CHAPTER 4

DECISION-MAKING - PART 1

THE DEPARTMENTAL DECISION

Introduction

4.1 Term of reference (d) requires the Committee to consider:

> The adequacy of current refugee determination procedures having regard to the role and function of the Refugee Review Tribunal in investigating asylum claims

Term of reference (a) also required the Committee to examine:

> The adequacy of legal assistance provided to asylum seekers under the Federal Government's Immigration Advice and Application Assistance Scheme

4.2 Chapters 4 and 5 examine the effectiveness of, and concerns about, Australia's current onshore refugee determination process,[1] and the role of application advice and assistance within this process. Chapter 4 examines the process from the arrival of an asylum seeker in Australia to the primary stage for the determination of refugee status by a departmental officer. Chapter 5 examines the operation of the merit review stage at the Refugee Review Tribunal, an appeal system for those asylum seekers whose applications have been rejected by the primary decision-maker.

4.3 Conflicting evidence was provided on the equity and the efficiency of these decision-making processes, and the extent to which they assisted or thwarted the applicant. There was also detailed evidence provided on the need for application advice and assistance and for legal assistance within a system considered by the department to be non-legalistic and user-friendly. However, much of this has been discussed above in Chapter 3.

The primary decision-making process

4.4 There are two main steps in what is known as the primary decision-making process, a preliminary assessment at point of arrival, and a more detailed assessment of written and sometimes verbal information. Both processes are undertaken by departmental officers.

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1 For the purposes of this chapter, the 'current onshore refugee determination process' refers to the system implemented in 1993 following the establishment of the Refugee Review Tribunal

4.5 People seeking asylum arrive in Australia either by air or by boat, and may arrive lawfully (with a valid visa) or unlawfully (without appropriate papers). The Jesuit Refugee Service considered that the possession of a valid visa immediately marks an inequitable distinction between asylum seekers.[2] Those who have a visa but perhaps no great claim to refugee status, are able to clear immigration and live in the community while applying to remain; others from a similar background may not even be able to pass the first hurdle of clearing immigration.

4.6 During 1998-99, 2,106 unlawful non-citizens were refused entry at Australian airports, and a further 926 people arrived without authority by boat.[3] In 1999-2000 there was an increased number of unauthorised arrivals by boat, a fact which contributed to the change in migration legislation limiting access for refugees to various services and benefits.[4] Details of boat arrivals are updated by the department.[5]

4.7 Those persons arriving by air, who are not immigration-cleared and who are seen as not having engaged Australia's protection obligations, are generally described as 'turnarounds',[6] and can be removed rapidly (within 72 hours), especially if they can be removed on the same carrier which brought them to Australia. Where people arrive unlawfully by boat and do not engage protection obligations, the Act specifies that they must be removed as soon as reasonably practicable and, if the person agrees, removal can be within 48 hours.[7]

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2 *Submission No. 54A*, Jesuit Refugee Service, p. 564

3 In the same year 61 stowaways arrived by ship. A person who arrives in Australia as a stowaway on a ship is not allowed to leave the ship unless they apply for protection in which case they are transferred to immigration detention. Department of Immigration and Multicultural Affairs Fact Sheet No. 81 *Unauthorised Arrivals by Air and Sea.* See also above, Chapter 1, Paragraphs 1.45-1.47

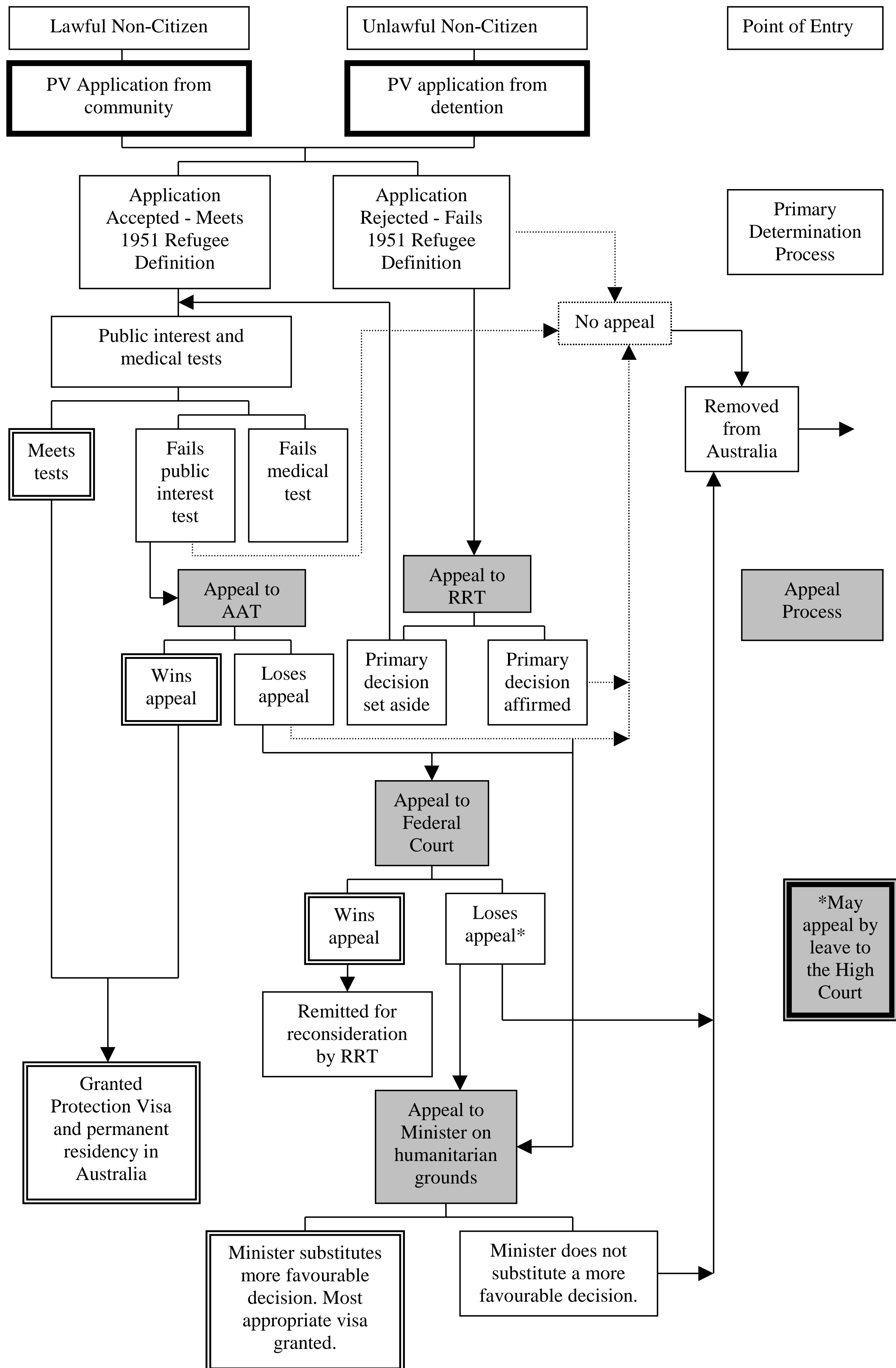
4 See above Chapter 1, Paragraphs 1.56-1.59

5 Department of Immigration and Multicultural Affairs, Fact Sheet No. 81 *Unauthorised Arrivals by Air and Sea*

6 See also below, Chapter 10, Paragraphs 10.3-10.4

7 *Migration Act 1958*, s189

Current Refugee Determination Process



Application for a Protection Visa (Form 866)

4.8 In order to qualify for a Protection Visa,[8] a person must satisfy the following criteria:

- be in Australia when the application is made;[9]
- meet the definition of refugee as defined by the 1951 Convention and 1967 Protocol on the Status of Refugees, to the Minister's satisfaction;
- undergo prescribed health tests (including a medical examination carried out by a Commonwealth Medical Officer and an x-ray examination performed by a medical practitioner qualified as a radiologist in Australia);
- pass a prescribed character test;
- be assessed as not being a direct or indirect threat to Australian national security; and
- be a person whose presence in Australia would not prejudice relations between Australia and a foreign country. [10]

4.9 A member of the family unit (a spouse, de facto spouse, dependent children or other dependents) of an asylum seeker who is granted a Protection Visa may also be

