



Australian Government
**Department of Immigration and Multicultural
Affairs**

**The Senate Legal and Constitutional Legislation Committee's
inquiry into the provisions of the Migration Amendment
(Designated Unauthorised Arrivals) Bill 2006**

QUESTIONS ON NOTICE

**Public hearing
Sydney, Tuesday 6 June 2006**

people our business |

6 Chan Street Belconnen ACT 2617

PO Box 25 BELCONNEN ACT 2616 • Telephone (02) 6264 1111 • Facsimile (02) 6264 4466 • Website:
www.immi.gov.au

Committee questions

Deadline: Wednesday 7 June (close of business)

Q.1. Can the Department provide a copy of the 2005 health report? (see discussion p. 36 of Hansard)

Answer

No, the report was commissioned by the Minister and is therefore confidential.

Q.2. What date was the 2005 health report provided to the Minister? (see discussion p. 36 of Hansard)

Answer

October 2005.

Q.3. What date did the Minister commission the 2005 health report? (see discussion p. 36 of Hansard)

Answer

October 2005.

Q.4. What is the budgetary breakdown, per detainee, for the offshore processing centres? (see discussion pp. 38-39 of Hansard)

Answer

There is no budgetary breakdown of costs per Offshore Processing Centre resident.

Q.5. What is the number of children who have been returned to Afghanistan from Nauru? How does that figure compare with children returned to Afghanistan from onshore detention centres? What is the status (i.e. accompanied or unaccompanied) of children returned to Afghanistan from either Nauru or Australia? (see discussion p. 47 of Hansard).

Answer

20 minors returned voluntarily to Afghanistan from Nauru. 13 returned within their family unit (that is, they were accompanied by their parents or guardians) and seven returned voluntarily to be reunited with their immediate families. All voluntary returns were facilitated by the International Organization for Migration.

Senator Ludwig

Deadline: Wednesday 7 June (close of business)

Q.1. What definition of 'persecution' does the Department use?

Answer

When conducting refugee status assessments in offshore processing centres, the Department uses the same definition of persecution which is used for onshore protection visa decision making. This is the definition set down in international law, as interpreted by the Australian courts and in key elements of the definition which are codified in Section 91R of the *Migration Act 1958*. Section 91R is set out below.

Section 91R. Persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:
 - (a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and
 - (b) the persecution involves serious harm to the person; and
 - (c) the persecution involves systematic and discriminatory conduct.
- (2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of *serious harm* for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (3) For the purposes of the application of this Act and the regulations to a particular person:
 - (a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;
disregard any conduct engaged in by the person in Australia unless:
 - (b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.

Senator Brown

Deadline: Wednesday 7 June (close of business)

Q.1. What are the rules, laws or guidelines used to process applications for refugees in Nauru or Manus Island?

Answer

Refugee status assessments conducted in the offshore processing centres are conducted in accordance with the administrative arrangements set down in the Onshore Protection Interim Processing Advice (OPIPA) No.16: Refugee Status Assessment Procedures For Unauthorised Arrivals Seeking Asylum On Excised Offshore Places And Persons Taken To Declared Countries. A copy of this advice is at [Attachment A](#) for your reference. Paragraph 20 of that document requires that the assessing officer is to consider and take into account the following reference material in making the refugee assessment:

- the Refugees Convention;
- the United Nations High Commissioner for Refugees (UNHCR) guidelines (Handbook) – copy at [Attachment B](#);
- the *Migration Act 1958* and *Migration Regulations 1994* (including any relevant guidance on Convention interpretation introduced by MLAA6); and
- all other relevant information, including information and source material held by DIMA.

In addition to OPIPA No.16, other relevant information relied on in onshore and offshore decision making includes: the Refugee Law Guidelines ([Attachment B](#)); and issues papers (copies attached) which are also sent to the Refugee Review Tribunal for consideration.

Assessing officers in the offshore process are trained protection visa decision makers, experienced in assessing refugee status. The source material to which these officers have access includes the Department's country information holdings maintained for onshore protection visa decision making.

Q.2. How do these rules, laws or guidelines differ from those applying to processing of refugees in Australia?

Answer

The test for assessing refugee status is essentially the same onshore and offshore.

Arrangements for decision making differ in that, in Australia, decisions about refugee status are made as a component of a broader decision about whether a person qualifies for the grant of a protection visa. This onshore visa decision incorporates a range of technical and legal considerations, such as whether a visa application has been validly made and whether health and character requirements have also been met. In the offshore refugee process, the assessment focuses on the issue of whether the person is a refugee under the Refugees Convention, without having to deal with the range of other technical criteria which need to

be taken into account in assessing whether the person qualifies for a protection visa. If a person found to be a refugee is to be considered for resettlement to Australia from an offshore processing centre, there is a separate decision-making process on an application for an offshore humanitarian visa.

The offshore refugee determination process incorporates arrangements at review stage to identify possible non-Refugees Convention related reasons for providing protection to an individual. For example, paragraphs 38, 39 and 40 of the Onshore Protection Interim Processing Advice (OPIPA) No.16: *Refugee Status Assessment Procedures For Unauthorised Arrivals Seeking Asylum On Excised Offshore Places And Persons Taken To Declared Countries* (as above, see Attachment A) set out arrangements to identify possible international obligations under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR), as well as possible humanitarian issues such as family links with Australia. None of these considerations is included in the decision on whether a person in Australia is eligible for a protection visa.

The offshore refugee determination arrangements are less formal than those applying onshore - with consequent greater reliance on face-to-face, oral interaction with the asylum seeker. By comparison the onshore process is more heavily reliant on documentation of claims by, and written communications with, the applicant.

In the offshore processing arrangements, the Department can at any time reopen and reconsider cases previously found not to be refugees, if there are significant changes to the individual's claims or in the home country (paragraphs 50 and 51 of the OPIPA, refer). In the onshore process, a person who is conclusively found not to be eligible for a protection visa is unable to make a further application for a protection visa if there are changes in circumstances, unless the Minister uses a personal, non-compellable power to allow this to occur.

Q.3. Will you provide the rules, laws or guidelines used to guide DIMA officials on Nauru or Manus Island? If not, why not?

Answer

Yes. Copies of the documentation identified in the response to question 1 from Senator Brown are attached.

A copy of the UNHCR Handbook is at Attachment B, and can also be accessed at:

<http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=3d58e13b4>

A copy of The Refugees Convention and Protocol is at Attachment C and can be viewed at:

<http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b66c2aa10>

The *Migration Act 1958* and *Migration Regulations 1994* are available at www.comlaw.gov.au. The most relevant sections for offshore refugee assessments are sections 91R and 91S of the Migration Act. Section 91R is provided in the text of the answer to the question by Senator Ludwig. The text of section 91S is reproduced below.

Section 91S Membership of a particular social group

For the purposes of the application of this Act and the regulations to a particular person (the *first person*), in determining whether the first person has a well-founded fear of being persecuted for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol; and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or
 - (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Senator Nettle

Questions provided in the Appendix to the *Australian Lawyers for Human Rights* submission to the inquiry (submission No.78, pp. 33-36).

Deadline: Friday 9 June

These questions will be provided prior to the Committee's deadline of Friday 9 June.