QUESTION TAKEN ON NOTICE

ADDITIONAL BUDGET ESTIMATES HEARING: 21 FEBRUARY 2011

IMMIGRATION AND CITIZENSHIP PORTFOLIO

(24) Program: Internal Product

Senator Hanson-Young (L&CA 20) asked:

Has the Government rejected any of the recommendations made by the recent Human Rights and Ombudsman's reports?

Answer:

Department of Immigration and Citizenship (DIAC) considers all recommendations made by the Australian Human Rights Commission (AHRC) and the Ombudsman and responds accordingly. Generally DIAC accepts most recommendations in these formal reports. However, the department has put forward alternative views on the issues highlighted in nine recommendations made by recent AHRC reports and two recommendations made by a recent Ombudsman report.

The AHRC in its 2010 reports 'Immigration Detention in Darwin' and 'Immigration Detention on Christmas Island' made a total of 36 recommendations, of which DIAC provided alternative views for nine recommendations. The Ombudsman in its report on the 'Christmas Island Immigration Detention Facilities' made six recommendations, of which DIAC provided alternative views for two recommendations.

Those recommendations, and DIAC's alternative views, are attached.

2010 Australian Human Rights Commission Report on Immigration Detention in Darwin

‘Recommendation 1: Australia’s mandatory detention law should be repealed. The Migration Act should be amended so that immigration detention occurs only when necessary. This should be the exception, not the norm. It must be for a minimal period, be reasonable and be a proportionate means of achieving at least one of the aims outlined in international law. The limited grounds for detention should be clearly prescribed in the Migration Act.

People in immigration detention are managed in accordance with the Government’s Key Immigration Detention Values which ensure fair and humane treatment, and any claims for asylum are assessed as expeditiously as possible.

The retention of ‘excised offshore places’, the mandatory immigration detention of all irregular arrivals for the management of health, identity and security risks to the community, and the continued use of Christmas Island for the non-statutory Refugee Status Assessment (RSA) processing of people who arrive at excised offshore places, are matters of government policy. The government is committed to these policies as essential components of strong border control, and as important elements in ensuring the integrity of Australia’s immigration program.

The High Court of Australia has determined that the department’s RSA and Independent Merit Review (IMR) processes are valid. However, the High Court has determined that certain aspects of the process were legally flawed and need to be changed.

All irregular maritime arrivals (IMAs) who seek protection are able to seek judicial review if they receive a negative assessment. The government has also decided to give a new review to clients who received a negative IMR outcome prior to the High Court’s decision on 11 November 2010. This includes the High Court litigant’s clients with a negative IMR assessment that has been handed down and clients with a negative IMR assessment that is yet to be handed down. Clients on a voluntary removal pathway will continue to be assisted by the department and those who have already left Australia will have no further action taken in regards to their negative IMR assessment. The department will continue with normal removals planning (that is, general contingency planning for removals) but will not proceed with obtaining individual travel documents until the IMR outcome is known, and any related judicial review proceedings are finalised.

The government is satisfied that immigration detention is not inconsistent with Australia’s international obligations under the Refugees Convention and its Optional Protocols, in particular, Australia's non-refoulement obligations, and that a fair process is provided for the assessment of asylum claims. Article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR) states that everyone has the right to liberty and security of person, and that no one shall be subjected to arbitrary arrest or detention. The government understands that the key elements in determining whether detention is arbitrary are whether the circumstances under which a person is detained are ‘reasonable’ and ‘necessary’ in all of the circumstances or otherwise arbitrary in that the detention is inappropriate, unjust or

unpredictable. Detention will not be arbitrary if it is demonstrated to be proportional to the end that is sought. Both the law under which the detention is authorised and the manner in which it is carried out or enforced must meet these criteria. The government is satisfied that the detention is proportionate to the aim of processing peoples' claims as swiftly and humanely as possible while also protecting the security and welfare of the Australian community. Mandatory immigration detention is an exceptional measure primarily reserved for people who arrive in Australia without authorisation.

Recommendation 2: The Migration Act should be amended to accord with international law by requiring that a decision to detain a person, or a decision to continue a person's detention, is subject to prompt review by a court.

Article 9 (4) of the ICCPR states that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful". This is based on the principle of *habeas corpus* that people detained must be able to bring proceedings to challenge the lawfulness of their detention. In Australia, every person who is detained is able to test the lawfulness of his or her detention before a court. Section 75 (v) of the Australian Constitution provides that the High Court of Australia has original jurisdiction in relation to every matter where a writ of mandamus, prohibition or injunction is sought against an officer of the Commonwealth.