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8 A Protection Visa (866) application comprises four parts: A, B, C and D:

- **Part A (for asylum seekers in detention only):** a single page which is effectively a declaration that the asylum seeker, having had the 1951 Convention and 1967 Protocol definition of a refugee read to them, believes that the definition applies to them and is applying for recognition as a refugee and a Protection Visa, which confers permanent residence on the holder. The form also includes a requirement to give details of any person who has assisted the asylum seeker in filling out the form.
- **Part B:** for personal details about the asylum seeker (and for those applying as a family unit, other persons included in the application, that is, members of the family unit present in Australia), including character and health questions. The form also includes a requirement to give details of any person who has assisted the asylum seeker in filling out the form. Documents supporting the asylum seeker's claims, for example, birth certificates) are attached to this form.
- **Part C:** for asylum seekers submitting their own claims to be a refugee, personal details including citizenship, means of travelling to and arrival in Australia and a statement of reasons for claiming to be a refugee.
- **Part D**: for members of a family unit who do not have their own claims to be a refugee, personal details, including citizenship, relationship to family member claiming refugee status and demonstrating the manner of travel documentation used to enter Australia

9 A person who is not in Australia may apply for protection under Australia's Offshore Humanitarian program

10 The character test and security tests are to determine if the individual has a criminal record (character) or a security-risk assessment (security). Failure to be pass these tests can be appealed to the AAT, but the evidence on which the security check is made- usually from ASIO – is not available. There is no obligation under the Refugees Convention to provide protection to an individual who has failed these checks (*Transcript of evidence,* Department of Immigration and Multicultural Affairs, pp. 855-856, although people may be kept in detention and not removed)

granted a Protection Visa if the relevant character and health tests are undertaken.[11] Form 866 also serves as an application for a bridging visa that allows the holder to remain legally in Australia while the application for a substantive visa is determined.

4.10 A person who is lawfully in Australia,[12] who wishes to apply for a Protection Visa as a single applicant, is required to complete Parts B and C (members of a family unit who want to submit a combined application are required to fill in parts B, C and D) and lodge the forms, along with an application fee of $30, at a DIMA office.

4.11 A person in immigration detention, who seeks to engage Australia's international protection obligations is provided, on request, with the application forms for a Protection Visa (Form 866) and other reasonable facilities to make a statutory declaration, obtain legal advice or undertake legal proceedings in relation to the person's immigration detention.[13] Section 256, however, does not require officials to provide information about visas.[14] Detainees initially complete Part A and submit it to an appropriate departmental or police officer.[15] On receipt of this initial application, the Department's Onshore Protection administrative unit allocates the application to a case officer. It is claimed that the detainee is provided with application assistance under the Immigration Advice and Application Assistance Scheme (IAAAS) to complete the full application,[16] which includes documentation supporting the applicant's claim for refugee status. There is no lodgment fee for persons in detention applying for a Protection Visa.

4.12 Asylum seekers in detention have three days in which to lodge the remaining parts of the application for a Protection Visa.[17] Asylum seekers who are in Australia lawfully may apply for a Protection Visa at any time up to the end of their valid visa, but if they have already been in Australia for 45 days by the time of lodgment, they may not be granted working rights.[18]

Determination of refugee status

4.13 The DIMA case officer determines whether the applicant meets the definition of refugee as set out in Article 1 of the 1951 Refugees Convention. The determination of refugee status may be done 'on the papers' following an assessment of the written application only.[19] Under section 56(2) of the Migration Act, the case officer may

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11 *Migration Regulations 1994*, Schedule 2

12 That is, a person who arrived on a valid visa, such as a visitor's visa

13 *Migration Act 1958*, s256

14 See above, Chapter 2, Paragraphs 2.18-2.20

15 Information on how to apply for a Protection Visa is included in *Submission No. 69C*, Department of Immigration and Multicultural Affairs, p. 983

16 See Chapter 3, Paragraphs 3.4, 3.6

17 That is part C, and parts B and D if including members of the asylum seeker's family unit

18 See for example, *Transcript of evidence,* Uniting Church, p. 338

19 *Migration Act 1958*, s47

seek further written information from the applicant or interview the applicant. National Legal Aid noted that the majority of applications were decided on the papers, with some 87 per cent of non-detention applications rejected without interview and some 33 per cent of detention cases rejected without interview.[20]

4.14 In making a determination, the primary decision-maker also refers to information on the social and political situation in the applicant's country of origin obtained through the department's Country Information Service (CIS), which is a data base containing information from a range of sources, including DFAT.

4.15 Where the applicant is assessed as not meeting the criteria for refugee status as set out in the 1951 Convention (amended by the 1967 Protocol), the applicant may appeal to the Refugee Review Tribunal. The current appeal process to the Refugee Review Tribunal is examined in Chapter 5.

Objectives for a refugee determination system

4.16 The Committee sees the system having to cope with what can sometimes be conflicting policy objectives. It must:

Provide protection to those who are considered to be refugees

4.17 This should be done through ensuring that Australia meets its international obligations to refugees; through maintaining the integrity of border controls, and ascertaining that people seeking illegal entry for economic or social reasons are not provided favourable treatment such as to encourage them to seek to bypass normal off-shore migration procedures.[21]

Meet high standards of administration

4.18 To meet this objective, processing must be quick in order to avoid unnecessary stress; be impartially applied; and be structured in such a way as to ensure there is proper consideration of an application without facilitating abuse of the system.

Acknowledge as much as possible changes in refugee populations

4.19 The system must be sufficiently flexible to meet the varying demands for protection of people in today's rapidly changing international environment. These demands can vary, including the need for:

- temporary safe haven, for example while reconstruction is undertaken in a former war or disaster zone;

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20 *Submission No. 63*, National Legal Aid, p. 723. The Committee notes that DIMA has only recently begun to provide a breakdown of primary decisions made on the papers or following an interview

21 See, for example, Department of Immigration and Multicultural Affairs, Fact Sheet No.46, *Australia's International Protection Obligations*, No. 41, *Seeking Asylum Within Australia*, and No. 83, *People Smuggling*

- short term temporary protection due to humanitarian or health[22] concerns;
- extended temporary protection while circumstances in a country or region are resolved;
- permanent protection where it is clear the person involved cannot be returned to their country of origin within the foreseeable future without being at risk; and
- unforeseen circumstances, in which case the person may make a request to the Minister under s417.

The issues

4.20 Several submissions and witnesses to the committee raised concerns about the first and second parts of the decision-making stage of the current onshore refugee determination process. These include:

Access to appropriate information and assessment

4.21 Issues raised under this heading included the exclusion of some people from even a preliminary assessment of whether their situation engages Australia's protection obligations; the standard of interviewing of asylum seekers on their arrival in Australia; the availability of information on visas, application assistance and the provision of legal advice; and the quality and amount of application assistance available to asylum seekers generally, and by agents approved under IAAAS.

Departmental procedures and standards

4.22 Issues raised included the potential conflict of interest arising from the fact that DIMA, as the department responsible for determining migration matters, is also responsible for refugee determination matters; the availability of information on visas, application assistance and the provision of legal advice; the adequacy of decision-making by DIMA case officers and the lack of interviews at the primary application stage; the quality of information available from the Country Information Service and the use of such material; and the alleged inconsistency in the quality of DIMA decision-making, where, on occasion, Departmental conclusions appeared contrary to the country information on which decisions claimed to have been based.

Related issues

4.23 A number of submissions expressed concern about inadequate time being allowed at the primary stage of the determination process for applicants to prepare the best case, which may lead to some claims being left out of the initial application. This subsequently may lead to adverse credibility findings by the RRT if claims presented

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22 In that a person who may not engage protection obligations may be allowed to stay in order to complete medical treatment for an illness identified usually while the individual was in detention as an unauthorised person. However, persons who have arrived under the safe haven program have also been allowed to stay longer for medical reasons

at the review stage are inconsistent with or contradictory to those presented at the primary decision stage.

4.24 Other issues included the need for an asylum seeker, who is not deemed to be a refugee but has strong humanitarian claims, to pass through the whole refugee determination process before being able to apply to the Minister under s417 for a visa to be granted on humanitarian grounds.[23]

Conduct of entry interviews- do they exclude some potential refugees?

