these sections:

- the correct information;
- the content of the genuine document (if any);
- the likely effect on a decision to grant a visa or immigration clear the holder of the correct information or genuine document;
- the circumstances in which the non-compliance occurred;
- the present circumstances of the visa holder;
- the subsequent behaviour of the holder concerning his or her obligation under subdivision C of Division 3 of Part 2 of the Act;
- any other instances of non-compliance by the visa holder known to the Minister;
- the time that has elapsed since the non-compliance;
- any breaches of the law since the non-compliance and the seriousness of those breaches;
- any contributions made by the holder to the community;
- what impact cancellation may have on children in Australia;
- in the case of a permanent visa – the person's ties with Australia; and
- whether cancellation would lead to removal in breach of Australia's non-refoulement obligations.

(7) **Section 128 – Issue of notice of cancellation**

The notice of cancellation must comply with section 129 of the Act and include:

- authority for cancellation (i.e. the power and ground considered);
- reasons and evidence for the cancellation;
- invitation to show that the ground for cancellation does not exist or to show other reasons why cancellation should be revoked;
- a time period for the non-citizen to respond;
- the consequences of the cancellation (i.e. that the person is no longer a visa holder and therefore cannot travel to Australia. If they do travel they may be refused immigration clearance and face removal); and
- that where the visa was cancelled for a mandatory ground, no revocation is possible.

(8) **Sections 109, 116 and 140 – Make the decision**

The decision maker must decide:

- if non-compliance did not exist, make a decision not to cancel the visa;
- if non-compliance exists but reasons not to cancel outweigh reasons to cancel, make a decision not to cancel the visa (except where cancellation is mandatory); or
- if non-compliance exists and reasons to cancel outweigh reasons not to cancel, make a decision to cancel the visa (except where cancellation is mandatory).

(9) **Section 128 – Make a decision about revocation**

The decision make must weigh reasons for/against revocation. Considerations will include:

- purpose of former visa holder's travel and stay in Australia;
- extent of non-compliance with condition(s);
- circumstances which led to the ground for cancellation arising;
- the person's behaviour in relation to DIMIA now and on previous occasions;
- links to the community (permanent visa holders only); and
- degree of hardship to non-citizen and family members.

(10) **Sections 109, 116 and 140 – Notify the visa holder of the decision**

Once a cancellation decision has been made, the following occurs:

- notification of the cancellation decision must be given in writing and include review rights;
- the outcome of the decision is to be recorded on DIMIA's electronic systems; and
- the Movement Alert List is to be updated, if required.

(11) **Section 128 – Notify the non-citizen of the decision about revocation**

Where a decision is made not to revoke a cancellation decision, the following occurs:

- notification of decision must occur in accordance with Regulation 2.55 and include review rights;

- the outcome of the decision is recorded on DIMIA's electronic systems; and
- the Movement Alert List (MAL) is to be updated, if required.

(12) Processes for visa class specific cancellation powers (s134, s137J, s137Q)

- These cancellation powers revolve around the specific nature of the 3 visa classes concerned (business, student and regional sponsored classes respectively).
- Accordingly the Act provides specific processes and considerations for notifying liability for cancellation, what considerations may be taken into account in making a cancellation decision, and for arriving at a decision that reflect the character of each visa class respectively.

Cancellation procedures to cancel a visa under section 501

Where information comes to DIMIA's attention that there may be grounds for cancellation of a non-citizen's visa under section 501, the following steps are followed:

(1) The case officer must check departmental records to confirm personal particulars and to check whether any relevant information is held by the Department. The non-citizen must be checked against Departmental databases such as MAL, Registry, Movements, Citizenship and the Visa Cancellation system. Personal files (including overseas files) should be obtained where available. If relevant, a copy of the visa holder's passenger card should also be obtained. Where cancellation of a visa is being contemplated in immigration clearance, reference should be made to the Referrals system. In some cases, further information may need to be sought from external agencies, such as law enforcement and intelligence agencies and foreign governments.

(2) The case officer makes a preliminary determination as to whether there are any grounds for cancellation of the visa - that is, whether there is any evidence to suggest that the visa holder does not pass the character test.

(3) Where preliminary investigations reveal that the possible ground(s) for cancellation are unsubstantiated, it is not necessary for the case officer to refer the matter to a section 501 delegate. A file note of the information received and action taken, including results of any further investigations, should be made and placed on the visa holder's personal file. This ensures that the matter is not reopened unless further information comes to light. No further action should be taken. If the visa holder is aware that enquiries had been taking place, they should be advised of the outcome of the enquiries.

(4) Alternatively, if the case officer is satisfied that the applicant may not pass the character test, the matter must be referred to the section 501 delegate. The case officer may continue to assist. However, in assisting to gather information/evidence, the case officer is not exercising the section 501 power.

(5) When considering a decision to cancel a visa under section 501, delegates must have regard to the requirements of natural justice.

(6) If, after appropriate enquiries, there is a reasonable suspicion that the person does not pass the character test, the case officer must send a Notice of Intention to Consider Cancellation (NOICC) to the visa holder. Note that the section 501 delegate cannot make a decision until the visa holder responds or the response period expires.

(7) If, after taking into account any response from the applicant, the section 501 delegate is satisfied that the person does not pass the character test, the discretion to refuse the visa is enlivened.

(8) The available evidence must be assessed. The information must be critically analysed for its relevance, the reliability of its source and whether the content of the information or intelligence is credible. Delegates must document and place on the applicant's or visa holder's file:

- * what intelligence and other information is held;
- * how it was obtained;
- * how relevant, reliable and credible it is believed to be;
- * how the information is considered sufficient to enliven the refusal or cancellation power; and
- * whether the information is non-disclosable or is protected by section 503A.

(9) If, after weighing all of the evidence, the section 501 delegate exercises his/her discretion to cancel the visa, a record of the decision must be prepared. The visa holder must be notified of the cancellation decision, including any review rights.

(10) In preparing the decision record, a determination should be made about which section 501 ground is the appropriate power to use. Where more than one ground exists, the grounds for cancellation should be established according to the degree of severity of the actions and the quality of evidence to substantiate each ground. Where it has been established that more than one ground exists, it is preferable to proceed relying on all of the established grounds.

(11) Alternatively, if the section 501 delegate decides not to exercise his or her discretion to refuse to grant the visa, the case is referred back to the case officer. The visa holder is notified of the decision not to pursue cancellation.

(12) If the section 501 delegate makes a decision to cancel the visa, the non-citizen must be placed on the Movement Alert List.

(13) A person who has their visa cancelled under section 501, who is inside the migration zone and who is not in criminal detention must be placed in immigration detention under section 189, as they have become an unlawful

non-citizen. This is subject to the person applying for merits review or judicial review and being granted a Bridging Visa E.

Consequences of Visa Cancellation under sections 109, 116, 128, 137J and 140

Where a visa is cancelled under sections 109, 116, 128, 137J or 140 the non-citizen whose visa was cancelled is subject to a three year exclusion period which prevents the non-citizen from making a valid application.

However, migration legislation provides for the exclusion period to be waived in certain circumstances. These include compelling circumstances that affect the interests of Australia; or compelling and compassionate circumstances affecting an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, that justifies the grant of a visa to return to Australia within the three year period.

Consequences of Visa Refusal and Cancellation under section 501

There are 3 major consequences of a visa refusal or cancellation under section 501 or related provisions:

- a prohibition on applying for other visas (section 501E);
- refusal of other visa applications and cancellation of other visas (section 501F); and
- periods of exclusion and special entry criteria may apply (section 503, clause 5001 and 5002).