The Department of Immigration and Citizenship (DIAC) notes that subsection 494AA(3) of the Migration Act 1958 (the Migration Act) states that 'nothing in this section is intended to affect the jurisdiction of the High Court under section 75 of the Constitution'. Clients are therefore able to seek judicial review of the lawfulness of their immigration detention under domestic law, pursuant to the High Court's original jurisdiction.

Recommendation 6: The Australian Government should, as a matter of priority, implement the recommendations made by the Commission in *A last resort?* that:

- **Australia's laws should be amended so that the Minister for Immigration is no longer the legal guardian of unaccompanied children in immigration detention.**
- **An independent guardian should be appointed for unaccompanied children in immigration detention and they should receive appropriate support.**

The *Immigration (Guardianship of Children) Act 1946* (IGOC Act) provides that the Minister for Immigration and Citizenship is the guardian of unaccompanied non-citizen children who arrive in Australia with the intention of becoming permanent residents. The Australian government recognises that the IGOC Act is outdated and not designed for the purpose for which it is now used. The department recognises the concerns which have been raised about the potential for a perceived conflict of interest between the Minister's role as guardian under the IGOC Act and as the decision-maker under the *Migration Act 1958*. The department is currently reviewing whether the current guardianship arrangements are appropriate and whether the

IGOC Act can be used in a more effective way to further the best interests of children potentially within its scope.

The department ensures appropriate support for UAM's by engaging LWB to provide an Independent Observer to attend interviews and meetings between UAM's and the department and/or other agencies. The Independent Observer provides a support role for the minor to support them during the interview process, including providing them with moral support, ensuring that appropriate food and toilet breaks are provided, and ensuring the minor is given the opportunity to ask questions and has their questions answered. LWB provide a 24-hour on call support service.

For UAM's who have been found to be refugees (known as unaccompanied humanitarian minors), the department, working with state governments or service providers, organises suitable accommodation and appropriate care arrangements. Services provided to unaccompanied humanitarian minors include: monitoring of care arrangements by a case worker, assistance with clothing, food, housing and educational requirements. Services for unaccompanied humanitarian minors are provided by the relevant State Child Welfare Agency or, where this is not possible, by a not-for-profit service provider.'

2010 Australian Human Rights Commission Report on Immigration Detention on Christmas Island

'Recommendation 1

The Australian Government should stop using Christmas Island as a place in which to hold people in immigration detention. If people must be held in immigration detention facilities, they should be located in metropolitan areas.

Response

It is Government policy that all IMAs are initially processed on Christmas Island. IMAs are managed in accordance with the Government's Immigration Detention Values which ensure that all people in immigration detention are treated fairly and humanely and any claims for asylum are assessed as expeditiously as possible.

The Australian Government has a variety of flexible accommodation options available for use on Christmas Island to manage this process. Where appropriate and for operational reasons IMA clients and crew can and have been transferred to the Australian mainland while their processing is finalised. Detention accommodation is available in both metropolitan and regional areas and sites are utilised as operationally appropriate.

As the Commission would be aware, the Prime Minister and the Minister for Immigration and Citizenship announced on 18 October the establishment of new detention accommodation on mainland Australia to relieve the strain on the detention network. Additional detention facilities will be opened at Northam in Western Australia, located about 80km north-east of Perth, which will accommodate up to 1500 single men, and Inverbrackie in South Australia, located about 37km east of Adelaide, which will accommodate up to 400 family members.

Recommendation 2

The Australian Government should repeal the provisions of the Migration Act relating to excised offshore places and abandon the policy of processing some asylum claims through a non-statutory refugee status assessment process. All unauthorised arrivals who make claims for asylum should have those claims assessed through the refugee status determination system that applies under the Migration Act.

Response

The retention of 'excised offshore places', the mandatory immigration detention of all irregular arrivals for the management of health, identity and security risks to the community and the continued use of Christmas Island for the non-statutory RSA processing of people who arrive at excised offshore places are matters of Government policy. The Government is committed to these policies as essential components of strong border control and important elements in ensuring the integrity of Australia's immigration program.

In respect of the Commission's concerns regarding the non-statutory RSA process, the Government is satisfied that the non-statutory RSA process is consistent with Australia's international obligations under the Refuges Convention, in particular, its non-refoulement obligation, and provides a fair process for the assessment of asylum claims.