4.25 Immigration officials conduct entry interviews with unlawful non-citizens who seek to enter Australia. The main convention against which individuals are assessed is the Refugee Convention, although the department has stated that other questions are asked, including: 'is there any reason why you couldn't be returned home?'[24] Such questions may elicit answers that refer more to a claim under other conventions such as CAT or ICCPR, but it is not clear that a person making such a statement at an airport would be allowed to stay and make a formal application.

4.26 The department advised that great care is taken when interviewing unauthorised arrivals to ensure that a person is not *refouled* by being required to leave Australia and return to an unsafe place. The department indicated that it was under an obligation to determine whether unauthorised arrivals were *prima facie* likely to engage Australia's protection obligations.[25]

> the threshold is very low, and we err on the side of making sure that we have a good look at people who might even possibly be invoking our protection obligations.[26]

4.27 The Committee was also advised that the results of interviews conducted at airports were referred to and considered by the department's State Director, head of the Onshore Protection Branch or a similarly senior officer in the central office Refugee and Humanitarian Division to assess whether Australia's international protection obligations were likely to be engaged.[27]

4.28 The Department further advised that:

> we believe that we have very good processes in place to deal not only with people who, upon arriving without authorisation, present and seek to engage Australia's protection obligation by indicating that they are seeking refugee status or that they are seeking protection or words to that effect…but also with people who may not perhaps articulate those claims in that sense but

23 This issue is discussed also in Chapter 8 on Ministerial Discretion

24 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 826

25 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 27

26 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 37

27 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, pp 824-825

> who do possibly have an issue of concern. Those people are also identified proactively by our procedures. We believe that those procedures are good.[28]

4.29 However, concern has been expressed at the fact that although unauthorised arrivals may be asked various questions designed to elicit information about fears and concerns, they are not provided with any legal or other assistance at this stage (except an interpreter, if required).[29] The Refugee Council of Australia advised of the case of five Sri Lankan nationals, who having been determined at the point of entry not to have been seeking Australia's protection, were after external intervention allowed to submit applications and subsequently determined to be refugees.[30] A similar concern was expressed by Legal Aid Western Australia who recommended that the Department **be required** to advise all arrivals of the right to seek legal advice.[31] Another witness also raised concerns about the manner in which unauthorised arrivals are dealt with at the borders:

> A related problem with access to lawyers by border arrivals is the "turnaround" of asylum seekers without being given entry to apply for protection visas. Once again, there is strong suspicion amongst refugee advocates that genuine asylum seekers are routinely being summarily "turned around" at the border. [32]

4.30 The witness cited the case of a Tamil Sri Lankan man, who claimed to have been displaced by the war in Sri Lanka and forced to work for the Liberation Tigers of Tamil Eelam (LTTE). He claimed that he would be persecuted if returned to Sri Lanka because of his Tamil ethnicity and his perceived involvement with the LTTE. However, the interview report recorded that he, *prima facie*, 'did not provide sufficient info to engage our protection obligations.'[33] Other cases have also been advised to the Committee of people who, it is claimed, have not been given an opportunity to present claims or who have been dismissed by department officials without sufficient assessment.[34]

4.31 The Committee notes there is a possibility of people being turned around, especially at airports,[35] without sufficient consideration having been given to their situation. '[i]nterviews at the airport do not fulfil the standard of a properly conducted

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28 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 35 and see also pp. 29-30

29 See below Paragraph 4.132-4.137 for a discussion on interpreters

30 *Submission No. 24A*, Refugee Council of Australia, pp. 261-262

31 *Submission No. 40*, Legal Aid Western Australia, p. 369. See also, *Submission No. 35*, Nick Poynder, p. 241

32 *Submission No. 35*, Nick Poynder, p. 243

33 *Submission No. 35*, Nick Poynder, p. 244

34 See *Submissions Nos 30 and 30A*, McDonells Solicitors, which are also referred to in Chapter 10

35 Although persons arriving by sea may get little information or other assistance, they may have a longer time in which to provide some information or to ask for legal assistance

and fair interview as the applicant is likely to be disoriented, hungry, scared and without representation.'[36] This could affect the extent to which DIMA's claimed 'low threshold test' and non-*refoulement* obligations are effective.

4.32 Some concern was also expressed that unauthorised arrivals might be discriminated against on the basis that they had arrived illegally instead of seeking refuge elsewhere or settling at a refugee camp. The department stated in response that the manner of a person's arrival was not relevant when assessing their claims:[37]

> although it was necessary to assess the circumstances of arrival:…genuine refugees are at times trafficked, so the onus is on governments to ensure that while, on the one hand, they aggressively pursue the traffickers, they do not, on the other, penalise genuine refugees who may take advantage of that way of reaching a country of asylum.[38]

4.33 The department also advised the committee of cases where lawyers were waiting and ready to seek an injunction to prevent the removal of an unauthorised arrival, which raised the question about whether there was 'some premeditation about this illegal entry into Australia'.[39] However, pre-meditation in itself is not a sign of having no valid claim to protection, although it may suggest that the individual could have sought asylum elsewhere and is, in the department's terminology, seeking 'a particular migration outcome'.[40]

4.34 The department also advised that processes were being put in place for airport interviews to be taped and that any interview information, including tapes, would be available to subsequent decision-makers.[41] However, the Committee notes that such tapes would be of little use in respect of people who had already been returned, although they could be very helpful for those who have been able to make a formal application.

4.35 UNHCR has stated that a review of a random sample of records of approximately half of all airport interviews undertaken during the first half of 1999 'revealed no evidence of any violation of Australia's *non-refoulement* obligations in

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36 *Submission No. 36*, Kingsford Legal Centre, p. 308. See also *Submission No. 30*, McDonells Solicitors, p. 208: 'There is no record of the relevant interviews other than as provided in writing, often several days later, by Immigration Airport staff who use telephone interpreters. Thus applicants, who may have been traumatised and generally in fear of people in authority, are expected to divulge personal information to strangers who speak a foreign language, who they have no reason to trust, through a disembodied voice on the telephone.'

37 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 37

38 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 39

39 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 36

40 Department of Immigration and Multicultural Affairs, Fact Sheet No.46, *Australia's International Protection Obligations*, p. 3

41 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 36

respect of such individuals.'[42] This assessment, however, only applies to the Refugee Convention and not other conventions.[43]

Application Process

Access to information

4.36 One of the main problems that has been identified in respect of the capacity to make an application for a Protection Visa is the fact that there is no obligation on departmental officers to provide detainees with information about the process or to advise that legal or other assistance is available. Neither s 193 nor s 256 place any obligation on an officer unless the asylum seeker makes a request.

4.37 The Committee notes that this situation is most likely to affect persons with limited knowledge and limited contacts, and can mark a further distinction between those who arrive with a valid visa and those who do not. In many instances, this lack of information is overcome by the exchange of information within detention centres. However, the Committee sees no reason why basic information on visas and on the application process should not be readily available.

Use of other information

4.38 As noted above, copies of entry interviews were not previously provided to the individual or to persons assisting in making an application,[44] although this information can be used by DIMA officers or the RRT in assessing the applicant's claims. Several issues were identified here: the inequity of refusing access; the possible inaccuracy of the information provided at this early stage; a refusal to acknowledge the circumstances under which the information was provided; and the use of the material to challenge different information provided on a later application:

> The current airport interview process should never be assumed to be an accurate record of events for many reasons, including:
>
> - There is no evidence that interview notes are a simultaneous record;
> - There is no indication as to whether the applicant was informed that the interview may be relied on at a later date and that adverse inferences could be drawn;
> - There is no indication as to the nature of the interview technique (eg leading, inquisitorial); and

42 *Submission No. 83*, United Nations High Commissioner for Refugees, p. 1436

43 *Submission No. 83*, United Nations High Commissioner for Refugees, p. 1436

44 *Submission No. 39*, Mr John Young, p. 358

- There is no indication as to the independence and suitability of interpreters used in the interview.[45]

4.39 The Committee believes that information provided during an entry interview should be used during the determination process, with the applicant having prior access to the record in order to explain any contradictions in their application.

Recommendation

Recommendation 4.1

To ensure effective record keeping, the Committee **recommends** that all information provided by non-citizens on arrival during an interview with a DIMA officer be retained, even if the individual is removed. In cases where individuals make an application, this information should be made available to them.

Issues concerning the making of decisions

4.40 Evidence provided to the Committee suggested that the decision-making process required a number of changes, including more experienced staff; reduction of unreasonable processing targets, and interviewing more applicants (rather than making a negative decision on the papers). These criticisms are made in a context of the department setting limits to the amount of assistance people need with their applications.

4.41 Case officers from the Onshore Protection Unit of the department are responsible for assessing whether applicants for a Protection Visa (866) are refugees in accordance with the 1951 Convention and 1967 Protocol.

4.42 In a submission to the Committee, the department advised that in order to discharge its international obligations under the Convention, Australia had established a ‘comprehensive onshore refugee process’[46] which was used for all persons, regardless of the credibility of their claims.

4.43 The department also stated that the UNHCR Program recommended seven basic requirements to ensure that asylum seekers are provided with certain essential guarantees, which the department believed it met.[47]

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45 *Submission No. 36*, Kingsford Legal Centre, p. 309

46 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 323

47 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 323. The basic requirements are: the competent official (eg. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority. The applicant should receive the necessary guidance as to the procedure to be followed. There should be a clearly identified authority—wherever possible a single central authority—with responsibility for examining requests for refugee status and taking a decision in the first instance. The

The need for assistance in making applications

4.44 As noted above, the Committee considers it important that all persons seeking to apply for refugee status have ready access to information. This belief extends to the provision of information on the refugee and humanitarian program to all, not just those in the community.

4.45 If there is a concern about false claims, these should be detected by means other than denial of basic information. The Committee acknowledges that many people of limited sophistication may be easily identified because they do not understand the difference between refugee status, and migration or temporary residence in another country. At present, they appear to be excluded from access because they have no right to information which might provoke an application, on valid grounds or otherwise.

4.46 However, the information currently available on the Department's website and from many other sites would provide the data required for the more knowledgeable to make a credible application. Further, in an age where the department is seeking to use sophisticated means of detecting fraudulent claims,[48] the belief that withholding basic information will prevent false claims would be unsustainable.

Level of assistance required to make an application

4.47 An essential part of the Department's approach to processing and assessing information is that while it is necessary for the applicant to make their claims as fully as possible, the onus is one the decision-maker[49] to ensure there is 'adequate information in front of them to properly determine whether or not somebody is a refugee'. For this reason, according to the Department, the need for legal assistance should be minimal although the need for application assistance is recognised:

> We would argue that, with the onus being on the way it is and the way the administrative and procedural system is set up, there is no need for the applicant to be represented by a legal practitioner.[50]

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applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHRC. If the applicant is recognised as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status. If the applicant is not recognised, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system. The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending

48 See, for example, the techniques referred to above in Chapter 1, Paragraph 1.56

49 The decision-maker at the primary stage and also at the RRT – *Transcript of evidence*, Department of Immigration and Multicultural Affairs, pp. 829, 847

50 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 47

4.48 According to the department, access to application assistance under the IAAAS is provided to all asylum seekers in detention and to disadvantaged asylum seekers in the community, with interpreters provided at the primary and merits review stages as required. Asylum seekers are also able to contact UNHCR at any time.[51]

4.49 Although it is recognised that the process is open to abuse by some unlawful non-citizens who make a protection visa application in the knowledge that they are not refugees and with the intention of gaining entry, residency, or at least extra time in Australia, Australia does not operate an 'accelerated' or truncated process for those applications that appear to be abusive or manifestly unfounded. Instead, a pro-active case management approach is taken to ensure that applications are dealt with quickly and that any incentive to lodge abusive applications is minimised.[52]

Skills of departmental decision-makers

4.50 If the departmental officer has the responsibility for assessing a case, the process by which this is done should be broad and transparent. In a sense, the officer as well as the RRT member would need to be well informed, able to elicit and assess information, and able to explain clearly why the information gained does not support the claim.

4.51 Information provided to the Committee suggested that this process was not always followed. The Committee has not been able to assess applications in sufficient numbers to identify if a major problem is the absence of relevant and detailed information in the application; if this results from the non-existence of such information; or if the person providing assistance failed in the task of ensuring the applicant's details were clearly explained. In some cases there may be no relevant information at the initial interview, and on this basis no claim would have been entertained. In other cases, where a person states in an initial interview that they are a refugee, they may not provide material in their application or later to demonstrate this claim.

4.52 DIMA case officers are Australian Public Service (APS) Class 6 level officers. Although concern was expressed at the 'relatively lowly' level of those responsible for assessing refugee status,[53] the department advised that these decision-makers were at a high level relative to other officers making similar decisions.[54] Further, the 'on the spot' decisions were made by senior officers.[55] This relatively higher level may reflect a greater number of factors to be considered or a greater complexity of issues, although the generally low level overall is likely to reflect the number of potential applications.

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51 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p.621

52 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 324

53 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 30

54 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 825

55 See *Transcript of evidence*, Department of Immigration and Multicultural Affairs, pp. 824-825

4.53 The skills and knowledge of case officers are dependent on a number of factors, including the nature and frequency of training. The department advised that onshore case officers received, on commencement, detailed casework training involving both UNHCR and NGOs, as well as attending occasional seminars and training as necessary, particularly following significant changes to case law.[56] In addition, the Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) advised that it also provided short training courses for some DIMA officers.[57]

4.54 Training does not necessarily lead to specific outcomes, and it is unclear if decisions are based on the assessment of individual situations or on matching claims to various categories of facts. The latter process does not require detailed consideration of individual circumstances, nor does it draw out factors that may be obscured.

4.55 A former member of the Refugee Review Tribunal commented adversely on the performance of departmental staff:

> Primary decision-makers…are often woefully ignorant of the law and of conditions in the country against which they assess the applicant. Anecdotal evidence is that they are often arrogant, hostile and even abusive towards applicants. In some cases, they reveal attitudes of prejudice, xenophobia and racism.[58]

4.56 Other witnesses have also spoken of the lack of skills of departmental staff:

> the Department's Onshore Protection staff have inadequate skills and ability to competently perform their functions.[59]

4.57 It was also suggested that the changes to determination processes made in 1996 had reduced actual investigation by primary decision-makers, which contributed to the poor quality of decision-making.[60] National Legal Aid stated that while these reforms had undoubtedly enabled 'more expeditious primary decision-making', a consequence has been that 'many meritorious cases are refused on the most cursory evidence, in some cases only using evidence from airport interviews'.[61]

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56 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 326

57 *Submission No. 47*, Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, p. 434

58 *Submission No. 16*, Dr Rory Hudson, p. 77

59 *Submission No. 30*, McDonells Solicitors, p. 206. See also *Submission No. 18*, Refugee Council of Western Australia, p. 101

60 *Submission No. 63*, National Legal Aid, p. 722

61 *Submission No. 63*, National Legal Aid, p. 723

4.58 This change in processing may be a major factor in various set-aside rates, as a higher percentage of applications are now rejected ‘on the papers’ without interview.[62] This may speed the initial process, but cause substantial delays as far as the RRT is concerned, while also possibly adding unnecessarily to detention costs.

4.59 Another factor that was noted as leading to later problems was the inability of staff to identify Refugee Convention matters if these were not specified clearly by the applicant. It has been previously noted, in a Legislation Committee report, that there is a problem expecting applicants to provide the ‘magic words’.[63] If staff are unable to identify possible claims from the information provided, it would be preferable to provide a printed form, requiring applications to be entered under one or more of the five convention grounds. This would be a means of meeting the department’s claim that in some areas of the process it is the department which must be proactive, not the applicant.[64]

4.60 This process may also assist in accurately determining if people at airports have a claim that will engage Australia’s protection obligations. Otherwise an ethos of ‘expeditious primary decision-making’ may have contribute substantially to the significant turnaround figures noted above.[65]

4.61 The administrative reforms, coupled with the limited right to information, may lead to illegal entrants who would *prima facie* engage Australia’s obligations being turned around or required to go through a much longer process.

4.62 Other factors, including case management targets and whether or not an applicant is interviewed, are important in the primary decision-making process. The department advised that as part of an overall purchasing agreement with the department of Finance and Administration (DOFA), which includes onshore protection decision making, primary decision-makers operate to a target of around 95 cases per year, averaged across the body of case officers. DIMA noted that ‘[c]ase officers would generally be operating with that as a framework but may either exceed it or not reach it for particular reasons’.[66]

4.63 The Committee recognises the need for an efficient and cost-effective determination process, but notes the criticisms highlighting the potential for cursory assessments.