DIAC also wishes to note that all non-refoulement obligations are assessed if a refugee claim is unsuccessful, to ensure that Australia acts in accordance with its international obligations. This process of assessment of an asylum seeker against our international obligations is the same whether the asylum seeker is onshore or in an excised offshore place.

The Department notes that the Commission is aware that the High Court is currently considering the validity of the Department's RSA process. The High Court is yet to make a decision and the Department is also monitoring the progress of this matter.

It would not be appropriate to comment further on Recommendation 2 until the outcome of the High Court's decision on the constitutionality of the RSA process is known.

Recommendation 4

Section 494AA of the Migration Act, which bars certain legal proceedings in relation to offshore entry persons, should be repealed. The Migration Act should be amended to accord with international law by requiring that a decision to detain a person, or a decision to continue a person's detention, is subject to prompt review by a court.

Response

As noted in the response to Recommendation 2, the retention of 'excised offshore places', the mandatory immigration detention of all irregular arrivals for the

management of health, identity and security risks to the community and the continued use of Christmas Island for the non-statutory RSA processing of people who arrive at excised offshore places are matters of Government policy. The Government is committed to these policies as essential components of strong border control and important elements in ensuring the integrity of Australia's immigration program.

Section 494AA of the *Migration Act* is part of the excision arrangements; the Government has no intention to repeal or amend the provisions of the Migration Act relating to excised offshore places or offshore entry persons.

DIAC notes that subsection 494AA(3) states that '[n]othing in this section is intended to affect the jurisdiction of the High Court under section 75 of the Constitution'. Clients are therefore able to seek judicial review of the lawfulness of their immigration detention under domestic law, pursuant to the High Court's original jurisdiction.

The Government is considering ways of improving the review of the appropriateness of detention in line with the Key Immigration Values. Key Immigration Detention Value 4 of the New Directions in Detention provides that:

4. Detention that is *indefinite or otherwise arbitrary is not acceptable* and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review. (emphasis added)

As noted by the AHRC, Senior Officer and Ombudsman's reviews introduced under the Government's Key Immigration Detention Values consider the appropriateness of the person's detention, their detention arrangements and other matters relevant to their ongoing detention and case resolution.
The Government is still determining the effectiveness of these detention review arrangements before considering the appropriateness of a more expansive model of judicial review of the decision to detain.

The Department notes the AHRC's reference to the recommendations of the Joint Standing Committee on Migration (JSCM). The previous Government had been considering the three JSCM reports closely and there had been extensive consultation across affected agencies on options for response. The current Government will consider the work done to date and will respond to the Committee's reports in due course.

Recommendation 8

The Australian Government should, as a matter of priority,implement the recommendations made by the Commission in *A last resort?* that:

• Australia's laws should be amended so that the Minister for Immigration and Citizenship is no longer the legal guardian of unaccompanied children.
• An independent guardian should be appointed for unaccompanied children and they should receive appropriate support.

Response

The *Immigration (Guardianship of Children) Act 1946* (IGOC Act) creates the Minister's guardianship obligations towards certain children. It is recognised that the IGOC Act is outdated and not designed for the purpose for which it is now used. The Government particularly acknowledges the perceived conflict of interest between the Minister's role as guardian under the IGOC Act and being the decision-maker under the Migration Act.

Independent observers from *Life Without Barriers* are available on Christmas Island to support unaccompanied minors and attend interviews and other appointments, as required. The use of independent observers is one way in which the Department has attempted to address the perceived conflict of interest issue.

Further, the Department has recently completed a detailed assessment of its current unaccompanied minor caseload including the age, family composition and current care arrangements to assess whether the current arrangements are appropriate and whether the IGOC Act can be used in a more effective way to further the best interests of children potentially within its scope.

Recommendation 9

If the Australian Government intends to continue to use the Christmas Island IDC, it should implement the recommendation of the Joint Standing Committee on Migration that all caged walkways, perspex barriers, and electrified fencing should be removed and replaced with more appropriate security infrastructure.

Response

DIAC is considering options for softening the appearance of the IDC, including removal of a number of internal fences and caged walkways. This will occur where it is possible to do so at an acceptable cost.

DIAC is not considering replacement of the Electronic Detection and Deterrent Systems (EDDS) with different fencing arrangements, as this would not be practical or cost-effective. In any case, the facility is being managed in low security mode and the EDDS is not activated. The EDDS is an accepted form of security in public places and is used in various situations (such as embassies, private businesses, etc) – it is not a security feature restricted to immigration detention centres or other higher security facilities.