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62 *Submission No. 63*, National Legal Aid, p. 723

63 Senate Legal and Constitutional Legislation Committee, *Report of the Inquiry into the Migration Legislation Amendment Bill (No.2) 1998 (1999).* However, the department also noted that the ‘magic words’ did have to be followed up by relevant detail: *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 824

64 See above, Paragraph 4.6

65 See above, Paragraphs 4.26, 4.47

66 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 33

Interviews

4.64 The Law Council expressed concern at the low percentage of interviews conducted by the department at the primary determination stage (particularly given the importance of determining the credibility of applicants) stating that it was 'both administratively inefficient and constitutes an abuse of what should be the basic procedural entitlements of claimants'.[67]

4.65 This view was supported by the Kingsford Legal Centre (KLC), which was critical of the emphasis on 'on the papers' decision-making by DIMA, stating that it disadvantages applicants who are from a non-English speaking background and who may not have received application assistance.[68] The Committee notes that this would primarily apply to asylum seekers who are not in detention and who do not qualify for assistance under IAAAS.

4.66 Amnesty International also was critical of the lack of interviews at the primary decision-making stage. In their submission to the Committee, Amnesty stated:

> Amnesty International is concerned that most claims are not examined through a personal appearance at the primary stage and that the quality of case presentation and representation, in addition to decision-making by DIMA is poor. We do not consider that the primary stage meets the minimum standards for the identification and protection of refugees. At present, emphasis on the speed of decision-making appears to outweigh the quality of decision-making. The difficulty with poor quality of decision-making at the primary level, results in the RRT having to examine cases including those which should have been recognised at the primary stage. The primary stage accordingly does not act as the filter it is intended to act as.[69]

4.67 The South Brisbane Immigration and Community Legal Service (SBICLS) also expressed dissatisfaction with the primary decision-making process, stating that it 'often lacks mechanisms and practices that permit a thorough and transparent determination of protection visa applications'.[70] Their criticisms included the rarity of interviews at the primary stage;[71] and the failure of the Department, at times, to

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67 *Submission No. 73*, Law Council of Australia, p. 1084

68 *Submission No. 36*, Kingsford Legal Centre, pp 307-308. See also, *Submission No. 46*, Refugee and Casework Service, p. 417, *Submission No. 50*, Amnesty International, p. 506

69 *Submission No. 50*, Amnesty International , p. 507

70 *Submission No. 61*, South Brisbane Immigration & Community Legal Service, p. 629

71 The SBICLS referred to the expense and hardships faced by genuine asylum seekers who are rejected at the primary stage but subsequently win their appeal at the Refugee Review Tribunal. The expense to the applicant, and costs involved in the appeal process could be avoided with a more 'thorough' primary application process, *Submission No. 61*, South Brisbane Immigration & Community Legal Service, p. 630

address significant claims in the application or to give reasons for the rejection of an application.[72]

4.68 Other factors were also noted in evidence as possibly contributing to limited skills development, including:

- the limited opportunity to acquire specialist knowledge;[73] and
- limited 'in the field' experience.

Expertise

4.69 While noting that it would not be uncommon for some case officers to specialise in certain countries, the department considered it 'unlikely' that a case officer would specialise in only one country, although building up knowledge and expertise in a particular country was cost-effective given the quantity of country information available.[74]

4.70 In response to concerns raised by Committee members that, during peak periods of annual leave, sufficient experienced case officers may not be available to assess Protection Visa applications, the department advised that while this situation could occur:

> we now have a significant body of officers in the department who have been case officers and, to the extent that is possible, we would seek in those peak periods to draw on officers who have… training and experience.[75]

'In the field' experience

4.71 If the extent of investigation of a claim has decreased, this may also be matched by a reduction in capacity to assess information. There is a lack of clear information on the nature of a departmental officer's role, but it is not apparent that officers are trained in inquisitorial methods. With limited interviews being granted, actual experience in some aspects of the inquisitorial process would also be limited. Thus, although the department advised that a case officer had to exercise his or her judgment in deciding whether an applicant was lying and the extent to which the lies affected the applicant's overall claims for refugee status, it is hard to see how this could be assessed except by a skilled individual.

> In the case of an applicant who tells a lie by perhaps exaggerating their claims, the lie may not be relevant to the application because, even if they had not exaggerated, there would have been enough there… The lie, of

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72 *Submission No. 61*, South Brisbane Immigration & Community Legal Service, p. 630

73 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 33

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

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

75 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 32

> itself, is not material to their case. On the other hand, it may be material to their case if the case officer forms the judgment that all of what the person is saying, or a large proportion of what they are saying, is in fact exaggerated or untrue.[76]

Recommendation

Recommendation 4.2

The Committee **recommends** that DIMA continue to use the current Australian Public Service level case officers to make decisions at the primary determination stage on the basis that the following proposals are implemented.

Recommendation 4.3

Recognising it is crucial that decision-makers have the necessary skills, knowledge and ability and the necessary personal attributes to perform the decision-making function, the Committee **recommends** that primary decision-makers have additional specialist training, both before and during their tenure. Such training can be obtained from a cross-section of sources, including the legal profession, European judicial specialists and other government and non-government organisations.

Recommendation 4.4

The Committee **recommends** that, where decision-makers are of the view that an applicant should not proceed to interview stage, the decision-maker must provide reasons for that decision to the applicant.

Non-adversarial approach to primary decision-making

4.72 The Committee notes both that the refugee determination process is a non-adversarial one, and the Department's advice that:

> …while there is an onus on the applicant to tell their story, tell the truth and not to withhold information when they are first asked to put their claims forward, the obligation of ensuring that Australia does not breach its protection obligations is on the case officers.[77]

4.73 Nonetheless there is evidence that the onus for establishing claims for refugee status could be shifting from the decision-makers towards the applicant if the applicant is seen as having to prove they are not lying.

4.74 Dr Rory Hudson claimed:

76 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 48

77 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 47

> The tendency for both Immigration Department and RRT officers to want to prove that [Protection Visa applicants] are not lying before their submissions? are even considered is increasing…Though the [Bureau] is aware that some applicants perpetrate deception and lies, it argues that Australia has an obligation to treat each Protection visa applicant fairly and without preconception and bias. The assumption should be that applicants are telling the truth unless there is an indication that they are not.[78]

4.75 The Committee is concerned at the apparently growing conflict between the theory and the reality of administrative law changes and the operation of administrative tribunals, including review by the RRT. It is argued by the department that the process is not supposed to be legal in nature,[79] but it is clear that the process is becoming increasingly legalistic.

4.76 This then creates the need for applicants to have specialist assistance because they cannot be expected to have any realistic knowledge of quasi-legal systems and their administration. The Committee is concerned that the overall trend in the primary decision-making stage may be for decision-making along the line of least resistance, that is, a tendency to reject an application in the knowledge that a person can appeal and to leave the real decision-making with the RRT.[80]

4.77 Furthermore, the Committee is concerned that performance management changes reinforce this line of decision-making by rewarding an agency for taking quick decisions and getting the workload off its books.

4.78 While acknowledging that applicants may be rejected at the primary stage only to have the decision set aside by the RRT,[81] the Committee notes that in 1997-98, 90 per cent of primary decision appeals were rejected at the merits review stage. Nevertheless, the committee is persuaded by the evidence which has identified problems at the initial refugee determination stage and considers that there is always a need to improve the quality of primary decision-making. The Committee agrees with the view expressed by another witness that:

> a better way of approaching the reform of the refugee determination process is to spend…less time devising ways of preventing applicants from appealing decisions, and…more time in improving the quality and independence of the decision-making process…[82]

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78 *Submission No. 16*, Dr Rory Hudson, p. 79

79 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 833. See also above, Chapter 3, Paragraphs 3.12-3.15

80 This issue is discussed further in Chapter 5

81 *Submission No. 63*, National Legal Aid, p. 722

82 *Submission No. 35*, Nick Poynder, p. 256

The independence of the primary decision-making process

4.79 Several submissions questioned the independence of the operation of Australia's onshore refugee determination process when the department responsible for controlling immigration also has responsibility for assessing applications for refugee status.

4.80 The Law Council of Australia stated, for example, that the link between immigration control and refugee determination was made 'explicit' through the policy of allocating nominal places for onshore refugees within Australia's broader humanitarian program.[83] It recommended that the onshore refugee determination system be removed from the Department of Immigration and Multicultural Affairs to the Attorney-General's portfolio.

4.81 HREOC also expressed concern at the blurring of the distinction between immigration and refugee laws by the inclusion in the immigration portfolio of the refugee determination process, such that refugee policy may be perceived as a subset of immigration policy, adding that '[t]he two have distinct legal bases, however, with distinct and divergent consequences.'[84] While immigration matters may rightly be interpreted as a matter of policy, determination of refugee status is a matter of law, and that, as a consequence, it is not a matter on which a minister should be able to issue policy directions.'[85]

Location of refugee determination

4.82 Several submissions recommended the transfer of the onshore refugee determination process to the Attorney-General's portfolio, which, according to National Legal Aid, 'has no vested interest in the outcomes of overall immigration arrivals.'[86]

4.83 Another witness proposed the following changes to the current refugee determination process:

- Removal of the refugee determination process from the Department of Immigration and its transfer to Attorney-General's.
- The replacement of the current procedure by a single stage merits assessment process, consisting of two or three person panels.
- Judicial review pursuant to section 5 of the Administrative Decisions (Judicial Review) Act 1977.

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83 *Submission No. 73*, Law Council of Australia, p. 1083

84 *Submission No. 51*, Human Rights and Equal Opportunity Commission, p. 531

85 *Submission No. 51*, Human Rights and Equal Opportunity Commission , p. 532

86 *Submission No. 63*, National Legal Aid, p. 722. See also, for example, *Submission No. 30*, McDonells Solicitors, p. 206

4.84 This was argued for because it would 'reduce the opportunity of certain people to abuse the system, reduce administrative costs, and promote public confidence in the process'.[87]

4.85 The Committee acknowledges that the inclusion of the refugee determination system within the portfolio responsible for controlling migrant intake may lead to perceptions of a conflict of interest.

4.86 The Committee also notes that the determination of refugee status is only one of the criteria required to be satisfied in order for a Protection Visa to be granted. As DIMA is responsible for the issuing of all visas, the Committee considers it logical that the assessment of all components of the Protection Visa should continue to be administered by this department. Improvement in the process, as recommended above, should help decrease the perception of bias.

Recommendation

Recommendation 4.5

The Committee **recommends** that the responsibility for refugee determination under the Protection Visa system remain in the DIMA portfolio.

The quality of the Country Information Service (CIS)

4.87 The Committee also received submissions and heard evidence critical of the Country Information Service (CIS). The issue of the relative reliance placed by decision-makers on particular types of information gathered through and held in the CIS is also discussed in Chapter 5, which deals with the Refugee Review Tribunal.

4.88 The department advised that the Country Information Service (CIS) was established in 1992 to ensure that decision-makers had access to information about 'political, social and human rights conditions' in applicants' countries of origin. The CIS contains a range of material from UNHCR, DFAT, other countries, newspapers, books, magazines, Internet web sites, information provided by community groups, protection visa applicants, academics and non-government organisations.[88]

4.89 The Department of Foreign Affairs and Trade (DFAT) advised that it provides two types of country information for the Country Information Service (CIS). The first type comprises general cables from overseas posts provided to various departments, including DIMA. DIMA may then identify cables that it may consider appropriate for inclusion in the CIS and seek permission from DFAT to do so.

> In almost every case we say, yes, we are happy for the cable to be included on the database. We desensitise the cable to the extent that we take out

87 *Submission No. 30*, McDonells Solicitors, p. 206

88 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 327

> sensitive attributions as to the source or individuals and that then goes on the CIS database, along with a wide range of other material. That is the most common input from DFAT into the process.[89]

4.90 A second type of information would be provided by DFAT following a request by DIMA or a member of the RRT for specific information about individuals or situations. DFAT advised that it would again be up to DIMA to determine whether this information was sufficiently general to warrant placing it on the CIS database, indicating that in may cases it was.[90]

4.91 When questioned by committee members about whether DFAT purports to give DIMA or the RRT member an assessment of the quality of the advice, based for example on its source, DFAT responded:

> The answer to that question is essentially no. We would say that it is for DIMA and the RRT to form their own view on the quality of information that we provide, but we would hope they do that against the perception that our posts are staffed by people who are across situations and ought to be in a position to provide well-founded information. But I repeat that it is for them to form a judgment as to how much weight to place on that information.[91]

4.92 DFAT advised that while it did not give the names of individuals who had provided the information, it might 'cite whether it was information that was available on a public record or that the information had been acquired from…a range of reputable human rights organisations'[92] working in the country from which the information had been sought.

4.93 As noted above, it is both the quality of the evidence in CIS and the skill of departmental staff in using information that would limit the effectiveness of the data base. The department advised that a range of information was held, including information that conflicted with other opinions.[93] However, it also appears that an individual decision-maker would need to request material that was not available on CIS or request if other information was available.[94]

4.94 This is likely to add to the time taken to make a decision and this process may contribute indirectly to ensuring that what is on the system is what shapes the decision. A more realistic timeframe should be established for assessing cases so that a proper information search is undertaken.

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89 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 753

90 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 753

91 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 754

92 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 754

93 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 31

94 '…the important issue is that it is still open to the decision-maker to request further information and to seek further sources of information if they so choose', *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 31

4.95 In evidence to the Committee, a departmental officer advised that the case officer was required to search the Country Information Service holdings and that it was not up to the applicant to provide the material in support of claims.[95] Further, where a claimant raises a matter that is not covered by the material held by the CIS, the case officer can ask the Service to research and seek out further information on the claims.[96] The department also advised that the CIS was proactively kept up-to-date and information added daily.[97]

4.96 However, other evidence provided to the Committee suggested that some of the material available had a particular bias and would therefore not mention a number of issues. The South Brisbane Immigration and Community Legal Service (SBICLS) stated:

> Whilst we find, in the main, a reliable and consistent body of country information does usually exist, there are significant exceptions to this experience. For example, official country information can at times be influenced by trade and diplomatic interests, which can inhibit a frank and impartial analysis of the human rights situation in a given country…In addition, not all human rights violations may be reported in such reports. This is particularly the case when a particular issue demands attention at the expense of less acute issues.[98]

4.97 The SBICLS cited as a specific example the situation in the former Yugoslavia where reports may focus on abuses against Abanian Kosovars but fail to include details of abuses against ethnic Serbs.[99] A representative of the Law Council of Australia, also criticised Department of Foreign Affairs and Trade country information, which he described in some cases as views 'from the cocktail bar of the Teheran Hilton'.[100]

4.98 Committee members noted evidence from DFAT with respect to the application of China's 'one child' policy, which suggested that some country information was 'extraordinarily difficult to get, particularly in relation to certain regions'.[101] The reliability and alleged 'bias' of some of the information included in the CIS relating to China's 'one child' policy was also questioned, as was the apparent

95 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 16

96 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 19

97 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 24

98 *Submission No. 61*, South Brisbane Immigration & Community Legal Service, pp. 629-630

99 *Submission No. 61*, South Brisbane Immigration & Community Legal Service, p. 630

100 *Transcript of evidence*, Law Council of Australia, p. 333. See also *Submission No. 18*, Refugee Council of Western Australia, p. 100

101 *Transcript of evidence*, Senator Coonan, p. 655

failure to include information that contradicted material apparently relied upon by DIMA officers.[102]

Recommendation

Recommendation 4.6

The committee **recommends** that accurate and up-to-date information from a broad cross-section of Government and non-government sources should be entered into CIS. Staff using CIS for visa determination decisions should be trained in rapid information retrieval, information analysis and methods of critical evaluation.

Inflexible application time frames

4.99 Criticisms were directed at the time frames for lodging applications for Protection Visas at the primary decision-making stage for both asylum seekers in detention and those already lawfully in Australia.