Recommendation 25

Legislation should be enacted to set out minimum standards for conditions and treatment of detainees in all of Australia's immigration detention facilities, including those located in excised offshore places. The minimum standards should be based on relevant international human rights standards, should be enforceable and should make provision for effective remedies.

Response

DIAC does not consider it necessary to enact standards in legislation in order to meet Australia's human rights obligations. While the large numbers of irregular maritime arrivals have increased the challenges in providing detention services, DIAC and its detention services provider always endeavour to meet relevant standards.

Australia adheres to Articles 20-24 of the Refugees Convention and ensures that people seeking asylum, including those in immigration detention, have their basic needs met, including access to food, clothing, shelter and medical assistance.

Detention services and their delivery are also subject to an external scrutiny and accountability framework which incudes the Parliament and a number of statutory authorities such as the Commonwealth Ombudsman, the Privacy Commissioner and the Australian Human Rights Commission.

Consistent with domestic law and international obligations, the Australian Government facilitates access by people in immigration detention to legal advice and representation.

As part of the Government's commitment to ensuring the appropriateness of the conditions of immigration detention, new contractual arrangements for detention services have a strong focus on the rights and wellbeing of people in immigration detention. These arrangements provide a comprehensive framework for ongoing quality improvement, including an effective performance management system.

Contracts with service providers are informed by the Government's New Directions in Detention policy, including the seven Key Immigration Detention Values. These new arrangements enhance oversight of service provider operations and align the needs of an individual in immigration detention with the most appropriate accommodation option.'

The Commonwealth Ombudsman's Report on Christmas Island Immigration Detention Facilities

'Ombudsman Recommendation 1

DIAC should conduct a thorough review of the RSA assessment processes with a view to introducing initiatives which will improve the overall timeliness of such assessments. The review to include reconsideration of the timing and processing of security clearances for successful RSA applicants.

DIAC response:

The security assessment process undertaken by the Australian Security Intelligence Organisation (ASIO) and the Refugee Status Assessment process undertaken by DIAC are two quite separate processes. In some instances, similar timeframes may be achieved in finalising security assessments and RSA cases which means clients

can move to visa application without undue delay. In other instances this will not be achievable.

The timing for the completion of security assessments varies from case to case, depending on individual circumstances. Some cases, therefore, may be more complex than others and this can contribute to extended timeframes for finalizing security assessments.

Because assessments are treated individually and undertaken on a case-by-case basis, there is no single timeframe within which the checks can be completed. Whether people arrive together on a boat or whether they arrive individually, their cases are still treated on a case-by-case basis depending on their individual circumstances.

While the Department cannot provide a definitive timeframe for completion of security assessments, we regularly liaise with ASIO on caseload management, follow up on specific cases to ensure they are being progressed, and escalate cases of concern.

DIAC is also taking steps to ensure that RSA processing continues to be done in a timely way. DIAC is currently recruiting and training more RSA case officers so that asylum seeker claims can be processed as quickly as possible. DIAC has also taken steps to strengthen the guidance provided to decision-makers so that they are able to assess cases more efficiently and effectively. This has been done through updates to the RSA Procedures Manual and the Credibility Assessment Guidelines. Further guidelines on assessing Country of Origin information are currently being drafted, which will further assist departmental officers to finalise cases in a timely manner.

Ombudsman Recommendation 2

DIAC should examine means by which a person who has received a positive Refugee Status Assessment can in a timely manner be released from immigration detention on Christmas Island. Such means could include placing the person in community detention on the Australian mainland subject to strict reporting conditions. A community detention strategy could also be considered for any person in similar circumstances who has been detained in an immigration detention facility on the mainland.

DIAC response:

The Department notes comments in the report in relation to appropriate accommodation options for IMA clients on a positive pathway. People in immigration detention are managed in accordance with the Government's Immigration Detention Values. These values ensure that clients are, as a matter of course, accommodated in the most appropriate lodging available on Christmas Island or the Australian mainland until their processing is finalised.

As the Ombudsman would be aware, the Minister has recently announced his intention to use existing powers under the Migration Act to progressively place significant numbers of unaccompanied minors and vulnerable families in residence determination arrangements.

These arrangements will be rolled out progressively in partnership with community organisations over the coming months and should provide more suitable longer term accommodation for this group of clients.

Community detention is however not possible to facilitate on Christmas Island at present, due to the lack of suitable accommodation resulting from the increased number of irregular maritime arrivals.'