4.100 For asylum seekers in detention, the full Protection Visa application must be lodged within three days of the referral of an IAAAS contractor.[103] In its submission to the Committee, National Legal Aid was critical of the inflexible application of this '3 day rule' stating that if not submitted in time the application is invariably refused and no attempt is made by the case officer to contact the applicant or the contractor to ascertain the reason for the delay. The organisation added that '[i]t is extremely difficult to obtain an extension of time, even where there are difficulties obtaining interpreters or in gaining access to proper interviewing facilities at the detention centre'.[104]

> The Refugee Council of Western Australia (RECOWA) considered that the time allocated for preparing a Protection Visa application was inadequate: Generally we are dealing with people who are from different cultures and may be suffering the effects of torture and trauma.
>
> The principle aim of torture is to destroy a person's sense of self and to destroy their trust in humanity. Therefore it takes some time to establish rapport and build trust with traumatised clients.[105]

4.101 The Committee was advised that it may require several visits to a detention centre with an interpreter to take instructions, and have forms and statements

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102 *Transcript of evidence*, Senator Harradine, pp. 655-657

103 *Submission No. 63*, National Legal Aid, p. 720

104 *Submission No. 63*, National Legal Aid, p. 720

105 *Submission No. 18*, Refugee Council of Western Australia, p. 94. The organisation also advised that: 'Additionally, sequela of Post Traumatic Stress Disorder includes memory loss, confusion, poor concentration and significantly impaired comprehension. All of these make interviews much harder and slower. The process must go at the client's pace, not the funder's, or crucial information will not be elicited.'

translated for the applicant to check before signing, which may not be able to be done properly in three days. As a result, National Legal Aid argued, the quality of service to detained asylum seekers may be compromised. The organisation noted that it takes the department much longer than three days to decide most applications.[106]

4.102 The Australian Red Cross also expressed concern about the '45 day rule' that came into effect on 1 July 1997.[107] This rule provides that an asylum seeker who has been in Australia for more than 45 days before submitting an application for a Protection Visa may be granted a bridging visa with no work rights. The Australian Red Cross advised that this rule particularly affects:

- people who become 'refugees' because of a change in circumstances in their home countries after having been in Australia for longer than 45 days (possible 'sur place' refugees);
- asylum seekers who do not understand the system and may be unable to contact an advocate within the time frame; and
- those who may have psychological barriers resulting from torture or other trauma and those experiencing difficulties in adjusting to new surroundings and a new culture.[108]

4.103 Case studies that were provided by the South Brisbane Immigration and Community Legal Service,[109] illustrate that hardship can be suffered by asylum seekers awaiting decisions with, in many cases, the asylum seekers relying on welfare or community services for support.

Advice available to asylum seekers

4.104 Funding under the IAAAS[110] is available for asylum seekers in detention and impecunious asylum seekers in the community who are lawfully in Australia.

4.105 The value of providing sufficient advice and resources to asylum seekers to apply for refugee status is referred to by the Australian Law Reform Commission (ALRC), which stated that "[a]ssistance in preparing the initial application could improve the quality and timeliness of decision making at merits review and judicial review levels'.[111]

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106 *Submission No. 63*, National Legal Aid, p. 720

107 See also above, Paragraph 4.12

108 *Submission No. 48*, Australian Red Cross, p. 453. See also *Submission No. 10*, Ms Sinead Callanan, p. 46; *Submission No. 33*, Australian Council of Social Service, pp. 227-228

109 See for example *Submission No. 61*, South Brisbane Immigration & Community Legal Service, p. 639, Case Study 4

110 See above, Chapter 3

111 *Submission No. 31A*, Australian Law Reform Commission, p. 296

4.106 Legal Aid Western Australia pointed out that a properly presented application assists the Department in its consideration of the case and also enabling the DIMA case officer to undertake shorter interviews with asylum seekers and thereby process more applicants more quickly.[112]

4.107 The Kingsford Legal Centre (KLC) stated that assistance for asylum seekers at the initial stage is especially important given the emphasis placed at the primary stage on the written application. The KLC stated:

> With legal assistance, applicants are much more likely to be able to submit clear and well documented applications. This assists not only the applicant, but also the Department to ensure than an asylum seeker's best case is put forward promptly, thereby reducing the likelihood of appeals.[113]

4.108 The Springvale Community Aid and Advice Bureau noted the increasing complexity and difficulties associated with applying for protection such as legislative and policy changes, and international political changes,[114] and advised that the IAAAS funded services are not meeting the needs of asylum seekers.

4.109 National Legal Aid, in its submission to the Committee, stated that in their experience many asylum seekers with strong claims have been unable to access assistance under the IAAAS. The problems for asylum seekers, particularly those who do not speak English were highlighted by NLA:

> Most did not speak English and would have had enormous difficulty preparing and lodging their own application for protection visas. Failure to submit a well-written and comprehensive protection visa application, including a detailed statement setting out the claims for refugee status, usually leads to rapid rejection of the application, and can cause great problems in any review before the RRT. This is particularly evident in cases where the Tribunal finds that the applicant lacks credibility because they did not include all claims in their written application to DIMA.[115]

4.110 Criticisms of the standard of advice given to asylum seekers was also made. Legal practitioner, Mr Leonard Karp advised that in the majority of applications he had seen, the quality was 'extremely poor'. The types of procedures considered inadequate included:

- forms and/or other statements completed for people who do not have competent English language skills without the aid of an interpreter;
- people being left with an interpreter and asked to "tell him/her your story", which is then submitted to the Department of Immigration without additional questions being asked;

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112 *Submission No. 40*, Legal Aid Western Australia, p. 367

113 *Submission No. 36*, Kingsford Legal Centre, p. 307

114 *Submission No. 15*, Springvale Community Aid and Advice Bureau, p. 71

115 *Submission No. 63*, National Legal Aid, p. 718

- submission of forms and statements to the Department without being read back to the applicant in his/her own language to check for errors and/or omissions; and
- agents telling applicants that claims and details of claims can be added later, when in reality they cannot.[116]

4.111 The submission added that the 'general lack of care exhibited in such applications…often contributes directly to failure' because both the department and the RRT are 'obsessed with credibility' and 'take any inconsistencies between written and oral evidence as an indication of mendacity'.[117] Similar points were also made by another organisation, noting the amount of time that should be taken to prepare a proper submission:

- 1 day to prepare and lodge a Protection Visa application, undertake pre-interview consultations with applicant, and attendance at interview conducted by a DIMA officer.
- ½ day post-interview counselling and preparation of any additional comments.
- ½ day to prepare and lodge review applications if required.
- 1 day to provide further support to the applicant through any RRT assessment process, including post-decision counselling and/or visa application assistance.[118]

4.112 Similarly, distance may also affect the amount of time available and the quality of service that can be provided. Where an interpreter is required, as will often be the case, this reduces the amount of time available for discussion of issues. Legal Aid Western Australia (LAWA) advised that funding via the IAAAS provided for one visit to Port Hedland for both the primary and review stages, but that all other communication must occur by phone, on most occasions with the aid of an interpreter, an unreliable method for taking detailed instructions. LAWA stated in its submission to the Committee that 'the adequacy of legal assistance is at times compromised by the location of asylum seekers in Port Hedland'.[119] The Committee notes, however, that LAWA has an office in Port Hedland,[120] and this should reduce these problems.

4.113 The Torture and Trauma Survivors Services of the Northern Territory, in its submission to the Committee, also highlighted the problems experienced by asylum seekers in the Northern Territory because of the absence of IAAAS providers:

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116 *Submission No. 30*, McDonells Solicitors, p. 207

117 *Submission No. 30*, McDonells Solicitors, p. 207

118 *Submission No. 18*, Refugee Council of Western Australia, p. 94

119 *Submission No. 40*, Legal Aid Western Australia, p. 366

120 *Transcript of evidence*, Legal Aid Western Australia, p. 256

> In the course of service delivery, we have noted that clients' emotional well being has been adversely affected by the lack of local legal support and information about the processes of seeking asylum.[121]

4.114 Another concern expressed about the manner of funding IAAAS service providers is the requirement for contractors to undertake a minimum of 3 client interviews per day when interviewing in Port Hedland. This refers both to interviews with clients to prepare a protection visa application and for attendance at interviews between DIMA and the applicant to consider the submitted application. LAWA stated, for example, that an entire day could be devoted to interviewing an asylum seeker and preparing the application and supporting statement.

4.115 Another witness expressed concern at the impact on community applications of the cuts to agencies including RACS and the Legal Aid Commission. He stated:

> …asylum seekers who are not detained often have no representation at all, meaning that their claims can be virtually incomprehensible, in many cases emphasising the irrelevant points and omitting the relevant points.
>
> …it is common for asylum seekers to play down any "problems" they may have had with the authorities in their home country, so as to show the Australian authorities that they will be "good citizens". The risk here is that the "problem" may have been persecutory in nature, and when the applicant later raises the issue with, for example, the Refugee Review Tribunal…he or she will be accused of recent invention and the claim will be rejected on credibility grounds.[122]

4.116 Concern was also expressed that many asylum seekers may not be aware of the existence of the IAAAS program.[123]

4.117 The Committee considers that the benefits of having additional resources in the IAAAS or an alternative system to supplement the IAAAS program, will lead to better applications and better decision-making.

4.118 The Committee notes that the justification for the calculation for the funding of the IAAA scheme was to remove overlap with legal aid funding. However, it is claimed that although legal aid has been withdrawn for this type of work, appropriate adjustments to IAAAS have not been made.[124]

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121 *Submission No. 26*, Torture and Trauma Survivors Service, p. 153

122 *Submission No. 35*, Nick Poynder, pp. 244-245

123 *Submission No. 47*, Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, p. 435

124 *Submission No. 38*, The Refugee & Immigration Legal Centre, p. 344

Recommendation

Recommendation 4.7

The Committee **recommends** that the ANAO conduct an efficiency audit to determine if improved primary decision-making will reduce program costs.

4.119 The department advised the Committee that it could get additional funding to cover detention cases but not for cases in the community. It stated:

> We do not have contingency funds, but I think the relevant point is that several of the community based service providers make considerable use of pro bono work. So that avenue is available, which, of course, is positively reinforced by the availability of continuing professional development points for migration agents who may be seeking re-registration. So the system has been set up to encourage pro bono work.[125]

4.120 The department indicated that there were two forms of assistance, general advice and formal application assistance covered by IAAAS funding, that could be provided by community based services. While understanding that the service may not be able to provide detailed application assistance, they were still able to give an applicant general advice.[126]

4.121 While noting the development of *pro bono* schemes, the Australian Law Reform Commission (ALRC) warned:

> concerns have been expressed to the Commission that the lawyers provided under such schemes may not have specific or sufficient experience in this specialised area of practice. Refugee cases can involve complicated facts and legal arguments, idiosyncratic to the jurisdiction and based on very complex and changing statutory regime. Inexperienced or over enthusiastic lawyers would impair the effectiveness of the scheme.[127]

4.122 The ALRC did, however, support funding for community services, stating that 'adequate resourcing of such services is the most effective way of providing appropriate legal advice and representation for refugee applicants and provide significant cost savings in the long run'.[128]

4.123 The Committee does not consider it necessary to limit IAAAS work to lawyers because the refugee and humanitarian status determination system is an administrative process.

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125 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 43

126 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, pp. 43-44

127 *Submission No. 31A*, Australian Law Reform Commission, p. 296

128 *Submission No. 31A*, Australian Law Reform Commission, p. 296

4.124 The Committee notes that several submissions argue against the provision of *legal* assistance.[129] The Committee notes the sentiments and concerns behind these views, particularly at a time when the media suggest that inordinate numbers of people are choosing to enter Australia illegally and are thereby calling the refugee program into disrepute. However, the Committee recognises Australia's international obligations for the fair and equitable treatment of people seeking refugee status.

4.125 Some submissions have argued against any resources being allocated to unlawful non-citizens.[130] However, the Committee considers there is merit in providing additional funding at the primary stage on 'whole-of-program' cost grounds. Improving the initial determination process should result in reduced recourse to more costly appeal processes, particularly judicial review. In addition, if the length of stay of an asylum seeker in the system can be significantly reduced, resources will be released for reallocation to this area.

4.126 The Committee is concerned allegations have been made that detention centre management, particularly in Port Hedland and Villawood, have restricted access to detainees and detainees' access to interested parties such as Amnesty International.[131] The Committee notes that detention centres are not prisons and that there is little basis for any systematic restriction of access to detainees.[132]

4.127 Allegations have also been made, but not tested, that mail is held up within detention centres, possibly contributing to failure to obtain a RRT hearing, The Committee is not in a position to judge such matters, but notes that interference with the mail is a serious matter, and one for the department to investigate in the first instance.

Recommendation

Recommendation 4.8

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

Interpreters

4.128 The quality and background of interpreters was also criticised in submissions to the Committee. The Tribal Refugee Welfare of Western Australia, in its submission to

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129 See for example, *Submission No. 41*, Mr Harry Taplin, p. 379; *Submission No. 2*, Mr Steven Sharp, p. 5, *Submission No. 11*, Ms Brenda Macintyre, p. 49

130 See above, Paragraph 4.124

131 *Submission No. 50*, Amnesty International Australia, p. 479

132 See also above, Chapter 3, Paragraph 3.22

the committee, indicated that some Burmese asylum seekers may be reluctant to express claims openly out of concern that interpreters may have military or military intelligence backgrounds and may have contacts in Burma who could harm family members.[133]

4.129 The Committee notes that in many cases it may be difficult for people to talk with interpreters because of the nature of the information to be provided. Thus, the provision of a qualified interpreter may not necessarily be sufficient. As noted by another organisation, other qualities may also be required.

4.130 The South Brisbane Immigration and Community Legal Service referred to the factors that result in increased complexity of refugee cases: the wide need for interpreters, the fact that many asylum seekers are traumatised either because they have suffered torture or through adjusting to a new country and unfamiliar surroundings and culture without close family and friends. Thus 'a great deal of personal sensitivity is required in order to practice refugee law responsibly, as well as a range of skills and expertise extending beyond the law, and including elements of psychology, cultural studies and linguistics'.[134]

4.131 It argued, therefore, that refugee cases did not lend themselves to the 'market mechanism' of the private sector for which profits are 'paramount', with more difficult cases, including those involving trauma and the use of interpreters, being refused assistance 'not on the basis of merit, but rather on the basis of complexity'.[135]

4.132 In his submission to the Committee, a community interpreter argued that there was insufficient ongoing training for interpreters, and that '[i]n the migration context, interpreters are hired by agents who select "qualified" interpreters on cost-conscious basis rather than experience.' This was particularly a concern where newly qualified interpreters were called on to 'practice and play such a decisive part in the determination of someone's future.[136]

4.133 Information was also provided that a person was allocated an interpreter who did not speak his language[137] and that there was a difficulty with accents, if not dialects, in some languages.[138] Valuable time can be taken up in both the application process and later the RRT hearing because of such factors.[139] The Committee notes

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133 *Submission No. 7*, Tribal Refugee Welfare of Western Australia, p. 32

134 *Submission No. 61*, South Brisbane Immigration and Community Legal Service, p.629

135 *Submission No. 61*, South Brisbane Immigration and Community Legal Service, p.629

136 *Submission No. 37*, Mr Muhammad Y Gamal, p. 313

137 *Submission No. 13*, Confidential submission, p. 2

138 This was noted as a problem in the case of Ms Z at her RRT hearing

139 *Submission No. 13*, Confidential submission, p. 2

these issues, but makes no recommendations. Qualified interpreters' training should ensure they act professionally.

Humanitarian cases

4.134 Concerns about the current procedures for dealing with humanitarian cases were raised with the Committee, as there is no onshore humanitarian program. The Minister may chose to exercise a discretion, pursuant to s417 of the Migration Act, to substitute a more favourable decision only after an application has been rejected at both the primary and merits review stages. The discretion is non-compellable and non-reviewable.

4.135 Many of the concerns raised related to whether ministerial discretion could be considered an adequate safety net for humanitarian cases which may fall within the CAT or ICCPR, particularly in relation to Australia's non-*refoulement* obligations under these treaties, and even when the asylum seekers may know they cannot be recognised as refugees.

4.136 The Committee believes that, until the CAT and ICCPR are incorporated into domestic legislation, the Ministerial discretion should remain. It recognises that the process of applying for refugee status, when believing that one's claims are more appropriate to CAT or ICCPR, is time-consuming and wasteful of resources.

4.137 In cases where a primary decision has been upheld by the RRT, but the RRT believes there are grounds for consideration under s417, the current system of notification by the RRT should continue.

4.138 The ministerial discretion is considered in greater detail in Chapter 8.